S. Hrg. 104–685

S. 1629—THE TENTH AMENDMENT ENFORCEMENT ACT OF 1996

HEARINGS

BEFORE THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1629

TO PROTECT THE RIGHTS OF THE STATES AND THE PEOPLE FROM ABUSE BY THE FEDERAL GOVERNMENT; TO STRENGTHEN THE PARTNERSHIP AND THE INTERGOVERNMENTAL RELATIONSHIP BETWEEN STATE AND FEDERAL GOVERNMENTS; TO RESTRAIN FEDERAL AGENCIES FROM EXCEEDING THEIR AUTHORITY; TO ENFORCE THE TENTH AMENDMENT TO THE CONSTITUTION; AND FOR OTHER PURPOSES

MARCH 21, 1996—WASHINGTON, D.C.
JUNE 3, 1996—NASHVILLE, TENNESSEE
JULY 16, 1996.—WASHINGTON, D.C.

Printed for the use of the Committee on Governmental Affairs

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S. 1629—THE TENTH AMENDMENT ENFORCEMENT ACT OF 1996

THURSDAY, MARCH 21, 1996

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Ted Stevens, Chairman of the Committee, presiding.

Present: Senators Stevens, Thompson, Smith, Glenn, Levin and Dorgan.

OPENING STATEMENT OF SENATOR STEVENS

Chairman STEVENS. Mr. Majority Leader, we are delighted you have come this morning to testify before our Committee.

We have before us the Tenth Amendment Enforcement Act of 1996.[1] Yesterday, I think the press was a little skeptical, but I want you to know it really and truly is a product of the comments that you have made to me throughout the years about the Tenth Amendment. I know you have carried a copy of it in your pocket for many years, and have it with you again today, I'm sure.[2]

But when I became Chairman of this Committee, I made the commitment that we would find a way to have Congress act on a policy of enforcement and recognition of the Tenth Amendment. And we put together a team—Paul Stockler from Anchorage, Chris Reed, an Assistant Attorney General from New Hampshire, Doug Fuller, who has been a counsel of this Committee, and Christine Ciccone, who is here with us, our deputy director of the staff.

They have worked together as a team to form this legislation based on many conferences with many Senators, and I want you to know we believe that this is an act that could carry out your promise to restore the power to the States and require the courts to recognize the intent of the Framers of the Constitution in the Tenth Amendment.

So thank you for joining us. We are pleased to hear you.

[News release dated March 20, 1996 follows:]

[1] A copy of the Tenth Amendment Bill S. 1629 appears on page 259.
[2] A copy of the Tenth Amendment referred to appears on page 267.

U.S. Senate Committee on
GOVERNMENTAL AFFAIRS
Ted Stevens, Chairman

FOR IMMEDIATE RELEASE.
MARCH 20, 1996

CONTACT: MITCH ROSE
(202) 224-3004

SEN. STEVENS CHAIRS HEARING
ON STEVENS-DOLE BILL
TO PROTECT STATES, ENFORCE TENTH AMENDMENT

Washington, D.C. -- U.S. Senator Ted Stevens (R-Alaska) today chaired a hearing before the Governmental Affairs Committee on legislation introduced yesterday by Stevens, Senator Robert Dole (R-Kan.), and a bipartisan group of 22 other Senate cosponsors. Senator Dole, joined by Senators Orrin Hatch (R-Utah) and Don Nickles (R-Okla.) will testify about the bill. The bill protects State and local authority by requiring that the federal government adhere to the Tenth Amendment to the U.S. Constitution, which restricts Federal activities to those powers delegated to the federal government under the Constitution.

"The Tenth Amendment Enforcement Act of 1996 is aimed at preventing overstepping by all three branches of the federal government," said Stevens. "It will focus attention on what State and local officials have been advocating for so long: the need to return power to the States and to the people." Stevens added that the Governmental Affairs Committee will hold additional field hearings throughout the country on the bill to return power to State and local governments.

The Stevens-Dole bill enforces the Tenth Amendment by:

- including a specific Congressional finding that the Tenth Amendment means what it says: The federal government has no powers not delegated by the Constitution, and the States may exercise all powers not withheld by the Constitution;
- stating that federal laws may not interfere with State or local powers unless Congress declares its intent to do so and Congress cites its specific Constitutional authority;
- giving members of the House and Senate the ability to raise a point of order challenging a bill that lacks such a declaration or that cites insufficient Constitutional authority. Such a point of order would require a three-fifths majority to be defeated;
- requiring that federal agency rules and regulations not interfere with State or local powers without Constitutional authority cited by Congress. Agencies must allow States notice and an opportunity to be heard in the rulemaking process;
- directing courts to strictly construe federal laws and regulations that interfere with State powers, with a presumption in favor of State authority and against federal preemption.

[The prepared statement of Chairman Stevens follows:]

PREPARED STATEMENT OF SENATOR STEVENS

Yesterday we introduced the Tenth Amendment Enforcement Act of 1996. This is the first of a series of hearings I will be holding as the Chairman of the Governmental Affairs Committee on this important piece of legislation. After this hearing we will hold several field hearings so that we can hear first hand the problems our States, cities and ordinary people have because of Federal overreaching.

Because the members of our first panel all have other commitments, I am going to have them testify before the Members of the Committee make their opening statements.

Bob Dole has been talking about the Tenth Amendment for years. We all know he carries a copy of it at all times. Senator Dole reminds us all that the Tenth Amendment was a promise to the States and to the American people that the Federal Government would be limited, and that the people of the States could, for the most part, govern themselves as they saw fit.

Unfortunately, in the last half century, that promise has been broken. The American people have asked us to start honoring that promise again: To return power to State and local governments which are closer to and more sensitive to the needs of the people. It is my pleasure to introduce The Tenth Amendments greatest advocate, Bob Dole.

Chairman STEVENS. Do you have an opening statement, Senator Glenn?

Senator GLENN. I do, but if the Majority Leader has a time problem I'll defer it until later.

Senator DOLE. I don't have a time problem. I might learn from your statement.

OPENING STATEMENT OF SENATOR GLENN

Senator GLENN. Well, we'll take a chance on that and I'll read it. I welcome witnesses here today and look forward to hearing their testimony. As I understand it, we are going to have other hearings with testimony from those who oppose this legislation; is that correct?

Chairman STEVENS. We will have another hearing later this year, yes. I'm not sure they will all be opposition.

Senator GLENN. Well, the political spectrum on our witnesses this morning runs all the way across the alphabet from A almost to B. No further than that I think. And so I think we should have some opposing testimony to it too.

Chairman STEVENS. If there is some opposition down there in the Zs, we'll get to them.

Senator GLENN. Well, all right.

Federalism issues have risen to the forefront in this Congress. We began by enacting S. 1, the Unfunded Mandates Reform Act of 1995, legislation I was proud to coauthor with my colleague, Senator Kempthorne.

I have also supported efforts to pass comprehensive regulatory reform legislation that would help reduce burdens on businesses, State and local governments—everybody here has worked on that over this past year—while maintaining important public health, safety, and environmental protections.

We have also passed proposals in the Senate to devolve Federal responsibilities to the States in welfare, job training, drinking water, and health care.

I supported a number of these proposals where I believe they reformed the administration of intergovernmental programs while at

the same time assuring an appropriate balance of Federal responsibility and funding.

The Clinton Administration has done its part to reinvigorate our system of federalism by proposing to consolidate 271 categorical grant programs into 27 performance partnerships, and by streamlining the State waiver process under Medicaid, AFDC and other programs. In fact, my home State of Ohio was just granted such a waiver on welfare just earlier this week.

The Administration will soon issue a report as required by S. 1 detailing agency compliance with the Act's requirements for intergovernmental consultations and cost benefit analysis in the regulatory process, and I look forward to reviewing that report.

One of the concepts behind the Chairman's bill is that Congress should have greater information on hand about the impact of legislation on State and local law before that legislation is enacted. I certainly support that concept, although I have other reservations about the bill.

The notion that Congress should have more information about the impact of its actions on State and local law is something we built into S. 1. Section 423(E) of the act requires Committee reports to state whether a piece of legislation is intended to preempt any State, local or tribal law, and if so, explain the effect of that preemption.

Now, S. 1 just went into effect on January 1 of this year, so I think it is too early to tell whether or not all the committees have been complying with that requirement.

However, I am troubled by another concept in this bill. While the bill does not take effect until 1997, its purpose and findings suggest that the Federal Government has improperly, illegally, or even unconstitutionally taken over State areas of responsibility. I think that is a very debatable premise.

Advances in the economy, international trade, civil rights, public health and safety, environmental protection apply to all States across the border. There is a long list of national problems that have been solved or addressed precisely because the Federal Government could do what the States either would not, should not or could not do.

Further, this bill sets up a process enforced by a supermajority points of order and judicial review that will make it much more difficult, or even impossible, for the Federal Government to act in the future to address problems that are national in scope and cannot be solved on a State-by-State business.

I certainly agree we need a more efficient and effective Federal Government. This Committee of all committees in the Senate has worked on those matters. That's part of our mandate on this Committee. But I don't think we need additional procedural hurdles that make governing a more difficult task than it already is.

I agree there are many instances of Congress overlegislating and the Federal agencies overregulating, thus the need for unfunded mandates legislation, and for regulatory reform, for devolution of authority in select instances, and greater intergovernmental grant flexibility as proposed by the National Performance Review.

These reforms will help repair the intergovernmental relationship. But I believe we can accomplish this objective without estab-

lishing a new or different interpretation of the Tenth Amendment than our courts have repeatedly interpreted it throughout our 220 year history.

I look forward to hearing today's testimony on our first hearing on this bill, and I commend the Chairman for scheduling additional hearings.

Thank you, Mr. Chairman.

Chairman STEVENS. Thank you. Gentlemen, if it is agreeable we'll forego any other statements and listen to the Majority Leader. Mr. Majority Leader.

TESTIMONY OF HON. ROBERT DOLE, U.S. SENATOR FROM THF STATE OF KANSAS

Senator DOLE. I would ask that my statement be made part (the record.

First of all, I want to thank the Chairman and the others who are participating in this hearing. In my view it is important.

As I have read some of the history, it seems our Founding Fathers were concerned about an all-powerful central government that might take away rights of States and rights of the people, and that's why we have this declaratory statement, Article 10: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

I think the statement is fairly clear. Unless the Constitution gives the Federal Government the power and denies it to the States, it belongs to the States or the people.

And I have been talking about it in the context of welfare reform, Medicaid—some of these major programs that I believe should go back to the States. If for some reason they shouldn't work, Congress is in session every year, we can always make the necessary changes.

But from the first days of the 104th Congress, I think we have recognized the importance of the Tenth Amendment and we have started to shift power out of Washington by returning it to our States.

As Senator Glenn indicated, we did pass unfunded mandates reform—I think that was a big step in the right direction—primarily due to the efforts of the Senator from Ohio and the Senator from Idaho, Senator Kempthorne.

This year we would like to shine up the Tenth Amendment by passing the Tenth Amendment Enforcement Act of 1996. We are going to shift power out of Washington and return it to our States, our cities, our neighborhoods, and to the American people. And that's the essence. It ought to be kept close to people.

And I do believe there has been a shift in, whether Republican or Democratic administrations, over the last 30 to 40 years of more and more power to the Federal Government. I always say in my statements, I think the Federal Government does many, many good things, but in my view this legislation is particularly timely.

So it seems to me that you are off on the right track. There may be those opposed to it, maybe in their opposition they can bring up some areas that should be modified or corrected. But I think we do want to send power back to the people and back to the States. They

are closer and they are more sensitive to the needs of the people. So we need to return Federal programs to the States and give the States the tools to do their job.

I believe that the enforcement act outlined by the Senator from Alaska, Senator Stevens, has the appropriate safeguards in the legislative process. It does restrict the power of the Federal agencies, and instructs the Federal courts to enforce the Tenth Amendment. And I think that's the right approach, and I don't believe it is a Republican issue or I don't think the Founding Fathers were Republicans or Democrats, and in their wisdom they felt this statement was necessary.

It was part of the Bill of Rights for the appropriate reason. The President said "The era of big government is over," and I am pleased that apparently he would indicate too, that this is something we might take a look at, and Senator Inouye is a cosponsor.

So this is a bipartisan issue, it is a bipartisan bill. Hopefully there will be a bipartisan result. So it deserves the support of our colleagues, and I look forward to working with the Chairman in the next few weeks and months.

Thank you very much.

[The prepared statement of Senator Dole follows:]

PREPARED STATEMENT OF SENATOR DOLE

It is a pleasure to testify today on behalf of the Tenth Amendment Enforcement Act of 1996. I want to thank my friend Senator Ted Stevens for his efforts to make this bill a reality, and thank all of the many cosponsors of this important legislation.

From the first days of the 104th Congress, we have recognized the importance of the Tenth Amendment and have started to shift power out of Washington by returning it to our States.

Last year, we dusted off the Tenth Amendment when we passed the Unfunded Mandates Reform Act. This year, we are going to shine up the Tenth Amendment by passing the Tenth Amendment Enforcement Act of 1996. We are going to shift power out of Washington and return it to our States, our cities, our neighborhoods, and to the American people.

Power should be kept close to the people. That was the idea on which this Nation was founded and that is where we need to return this country.

As many of you know, I always carry a copy of the Tenth Amendment in my pocket. I want to remind people, especially people here in Washington, of the need to rein in big government.

The Tenth Amendment contains just 28 words: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

We want to send power back to the people and to the States. State and local governments are closer to and more sensitive to the needs of the people. So we need to return Federal programs to the States and give the States the tools to do their jobs.

The Tenth Amendment Enforcement Act of 1996 will place safeguards in the legislative process, restrict the power of Federal agencies, and instruct the Federal courts to enforce the Tenth Amendment. It's the right approach.

I don't care what your party is. This isn't a Republican or a Democratic issue. Even the President has said "the era of big government is over." I'm glad to know that Senator Inouye is a co-sponsor of this bill. This is a bipartisan issue and this is a bipartisan bill.

The Tenth Amendment Enforcement Act of 1996 deserves the support of all of us and I look forward to its passage by this Committee and by the full Senate.

Chairman STEVENS. Thank you very much, Senator Dole. We are pleased to have you with us, and we know that you have other business so, please, as long as you can stay with us.

Senator HATCH.

TESTIMONY OF HON. ORRIN G. HATCH, U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I agree with our distinguished Majority Leader and I appreciate his leadership in this area, but particularly I appreciate yours.

Thank you for inviting me to testify in this very important hearing on the most fundamental principle of our government, the Tenth Amendment.

The Tenth Amendment Enforcement Act of 1996 would require Congress to identify the constitutional authority relied upon to enact every statute. It would require Federal agencies to bring the States into the law-making process, and it would require that the Federal courts construe narrowly exercises of Federal power that might displace State law.

This is important and necessary legislation. The Tenth Amendment expresses the first principle of our Federal Government, and Senator Dole read that to us.

Our system of government stems from the one overriding principle that all power stems from the consent of the people. The people have given only limited enumerated powers to the Federal Government, and in the Tenth Amendment they declared their intention to reserve to the States or themselves every power not specifically given to the Federal Government.

By enshrining this principle in the Tenth Amendment, the Framers of our Constitution declared their understanding that the States would continue to bear the primary responsibility for regulating the affairs of all of us in our everyday lives.

Let me just read a quote on this point. "The Federal Government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the Republic but which are not to be attained by the separate provisions of any. The State government, which can extend their care to all of those other subjects which can be separately provided for, will retain their due authority and activity."

Now, was this some revolutionary Republican freshman who said this? Yes, he was a revolutionary, and yes, at the time he had little experience in our national government. His name was James Madison, one of the founders of our country and the father of the Constitution, our third president, and the author of Federalist Paper No. 14 from which the quote is taken.

James Madison, like all the Framers of the Constitution, believed that the Federal Government could exercise limited enumerated powers that arose from specific delegations made in the Constitution.

Indeed, the whole purpose of a written constitution, one of the great innovations of American politics, is that government can only exercise powers that are granted in that very document. Unfortunately, in the view of many, runaway Federal agencies, and sometimes we in Congress, have forgotten our Founding Fathers and what they so clearly understood.

Federal laws intrude into almost every area of our lives, and Federal regulations encroach into some of the most basic decisions of individuals and local government. Activist Federal judges at

times have been accomplices in this power grab away from the States and away from the people.

This legislation would begin to put an end to unaccountable Federal power by reminding Congress and agencies that the Tenth Amendment's principle of limited government must be obeyed. Congress must include findings concerning the legitimate reach of Federal power when it passes a statute. Agencies must consider preemption issues and the proper sphere of State authority when promulgating regulations.

I believe that the point of order provision that you have provided for, Senator Stevens and others who have worked with you on this bill, which would require a three-fifths majority to be defeated if a bill fails to identify the specific constitutional authority for its provisions, will be very important.

If enacted, we will have to ensure that this provision is not abated by pro forma citations to the commerce clause. Indeed, as the Supreme Court reminded the Congress last term in *United States v. Lopez,* a very important decision, Congress cannot merely rely upon the interstate commerce clause to justify every limit, or without limit, every law and regulation that it wishes to enact.

Furthermore, I believe that if Congress intends to displace State law, it must do so clearly and with full awareness of the grave consequences.

As the Supreme Court declared recently, the decision to override State authority, "is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."

That's in *Gregory v. Ashcroft,* a 1991 case. Therefore, the courts have required that when Congress acts, "to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."

That's the Gregory case quoting the *Atascadero State Hospital v. Scanlon* case. The point of order provision will force Congress to comply with this command from the Supreme Court

Now, as Chairman of the Senate Judiciary Committee, let me also address the provision concerning the displacement of State law or authority by Federal law, otherwise known as Federal preemption.

Section 6 of your bill creates a rule of construction that requires the courts to interpret Federal statutes and regulations so as not to preempt State or local laws. If there is a clear conflict between Federal and State law, or there is an express declaration to preempt, then preemption is clear and the rule of construction does not go into effect.

It is wholly appropriate that the legislation contain such a provision. Indeed, such a rule of construction is almost required by the Tenth Amendment. If our government is one of limited, enumerated powers, then every exercise of those powers must be narrowly construed so as to respect the authority reserved to the States and to the people.

Indeed, this rule of construction in many ways codifies the Supreme Court's presumption in interpreting statutes that Congress

does not intend to displace State law unless it clearly says so, as the Court said in *Maryland v. Louisiana* in 1981.

There can be little doubt that Congress possesses the authority to determine how its laws are to be interpreted. Congress regularly includes provisions in various statutes declaring whether the statute is to be read to preempt State law or not. Congress certainly has the authority to define specific words in a statute, and it has the power to declare whether a statute is to be read narrowly or broadly. This legislation merely passes a general rule for all statutes and regulations concerning preemption.

Mr. Chairman, and Members of this Committee, thank you for this opportunity to testify in this important legislation of which I am proud to be a cosponsor.

I will work with you, Mr. Chairman, and others on this bill to make sure that it achieves passage and that we once again take care to see that the Tenth Amendment's principles are preserved.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR HATCH

Mr. Chairman, thank you for inviting me to testify on this very important hearing on the most fundamental principle of our government, the Tenth Amendment. The Tenth Amendment Enforcement Act of 1996 would require Congress to identify the constitutional authority relied upon to enact every statute, it would require Federal agencies to bring the States into the lawmaking process, and it would require that the Federal courts construe narrowly exercises of Federal power that might displace State law.

This is important and necessary legislation. The Tenth Amendment expresses the first principle of our Federal Government: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Our system of government stems from this one overriding principle: That all power stems from the consent of the people. The people have given only limited, enumerated powers to the Federal Government, and in the Tenth Amendment they declared their intention to reserve to the States or themselves every power not specifically given to the Federal Government. By enshrining this principle in the Tenth Amendment, the framers of our Constitution declared their understanding that the States would continue to bear the primary responsibility for regulating the affairs of everyday life.

Let me read a quote on this point: "The [Federal] government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The [State] governments which can extend their care to all those other objects, which can be separately provided for, will retain their due authority and activity."

Was it some revolutionary Republican freshman who said this? Yes, he was a revolutionary, and yes, at the time he had little experience in the national government. His name was James Madison, the father of the Constitution, our third President, and the author of Federalist Paper No. 14, from which the quote is taken. James Madison, like all of the framers of the Constitution, believed that the Federal Government could exercise only limited, enumerated powers that arose from specific delegations made in the Constitution. Indeed, the whole purpose of a written Constitution—one of the great innovations of American politics—is that the government can only exercise powers that are granted in the document.

Unfortunately, runaway Federal agencies and sometimes we in Congress have forgotten what our Founding Fathers so clearly understood. Federal laws intrude into almost every area of our lives, and Federal regulations encroach into some of the most basic decisions of individuals and of local government. Activist Federal judges at times have been accomplices in this power grab away from the States and away from the people.

This legislation would begin to put an end to unaccountable Federal power by reminding Congress and the agencies that the Tenth Amendment's principle of limited government must be obeyed. Congress must include findings concerning the legitimate reach of Federal power when it passes a statute. Agencies must consider pre-

emption issues and the proper sphere of State authority when promulgating regulations.

I believe that the point of order provision, which would require a three-fifths majority to be defeated if a bill fails to identify the specific constitutional authority for its provisions, will be very important. If enacted, we will have to ensure that this provision is not evaded by *pro forma* citations to the Commerce Clause. Indeed, as the Supreme Court reminded the Congress last term in *United States v. Lopez*, Congress cannot merely rely upon the Interstate Commerce Clause to justify without limit every law and regulation it wishes to enact.

Furthermore, I believe that if Congress intends to displace State law, it must do so clearly and with full awareness of the grave consequences. As the Supreme Court declared recently, the decision to override State authority "is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Therefore, the courts have required that when Congress acts "to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). The point of order provision will force Congress to comply with this command from the Supreme Court.

As chairman of the Judiciary Committee, let me also address the provision concerning the displacement of State law or authority by Federal law—otherwise known as Federal preemption. Section 6 creates a rule of construction that requires the courts to interpret Federal statutes and regulations so as not to preempt State or local laws. If there is a clear conflict between Federal and State law or there is an express declaration to preempt, then preemption is clear and the rule of construction does not go into effect.

It is wholly appropriate that the legislation contain such a provision—indeed, such a rule of construction is almost required by the Tenth Amendment. If our government is one of limited, enumerated powers, then every exercise of those powers must be narrowly construed so as to respect the authority reserved by the States and the people. Indeed, this rule of construction in many ways codifies the Supreme Court's presumption in interpreting statutes that Congress does not intend to displace State law unless it clearly says so. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

There can be little doubt that Congress possesses the authority to determine how its laws are to be interpreted. Congress regularly includes provisions in various statutes declaring whether the statute is to be read to pre-empt State law or not. Congress certainly has the authority to define specific words in a statute, and it has the power to declare whether a statute is to be read narrowly or broadly. This legislation merely passes a general rule for all statutes and regulations concerning preemption.

Mr. Chairman and Members of the Committee, thank you for this opportunity to testify on this very important legislation, of which I am proud to be a co-sponsor. I will work with you Mr. Chairman to make sure that it achieves passage and that we once again take care to see that the Tenth Amendment's principles are observed.

Chairman STEVENS. Thank you very much, Senator.

Senator Nickles.

TESTIMONY OF HON. DON NICKLES, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. Thank you very much. I wish to compliment you and your staff for this legislation, and also compliment Senator Dole and Senator Hatch for their statements and for this renewed attention to the Tenth Amendment.

I appreciate the fact that Senator Dole reads the Tenth Amendment. I appreciate the fact that he pays some attention to it, and I hope that we in Congress will start to pay attention to it, because I think it is one of the most ignored amendments that we have in the Constitution. And I think this Congress is starting to do that.

I think some of the actions that we have already taken—Senator Dole mentioned welfare reform where we are trying to move more decision criteria to the States and to the people. I think that makes

good sense, and hopefully we'll have some success on that legislatively.

This past Congress we have done some things legislatively that show also that we believe that States and localities should make more decisions. We repealed the so-called national speed limit and said the States should be the proper criteria, the proper level of government, to set speed limits, not the Federal Government.

But in other areas Congress has done just the opposite. When Congress, in the Motor Voter legislation—that was national legislation that, in my opinion, more properly belonged to the States.

Just a couple of facts. Mr. Chairman, I'll ask consent for my entire statement to be inserted into the record.

But in 1940 the Federal Government received 39 percent of all revenues of all levels of government. Today it receives 56 percent.

The Federal Government today runs more than 500 separate categorical grant programs for States and local governments. Over one-third of all State expenditures are now devoted to matching Federal entitlements and grants.

There is an array of confusing and overlapping and costly, and sometimes useless, Federal requirements on States and localities.

Many of us served in State governments, either in the legislature, or we have governors, we have others, attorney generals and so on, who have been trying to limit the overregulating, overgoverning, overburdening of the Federal Government. When we see many actions that the Federal Government has taken, it is almost in direct conflict with what our forefathers intended.

I might mention as well, our forefathers in the Senate had the Senate selected by the State legislators. So the States would be well represented. When we passed a constitutional amendment providing for the direct election of senators, which incidentally I'll say I'll support because without the Oklahoma legislature, I would have never made it.

But the original concept kept States at the forefront in the Senate. And I think we need to recognize that. Our forefathers wanted to have the States at the table. By passing the Tenth Amendment, they said all other rights and powers are reserved to the States and to the people.

We have gotten into a situation, I think, over the last few decades where if we had a problem many people seemed to think the solution would be another Federal program. We now have 334 Federal means-tested welfare programs. We have 156 Federal job training programs.

Surely these are programs in many cases which would be much better maintained, controlled and governed at State and local levels instead of the Federal Government.

So again, Mr. Chairman, I want to compliment you and your staff and Senator Dole, Senator Hatch, and others, for the input not only for the Tenth Amendment enforcement but for these hearings for the enlightenment of others. I think this can be very helpful in the process and I compliment you for your efforts.

[The prepared statement of Senator Nickles follows:]

PREPARED STATEMENT OF SENATOR NICKLES

Mr. Chairman and Members of the Committee: I am going to begin by quoting the 10th Amendment, which was ratified with the other nine amendments of the Bill of Rights in December 1791. It says, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Of course, during the course of this hearing the 10th Amendment is going to be quoted often, but I have chosen to repeat it myself because the 10th Amendment has become one of the forgotten parts of the Bill of Rights. If the 10th Amendment were as familiar to Americans as the 1st Amendment, and if Americans cherished the 10th as they do the 1st, I think the effect on the American Republic would be dramatic.

The 10th Amendment teaches us that the National Government has such powers, and only such powers, as are assigned to it by the Constitution. The States, on the other hand, have all powers which the Constitution does not prohibit to them. The people do, of course, have the ultimate authority.

Renewed attention to the 10th Amendment to the Constitution is long overdue. You, Mr. Chairman, are to be congratulated for holding this hearing and for sponsoring the Tenth Amendment Enforcement Act of 1996, which I am pleased to cosponsor. Perhaps the most lasting legacy of this Congress will be a renewed dedication to the power and authority of State and local governments—and of the people themselves.

The Majority Leader, Senator Bob Dole, deserves much of the credit for this renewed interest in the 10th Amendment. His agenda for the 104th Congress has revolved around the principles of the 10th Amendment. "Shifting power out of Washington, and returning it to our States, our cities, our neighborhoods, and to the American people," Senator Dole says, "That's what the 10th Amendment is all about."

There are several other Members of the Senate who deserve praise for reminding us that the National Government is one of limited powers. Senator Abraham, for example, has introduced a bill and a resolution which would require Congress to state explicitly the constitutional authority that is being relied upon whenever we enact a bill.

Why are we so concerned about the growth of the Federal Government? Consider these facts:

1. In 1940, tile Federal Government received 39 percent of all revenues to all levels of government; in 1992, it received 56 percent.
2. The Federal Government runs more than 500 separate categorical grant programs for States and local governments.
3. Over one-third of all State expenditures are now devoted to matching Federal entitlements and grants.
4. There is an array of confusing and overlapping and costly and sometimes useless Federal requirements on States and localities.[1]

With these kinds of facts facing the country, even President Clinton (a former governor) has had some helpful things to say about a smaller National Government. A few weeks ago, in his State of the Union Address, the President announced that, "The era of big government is over." A year ago, in Iowa, he said, "We know that we no longer need the same sort of bureaucratic, top-down, service-delivering, rulemaking, centralized government in Washington that served us so well during the industrial age, because times have changed." I applaud the President's words, and I look forward to the time when his actions match his words.

At the Supreme Court, too, there appears to be renewed interest in the 10th Amendment. The decision in *United States v. Lopez*[2] and Justice Thomas' dissenting opinion in *U.S. Term Limits v. Thornton*[3] have helped to remind the Nation that Congress has only those powers that are set out in the Constitution and that the 10th Amendment is not a dead letter.

My own interest in the 10th Amendment and in limited government goes back to before my election to the Oklahoma State Senate when I was a small business-

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[1] This list is from Philip Burgess' speech to the Federalism Summit of October 23, 1995, and reprinted at 62 Vital Speeches 108 (Dec. 1, 1995). The four points have been edited slightly.

[2] 115 S. Ct. 1624 (decided April 26, 1995) (holding that the Gun-Free School Zones Act exceeds Congress' authority under the Commerce Clause). See also, *New York v. United States*, 505 U.S. 144 (1992) (Congress may not "commandeer" the State legislative process by compelling the States to enact and enforce a Federal regulatory program).

[3] 115 S. Ct. 1842 (decided May 22, 1995) (the majority held that Arkansas' attempt to limit the terms of its U.S. Senators and Representatives violated the Federal Constitution).

man. After my election to the U.S. Senate, I served as the Chairman of the Labor Subcommittee when Congress passed and President Reagan signed the Fair Labor Standards Amendments of 1985, Pub. L. 99–150, which allowed States and local governments to give their employees compensatory time off in lieu of overtime pay. As this Committee knows, those 1985 amendments were necessitated by the line of cases beginning with *Maryland v. Wirtz*[4] which was reversed by *National League of Cities v. Usery*[5] which was reversed by *Garcia v. San Antonio Metropolitan Transit Authority.*[6]

In *National League of Cities v. Usery* the Supreme Court affirmed the constitutional integrity of States and their political subdivisions, saying:

> "These activities [fire, police, sanitation, public health, parks, recreation] are typical of those performed by State and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' separate and independent existence."[7]

Usery was, of course, reversed by *Garcia* so the law quoted above is now out-of-favor, but in my judgment it remains the law of the Framers' Constitution, and Congress ought to follow its precepts even though the Supreme Court will allow the Federal Government greater latitude in telling the States how to manage their affairs.

It is extremely important that Congress itself act within the letter and spirit of the 10th Amendment. We cannot count on the Federal courts to restrain Congressional excesses, as the recent litigation about the "Motor Voter Act" again demonstrated,[8] and we should not have to rely on the courts. Each Senator and Representative is sworn to support and defend the Constitution of the United States. Congress should ensure that its own enactments respect the rights and powers of the States. This is one of the strengths of the Tenth Amendment Enforcement Act, which I encourage the Committee to approve.

Thank you.

Chairman STEVENS. Thank you very much, gentlemen.

I will ask unanimous consent that your statements be printed in the record as so read, and my opening statement also, which I deferred in view of the Leader's presence.

I do want to just make two comments to you. We, too, Senator Hatch, went back and looked at some of the comments of our Founding Fathers.

For instance, George Mason was the originator of this concept. He said that: "The Congress should have power to provide for the general welfare of the union I grant, but I wish a clause in the Constitution with respect to all powers which are not granted, that they are retained by the States. Unless there be some express declaration that everything not be given be retained, it will be carried to any power that Congress may please."

In Federalist Paper No. 45, Madison said this: "The powers delegated by the proposed Constitution of the Federal Government are few and defined. Those which remain in the State government are numerous and indefinite. The powers reserved to the several States will extend to all objects which in the ordinary course of affairs concern the lives, liberties and properties of the people and the in-

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[4] 392 U.S. 183 (1968).
[5] 426 U.S. 833 (1976).
[6] 469 U.S. 528 (1985).
[7] 426 U.S. at 851 (footnotes, citations, and internal quotation marks omitted).
[8] *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (Jan. 22, 1996) (rejecting State's claim that "Motor Voter Act," Pub. L. 103–31, unconstitutionally intruded on its authority).

ternal order, improvement and prosperity of the State. The operations of the Federal Government will be most extensive and important in times of war and danger, those of the State governments in times of peace and prosperity."

Now, I think our bill is necessary and is warranted.

I'll yield to my friend here for questions. We do have one problem, and that is that Senator Warner would like to present the Attorney General of Virginia and then go to his committee. Would it be permissible at this time to ask that? And does anyone have any particular questions for the two Senators?

Senators Dorgan, Levin, and Thompson are here.

Would it be permissible at this time to ask Senator Warner does anybody have particular questions for the two senators.

Senator LEVIN. Just a couple.

Chairman STEVENS. Gentlemen, would you mind if we allowed Senator Warner to present his Attorney General and then go to questions. Have you got a time frame problem too?

Senator HATCH. I have to preside over the immigration bill at 10:30, but I would be happy to stay.

Senator WARNER. One minute.

Chairman STEVENS. All right. Senator, if you will present the Attorney General, we'll be pleased to hear him then after the questions are presented to the Senators.

TESTIMONY OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Mr. Chairman and Members of the Committee, I thank you for this privilege to do so.

You have just recited some history from the Commonwealth of Virginia, and I think it most appropriate that we join in welcoming the Attorney General of Virginia here today.

I have known this fine man for many years, and I stop to think when I look at him how many times those of us in public life raised our hand to uphold the Constitution of the United States and the laws of our several States, and this fine man has done it many times.

Yet in any public career there are temptations now and then when politics or other popular causes intervene to sometimes not go forward and look the other way.

But this is a man of character, a man of courage and a man of principle that always puts the law ahead of every other consideration, and I am pleased to be here to introduce him to the Committee today.

Chairman STEVENS. Thank you very much, Senator.

Mr. Attorney General, we'll look forward to your testimony as soon as we can finish with the two Senators.

I would just make one statement, Senator Hatch. As I indicated when we introduced the bill yesterday, the 60 vote point of order waiver has raised some concern, and we are researching that again. And we'll make a final decision with all the cosponsors before the bill comes to the Floor as to whether that should be a simple majority or 60 votes.

Senator HATCH. Or a constitutional majority.

Chairman STEVENS. Or it could be the other way, yes.

Senator Glenn.

Senator GLENN. Thank you, Mr. Chairman.

We passed the unfunded mandates bill earlier this year. We are all aware of that and what was in it.

It requires the committees, when reporting legislation, to include in the committee report an explicit statement on the extent to which the underlying legislation preempts State, local and tribal law, and an explanation as to the effect of such a preemption. That act has just gone into effect.

Don't you think it would be a good idea to wait until we see how that is working before we see what is needed to go beyond that?

Senator HATCH. Actually, I think this bill would complement that provision, and I think it would also define it even a little bit better than it is defined in that unfunded mandates bill.

This is pretty simple really. It is seemingly revolutionary because we have so ignored it through the years, or at least the Court has ignored it so much through the years.

And what this bill does is just say we are going to get it back to where the Founding Fathers thought it would be. I think it would be a complementary bill to the unfunded mandates bill and help it to work even better.

Senator GLENN. I think the way the bill is set up right now, it would be a way of just bringing any legislation to a halt. Because the way it is worded now, it says it is not in order to consider—even to consider—any bill not complying with Section 3.

Now, Section 3 states the following: First, that authority to govern in the area addressed by the statute is delegated to Congress by the Constitution, including a citation to that effect.

Second, that Congress specifically finds it has a greater degree of confidence than the States to govern in the area addressed.

And third, if it interferes with State powers or preempts any State or local government law, regulation or even an ordinance, that Congress specifically intends to interfere with State powers or preempt State and local governments.

Now, it is not in order to even consider any bill, joint resolution or amendment that does not include that kind of a declaration.

Now, the only person that could make that kind of a decision is the Senate parliamentarian, because if you object to bringing a bill up, the parliamentarian has to rule on it. So in effect it would appear to me that we are giving the parliamentarian authority to decide matters that are admittedly rather vague in the Constitution, and that the Supreme Court has wrestled with it on a number of occasions and hasn't come up with a very definitive answer.

We are making the parliamentarian almost a super dictator on legislation, unless I misunderstand this.

Is that your understanding of how it would work?

Senator HATCH. No, that's not how it works. What this bill really does is it says that Federal laws may not interfere with State or local powers "unless."

We can interfere, but it says we can't unless Congress expressly declares its intent to do so, and cites the specific constitutional authority upon which it relies.

Now, that's what we are going to have to do. Now, you can say, well that could be a parliamentary decision. I'm not so sure that

that is so. But in any event, it is going to have to ultimately be construed by the Court.

Senator GLENN. But as I read it you can't even consider an amendment on the Floor unless you have complied with paragraph three of this bill, all those things I have said. And if that's challenged through a point of order and you say you can't bring up your amendment, then the parliamentarian has to rule on that.

Senator HATCH. Well, that's true of almost anything in legislation. If we want to challenge it we have to have a parliamentary ruling. I don't see that as being revolutionary.

Senator GLENN. So you think it would be good that we would give the Senate parliamentarian authority that even the Supreme Court has not really felt competent to deal with?

Senator HATCH. We do today. We give the parliamentarian authority today in certain matters.

The fact is I don't think it is going to come to that. I think it would come to where we would all be more cognizant of the rights of the States and the localities to be able to run their own show, and if we disagree with those rights and we pass legislation, we have to state why and we have to state the constitutional authority for us to disagree.

Senator GLENN. Senator Nickles, do you have any problem with the parliamentarian having that kind of authority.

Senator NICKLES. Senator Glenn, let me just kind of add a caveat. We have given the parliamentarian an enormous amount of authority, if you look at what we have done under the budget law.

And one could step back and say, well, wait a minute, is that the right thing to do, because you get into these points of order. Points of order can be waived by 50 votes in some cases, and so we wrestled with wait a minute, you have a 60 point point of order but if you can appeal the ruling of the Chair and win with 50 votes, you still win with 51 votes.

And I haven't been able to work my way all the way through this, can you do the same thing if you disagree with a point of order or the ruling of the Chair. I think you could. And I don't want to get too arcane in the parliamentary procedures, but I think the thrust—let me just echo on the thrust of the intention of the legislation—is that we want, or hopefully we would like to, preserve what our forefathers had in the Constitution and said, wait a minute, let's leave these powers to the States and to the people.

If Congress wants to preempt that, let's so state. If we are going to be taking over actions that really our forefathers envisioned for the State and the people, if Congress is going to intervene in those cases, let's state so objectively and have the parliamentarian agree, and then if we want to move into constitutional areas that really should be preserved to the States, then we should do so with a supermajority and do so with our eyes wide open. I think in many cases we haven't done that.

As far as whether you can do that with 60 votes or 50 votes, again, in the budget act you are able to do it in most cases with 50 votes. But we can, I think, work on the parliamentary procedures, but the thrust of what Senator Stevens' legislation has that it should be difficult for us to do so, I think, is correct.

Senator HATCH. And we still have the right to overrule the parliamentarian, and I think Senator Nickles cites it very well. We already have given the parliamentarian great powers, and in this case it will not be unusual, and I think this will all sift down to where we will all be able to understand it.

Let's say though that the parliamentarian rules against the particular Senator, the Senator appeals the ruling of the chair and the Senate votes to overrule the chair. Then it will come down to whether the Supreme Court agrees in the end, I suppose. But that's our constitutional system.

Senator THOMPSON. Senator Glenn, could I ask a question of clarification?

Senator GLENN. Sure.

Senator THOMPSON. As I read this, it says it shall not be in order to consider any bill that does not include the declaration.

Senator GLENN. That's in Section 3, yes.

Senator THOMPSON. That's in Section 3. You look to Section 3 and it says, the statute shall include a declaration.

In other words, all the parliamentarian does is determine whether or not the statute includes such a declaration. The parliamentarian doesn't make any substantive decisions. He simply looks to the statute to see whether or not it includes that declaration.

Senator GLENN. No, but as I read this, if I tried to bring up an amendment on the Floor, it would be up to the parliamentarian to determine whether those three areas above are met.

Senator THOMPSON. No, I respectfully disagree. It would up to the parliamentarian to determine whether or not your amendment contained such a declaration.

Senator HATCH. Yes, whether the declaration is a declaration. But that's not unusual. That's not difficult to do.

Senator THOMPSON. And then Congress can debate whether or not substantively those qualifications are met.

Senator HATCH. And we can overrule the parliamentarian if we want to. It is still a democratic principle.

Senator DORGAN. Would the Senator yield just to a question on that point?

What if the declaration is faulty on its face? If it is a totally faulty declaration and everyone understands it, would the parliamentarian then be asked to rule on whether the declaration is appropriate?

Senator THOMPSON. You mean faulty on its face substantively or faulty because it only had two of the three requirements?

Senator DORGAN. Substantively.

Senator THOMPSON. Well, then I would think that that would be a matter for the Congress to debate. The parliamentarian would make a determination as to whether or not these three requirements were met, and if in fact he made an erroneous decision, there are only two requirements clearly there, and he says that there are three, then I assume that that would be decided by the Congress, or the Senate.

Senator GLENN. Well let me come back to this again. On the parliamentary issue, let's say that it is only a statute and the statute is only judged by whether all components of it comply with those items in Section 3.

The parliamentarian now has to determine specifically whether the authority is delegated to Congress by the Constitution, including a citation of the specific constitutional authority; he has to determine the degree of competence that the States have to govern in this area addressed by the statute; and then he also has to judge if the statute interferes with State powers or preempts any State or local government law, regulation or ordinance.

The parliamentarian would have to judge whether all of these conditions have been met, even local ordinances, and if Congress specifically intends to interfere with State powers, the parliamentarian would rule if there was a challenge on any amendment or bill.

Chairman STEVENS. I must say, Senator, that's not true.

Senator GLENN. Well, that's what the bill says, Mr. Chairman.

Chairman STEVENS. The parliamentarian only has to make a finding that there is a declaration of intent as required under Section 3. The substance of it is determined by the Committee, whatever is stated. But there is nothing here that says that he has to determine that the authority stated in Subparagraph 1 of 3(A) is correct, or that the finding of Congress is correct, or that the statute does not interfere with State powers.

He just has to make a finding, is there a declaration of Congressional intent as required by Section 3? And if there isn't, it takes 60 votes to proceed with the bill.

Senator GLENN. You mean as long as the statute said——

Chairman STEVENS. Let me tell you. The intent of this is to put teeth into S. 1. S. 1 merely required the committees to make this finding, but none of them are doing it.

And this is teeth. It says if you are on the Floor and a bill is out there and it in your judgment will interfere with State powers, or if it does not have a statement of the constitutional authority, you can raise the point of order that this bill has not been complied with and that there is no declaration.

And the Congress will vote on that, and 60 votes could waive that. If they want to waive it they could waive it.

But nothing here says, as you say, that we are giving the parliamentarian the right to interpret the declaration to see whether it is valid or not.

Senator GLENN. What you are saying is then that the parliamentarian wouldn't rule on the substance of the declaration, he would just rule that a declaration had been made?

Chairman STEVENS. That's what it says.

Senator GLENN. That's not the way I read it.

Chairman STEVENS. "Does not include a declaration of intent as required under Section 3."

Senator GLENN. In other words, I could just put something in that says, this bill complies with Section 3, and as long as I said I comply with Section 3 he would say that's OK?

Chairman STEVENS. No, the 60 votes have to agree with you, because I would make a point of order that you haven't complied.

Senator LEVIN. That wasn't my understanding. My understanding is all you have to do is put the certification in there and you have met the requirement. That's just what was said a minute ago.

Senator GLENN. Yes, whether it is valid or not.

Senator LEVIN. Now you are saying that the parliamentarian rules as to whether the certification is accurate?

Chairman STEVENS. The requirement can be waived by two-thirds. I believe maybe we'll have to make it clearer if you want it, but suppose the parliamentarian rules that I'm wrong?

Senator THOMPSON. Mr. Chairman, it says, the statute shall include a declaration of the following three things, and they are delineated.

I would think that any statute would follow that very language, and that any statute that did not follow that very language of the three requirements would be subject to a point of order.

It wouldn't be any great debate as to whether or not such a declaration was included. It would be pretty obvious whether or not this declaration was included.

Senator LEVIN. The Chairman just said the accuracy could be challenged.

Chairman STEVENS. But go back to S. 1 and see what we agreed would be in there, and they are not there. And I think that we are tracking S. 1 on what we tried to do. And that is require Congress to consider whether or not it had the authority to do what it wanted to do when it gave a mandate to the States.

But this goes further than S. 1, because we are not only talking about when they give a mandate to the States, we are saying now any bill that we pass must cite its constitutional authority in terms of the delegated powers of the Constitution to the Congress.

Senator GLENN. What if the sponsor of a bill doesn't believe a declaration is needed? In other words, on some item that he doesn't think really interferes with State and local law, and so he submits his amendment, or he submits the whole bill, the whole piece of legislation, and that is challenged on the Floor.

Then what would the parliamentarian do? He would have to decide whether the bill interferes with State or local law. How will he do that?

Chairman STEVENS. Well, he makes a ruling, is there a declaration or not. If there is no declaration and 60 people in the Senate believe there should be, then the bill will not be considered until it does make the declaration.

Senator GLENN. Yes, but 60 people in the Senate don't vote until after the parliamentarian has ruled.

Chairman STEVENS. That's correct.

Senator HATCH. But there is a decision that is made before that, and that's made by any member who wants to raise a point of order. If a member raises a point of order challenging the bill because it lacks such a declaration—or through two reasons—it either lacks the declaration, or it cites insufficient constitutional authority, and that's a simple matter for the parliamentarian to rule on.

Then it becomes a question of whether you can get 60 votes to overrule the point of order. But the purpose here is legitimate and worthwhile.

Chairman STEVENS. I told Senator Hatch he could be able to get back to the Floor. We have been on this matter for 15 minutes. It will be something we will be on the Floor for 15 hours some day in the future. I would hope we would let Senator Hatch go.

Senator NICKLES. Mr. Chairman, just a comment before I take off.

I think the parliamentary procedure is interesting, but the thrust of what you are trying to do is exactly right. And maybe we need to have Bob Dove and other parliamentary experts come in and educate all of us as far as the procedures are concerned.

But the point that you are trying to do by the legislation is saying that we want to make it more difficult for the Federal Government to be doing something that really our forefathers said belonged to the States and to the people, I think is right on target. I compliment you for that.

How we do it, through our rules, or through a statute, or should it be a bill or an amendment, I think are all good questions and procedurally we need to work out so it can be smooth, so it can work, so the committees will know exactly what they have to do.

So it is not just language, oh, yes, here is the requirement, and oh, yes, this says we are supposed to be able to do things better than the State, before they intervene in an area that really is a prerogative of the State, and if they don't do that then someone can make a point of order.

I think we have to work on the parliamentary procedure so we can all understand it and make it work well. But the thrust of what you are trying to do by letting some sun shine on the Tenth Amendment, I think, is very commendable.

Senator GLENN. I have just one comment before Senator Hatch has to go.

I thought we went a long ways toward addressing some of these issues in the unfunded mandates bill. We require some reports that the committees have to do. The committee has to consider all of these things, and that's where it should be as far as I'm concerned. They have the expertise. And that system is just starting to work now. We don't know yet whether it is going to work well or not. I hope it will.

But it seems to me that it does a lot of what we're trying to do here with this legislation, and I think we are getting out a shotgun where a BB gun is maybe necessary on this. This is a bill with an enormous impact. Use of its procedures would enable someone, basically, to stop anything going through Congress if they wanted to. They could just bring the government to a halt.

I happen to be one who thinks the Federal Government happens to do a lot of good things. I think we have clean air, we have clean water, that if we had left all those things up to every State to do their own thing we would still be having a lot of problems there.

We have Medicare, we have a lot of beneficial Federal programs and services. We need to fine-tune all of these things, but this bill is a real blunderbuss toward knocking some of these things out for the future.

Senator LEVIN. Mr. Chairman, could I have a brief statement and question? Will we have an opportunity?

Chairman STEVENS. Senator, We made a commitment to these two Senators. They have other responsibilities. They have been here now for 45 minutes.

It is up to Senator Nickles.

Senator LEVIN. Can I make just a one-minute statement?

Senator NICKLES. Sure.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. I happen to agree with the thrust of the second half of this bill in terms of making sure that courts do not preempt State laws unless there is an explicit statement of preemption in the bill, or unless there is a direct conflict. Your statement on that I happen to share, basically.

But the first half of this bill, it seems to me, will plunge this Congress into a total gridlock in every single amendment. This bill says on every single amendment there must be a certification.

We have hundreds of amendments on defense bills and on every other bill which have nothing to do with the Tenth Amendment, and this requires a certification.

Yesterday there was a vote on cloture on a bill that has to do with product liability. The folks who support that national product liability would have to find that the Federal Government has a greater degree of competence than the States in this area.

It seems to me the supporters of that——

Chairman STEVENS. All they have to do is ask the Congress to make that finding.

Senator LEVIN. Excuse me, but if I could just finish.

There are times that Congress under the Constitution has a right to have national legislation, not because the States are incompetent but because they want to supplement the States, they want a national rule, they want uniformity, which is the argument on product liability.

Do you have to insult the States? It seems to me that this certification, to say that the Federal Government is more competent in every single amendment and bill than States, would require in effect a certification that the Federal Government is more competent than the States, when in fact it may be that on Headstart the Federal Government sees a national interest to supplement funding in education, not because the States are incompetent but because there is a national interest in providing Headstart.

So I would urge a lot of attention be paid to this whole certification requirement. I think it, frankly, would plunge us into almost a bizarre situation where on every amendment, every bill, there would have to be a certification or a point of order that the States aren't as competent as the Federal Government to reduce or increase the number of F–16s.

Senator HATCH. Well, Mr. Chairman, if I could just spend one second on that, and then I do have to go to my markup on immigration. I'm late.

But I don't think it has to be on every amendment. The bill itself has to declare or cite——

Senator LEVIN. It says every amendment here.

Senator HATCH. OK. Let's assume it is. I don't see anything wrong with that.

Chairman STEVENS. Well, most of the devil is in those amendments. As a matter of fact, if you want to look at the changes that have been made that have affected States, they have been on amendments. S. 1 does not cover that.

Senator HATCH. All we have to do is cite sufficient constitutional authority, and I think that is something more of us ought to give more consideration to.

I don't think it prevents us from preempting on food safety, all those issues, or civil rights, or product liability, to cite your instance.

But it does make all of us be a little more concerned about whether or not there is sufficient constitutional authority to do what we are doing, and whether there is a declaration of same.

Chairman STEVENS. We have not even gotten to this side of the table yet, Senator, but I want you to know that I am sensitive to the comments that have been made. I think we can refine this language so it meets some of these objections. Many of the objections are not well-founded in terms of what the intent was.

Gentlemen, do you have any comments for our colleague?

Senator THOMPSON. I'm not leaving until my Chairman of the Judiciary Committee leaves, so we will just keep him here awhile.

Senator SMITH. I just have a couple of comments, but I don't need to hold Senator Hatch.

Chairman STEVENS. Thank you very much, Senator. We appreciate it very much.

Senator THOMPSON. Excuse me. Can I just make a brief comment? I don't need the Senator here either.

I think the question on the word "competence" is probably a good one that needs to be looked at. I'm not sure that that's the correct word to be used on that. I don't think we need to insult the States either.

But this is a two-edged sword. This is a big piece of legislation for all of my friends who would like to take over all the State tort laws, for example. Those who would like to get medical malpractice reform, those who would like to put punitive damage caps on intersection lawsuits in the smallest town in Tennessee, for example.

Better take a choice look at this, because it is definitely a two-edged sword as to whether or not we want to make a determination that Congress in Washington ought to be taking—we are talking a lot about sending things back to the States, but in some of these areas what some of us have been trying to do is take more from the States that have been traditionally there over the years and bring it to Washington.

Chairman STEVENS. Gentlemen, I am constrained to say I also made some commitments to the attorney generals who have come from Virginia, South Carolina and Colorado, and I would like to call them to the table and proceed with this. We can have our debate, and I'll be glad to call a special session of the Committee to talk about just sort of refining this language so we don't have these long harangues.

I am certain that I never had the intent to do what some people have said this bill does, but I do think we ought to go into the 21st century observing the Constitution of the United States, and that's why we are happy to have these attorney generals here, and I would urge that we listen to these attorney generals.

Senator SMITH. Mr. Chairman, while they are coming up——

Chairman STEVENS. Let me call them up. Mr. Gilmore, Mr. Condon, Mr. Tymkovich, one from Virginia, one from South Caro-

lina, and one from the State of Colorado. We are honored that you have come to our hearing this morning.

Senator Smith.

TESTIMONY OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. I just want to make a brief comment because I have to be at an event at 11 o'clock.

But I tend to agree with Senator Levin on the point of competence. As I read it, I don't think there was any language in the Tenth Amendment implied or specifically stated that said if the Federal Government felt competent to do something that they should do it. I think it was very clear in the Tenth Amendment that if the Federal Government wasn't specifically delegated to do it, then they don't have the right to do it.

And so I think it is a point well taken. I don't think that was the intention of you as the author.

But let me also say that I think it is interesting that there may be—not that there were very many defects in the Constitution, but this may be one in the sense that here we have an amendment, a bill, to enforce the Tenth Amendment when in fact the courts are supposed to enforce it and they haven't. And the courts have usurped over the years this whole action here.

And I think to say that the Tenth Amendment exists and then to say that we have allowed for 200 years the courts to take authority that they shouldn't have taken from the States, I think is an interesting comment in and of itself.

I'm sorry I'm not going to be able to stay to hear you gentlemen, but if you could reply to that for the record I'd appreciate it, because I think it is very interesting.

We are basically saying that nine individuals now on the Supreme Court of the United States can simply usurp the Constitution because they are omnipotent.

And that's what has happened, and perhaps with the help of Congress, of course, by passing laws which they have interpreted.

So I think we may have a defect there that ought to be taken a close look at, but if you could comment to that for the record I'd be grateful.

Thank you, Mr. Chairman. I do support your bill and I'm an original cosponsor and proud of it.

[The prepared statement of Senator Smith follows:]

PREPARED STATEMENT OF SENATOR SMITH

I am proud to be an original co-sponsor of the "Tenth Amendment Enforcement Act of 1996."

It is indeed unfortunate that the Tenth Amendment is perhaps one of the least known provisions of our Nation's Bill of Rights. Sadly, it is also one of the provisions of the Bill of Rights that is most ignored, and seldom enforced, by the Federal Courts.

The Framers of our great Constitution put the Tenth Amendment in the Bill of Rights for a compelling reason—they wanted to make it absolutely clear that the Federal Government is one of limited, and specific, powers, and that any powers not assigned to the Federal Government would be reserved to the States and the people. That is our system of Federalism as it was intended to be—a central, national government of limited powers, and a vital system of individual, strong State governments, each a laboratory of democracy.

This bill aims to breathe new life into the Tenth Amendment. It aims to make certain that the courts can no longer ignore the Tenth Amendment. And, frankly, this bill aims to make certain that Congress can no longer ignore the Tenth Amendment.

As I said, Mr. Chairman, I am proud to be a part of this effort. I commend you for holding this speedy hearing and I look forward to quick action by the Committee in reporting this bill to the Senate floor.

Chairman STEVENS. Thank you.

OPENING STATEMENT OF SENATOR DORGAN

Senator DORGAN. Mr. Chairman, let me ask unanimous consent to include an opening statement in the record.

I, too, have an 11 o'clock hearing. And I have real reservations. I think the discussion we heard this morning is a microcosm of some very large problems. I hope we'll have further hearings in which we will have an opportunity to hear from those who can explore the problem side of the issue as well.

Chairman STEVENS. We shall.

I think this will be with us for some time, because I'm committed that we are going to have some action by Congress to do what the Court indicated was necessary, and that is for Congress to delineate in some way the mechanisms for enforcement of the Tenth Amendment.

It is in a recent Supreme Court case. I'd be glad to show you the invitation to Congress to speak out.

Maybe these gentlemen can help us in that.

Mr. Gilmore, you have been introduced. Let me apologize to Mr. Tymkovich. You are the Solicitor General of Colorado, but we will get to you in a minute. Thank you very much.

Mr. Attorney General.

TESTIMONY OF HON. JAMES S. GILMORE III, ATTORNEY GENERAL, STATE OF VIRGINIA

Mr. GILMORE. Mr. Chairman, thank you very much. I greatly appreciate my opportunity to present some brief remarks to the Committee and to join my colleagues today from South Carolina and Colorado.

I bring you greetings from the Commonwealth of Virginia which, of course, was the home of James Madison and George Mason, who contributed to the philosophical underpinnings of the government of the United States.

I do request that the Committee include my written remarks, which have been previously submitted, as part of the record.

Soon after I was elected to a statewide office in Virginia, I came face to face with something that I had known really only intellectually before, and that is that in recent years the Federal Government has greatly expanded its powers at the expense of the States.

In fact, the growth of a powerful central government has upset the delicate balance, which is the hallmark of the Federal system which has been so carefully crafted by the Framers of the Constitution.

In general, Virginia enjoys a very positive and cooperative relationship with the Federal Government and its agencies. In many areas our respective agencies work hand-in-hand to advance the general welfare of our citizens.

Nevertheless, several recent developments have impressed me with the need for Congress and the Federal agencies to act with greater sensitivity in the area of Federal-State relations.

An excellent example is the Clean Air Act Amendments of 1990. Discarding its traditional respect for and utilization of a Federal-State partnership to achieve national air pollution goals, the Act simply ordered the States to do the bidding of the Environmental Protection Agency in air pollution control.

Virginia has long operated an effective and efficient automobile emissions inspection program in our Northern Virginia localities, right here near the District. This system is decentralized, relies on hundreds of local service stations and automobile dealers, and is coordinated with Virginia's automobile safety inspection program. Any necessary repairs to an automobile's emissions control system could ordinarily be performed by the same facility that conducted the testing. The low cost and convenience of this program has resulted in widespread acceptance and compliance by the motoring public.

The Clean Air Act amendments would have mandated that the States, on pain of coercive sanctions, implement a costly and unworkable centralized test-only regime for automobile emissions testing. Maine, New Jersey, Maryland and Texas attempted to comply with this mandate with disastrous results. The Missouri legislature actually directed that State's Attorney General to challenge this requirement in the Federal court.

In Virginia, Governor Allen and I filed suit for declaratory judgment in the Federal District Court because we felt that these draconian sanctions, these provisions of the Clean Air Act amendments, effectively commandeered the legislative and administrative processes of Virginia in a way that is forbidden by the Tenth Amendment.

These sanctions include cutting off dollars of Federal highway funds—and thus punishing the taxpayers of the State who have paid those Federal gasoline taxes—increased offsets for industrial permits, denial of Federal permits for construction and industrial development. Failure to bend to the Federal will results in economic consequences so severe that few, if any, States could afford to suffer those consequences.

Incredibly, the Federal District Court refused even to consider our arguments, and agreed with the Justice Department that Congress had insulated the Clean Air Act from constitutional scrutiny unless a State actually refused to comply with the EPA regulations and faced imminent imposition of sanctions. In this way, the Tenth Amendment can be effectively circumvented.

Obviously, if the coercion were effective no State would ever have standing to raise the issue in a Federal District Court.

Another example of grave concern in Virginia's experience with the Federal Department of Education concerns its grant funds for special education under the Individuals with Disabilities Education Act.

Virginia and the Department of Education are currently litigating the merits of Virginia's school discipline policy in the context of special education. Now, I'm not here to argue Virginia's legal case on the merits of that policy, but I am here to recount to you

the Hobson's choice provided Virginia by the Federal Government and the dangers inherent in a Federal system that would permit destruction of State interests.

Virginia has long provided for a local control in determining appropriate discipline of students. In the struggle to combat violence and drugs in our public schools, Virginia's educators and local school boards are authorized by State policy to discipline special education students fairly and equally with nondisabled students when the disability is proven to have no causal connection to misconduct, and where the student is appropriately placed.

Despite prior approvals, the Federal Government determined that Virginia's policy violated a new Federal interpretation of the law. Virginia was informed that under the U.S. Department of Education's reading of the statute, the mere fact that a student is classified as a special education student immunizes that student from equal discipline.

Virginia was told that it had a choice, either submit to the Federal interpretation and receive Federal funds, or appeal to the Department of Education interpretation but forego the $50 million in Federal assistance allocated to Virginia by the Congress.

No State should have to experience the choice of protecting its sovereign interests and concerns at that kind of price.

At the time Virginia's public schools were in the middle of the school year, operating under a special education plan previously approved by the Federal Department of Education. Federal funds were needed to pay for already contracted special education programs and teachers.

Nonetheless, all Federal funds were to be withheld from our public schools, including schools that had nationally recognized special education programs in place.

Now, Virginia successfully obtained an order from the U.S. Fourth Circuit Court of Appeals restraining this abuse of Federal power and protecting the Commonwealth as it defends the legal merits of its school discipline policy in court.

Virginia was one of the first States in the Nation to provide special education, and did so before the U.S. Department of Education took up that cause.

Our special education plan and discipline policy was even approved by the Federal Government, as was that of other States.

While the agency has represented that its prior approvals were a mistake, we nevertheless have a disappointing exercise of coercive Federal power by an agency apparently believing that its powers supersede the Tenth Amendment interests of States.

So it is in light of these experiences that I wholeheartedly support the purpose of this bill. It directs Congress and Federal agencies to specifically consider the impact of the Tenth Amendment on their legislative and regulatory actions.

It mandates self-examination and specific findings before attempting to extend Federal power further into areas where the States have historically governed, and in fact are competent to govern now.

It directs Federal courts not to construe Federal law to preempt or usurp State functions unless there is an express legislation declaration of intent to do that.

My support for this legislation in no way rests on any outdated notion of States rights, a term which has come to mean for some the unbridled power of State governments to abuse its citizens.

Instead, my views echo those of Alexander Hamilton and James Madison, who regarded the separate existence of individual State governments as the bulwark to the liberties of the people.

Most recently, Supreme Court Justices Louis Powell, Sandra Day O'Connor and Anthony Kennedy have written eloquently of the need to preserve the balance between national and State power because the balance helps to preserve the liberties of all Americans.

It is no mere accident of history that the Tenth Amendment takes place among the other great amendments that form the Bill of Rights.

So I expect that one by-product of this legislation would be to strengthen and preserve the States as laboratories of democracy, in the words of the Supreme Court, in which new ideas and new approaches can be tried and tested in action so the best ideas, and proved in the light of actual State experience, can be then employed by the States, and if appropriate extended to the Nation as a whole.

So this happy incident of the Federal system, in the words of Justice Brandeis, has served our Nation well for generations. It cannot function in an atmosphere of ill-considered and premature Federal preemption.

So I believe this legislation is a good first step toward a new revitalization of our Federal system, and I'm pleased to be here to support it today.

[The prepared statement of Mr. Gilmore follows:]

PREPARED STATEMENT OF JAMES S. GILMORE, III

Mr. Chairman, I greatly appreciate this opportunity to present some brief remarks to the Committee in support of this bill, the Tenth Amendment Enforcement Act of 1996.

Soon after I was elected to a statewide office in Virginia I came face to face with something that I had known only intellectually before. In recent years the Federal Government has greatly expanded its powers at the expense of the States. In fact, this growth of a powerful central government has upset the delicate balance which is the hallmark of the Federal system so carefully crafted by the Framers of the Constitution.

I like to think that Virginia, the home State of George Mason, has a special reverence for the Bill of Rights, and a special responsibility to instill in its citizens and the Nation as a whole a deeper understanding and respect for the great principles embodied in the first ten amendments to our Constitution. I fear that it is often overlooked that the Tenth Amendment is no less a part of the Bill of Rights than the First, Fourth, Fifth, and Sixth Amendments, and that the principles expressed in the Tenth Amendment are, in their own way, no less a bulwark of freedom than free speech, freedom of the press, trial by jury, or any of the other great freedoms found in our Bill of Rights.

For, as this bill makes clear, the Tenth Amendment is the only real recognition in the Constitution of the key role the States play in our Federal system. Unfortunately, Federal statutes and Federal spending power—implemented by Federal agencies and interpreted by sympathetic Federal courts—have eroded the Tenth Amendment and with it the ability of the States to fulfill their appointed roles in our great experiment in constitutional self-government.

In some areas, the States have been reduced to the functional equivalent of mere instrumentalities or departments of the Federal Government.

No thinking person can doubt the pressing need for uniform Federal rules established by Congress to govern many, many areas of our national life. This carefully crafted bill recognizes this need, and says only that Congress and all Federal agencies be mindful of the role of the States when they make legislative and administra-

tive policy. I commend Chairman Stevens for his authorship of this measure, which I believe will be a landmark in restoring and enhancing the crucial balance in our Federal system.

FEDERAL-STATE RELATIONS IN VIRGINIA

In general, Virginia enjoys a very positive and cooperative relationship with the Federal Government and its agencies. In many areas, our respective agencies work hand-in-hand to advance the general welfare of our citizens. Nevertheless, several recent developments have impressed me with the need for Congress and the Federal agencies to act with greater sensitivity in the area of Federal-State relations.

An excellent example is the Clean Air Act amendments of 1990. Discarding its traditional respect for and utilization of a Federal-State partnership to achieve national air pollution goals, Congress simply ordered the States to do the bidding of the Environmental Protection Agency in air pollution control.

Virginia has long operated an effective and efficient automobile emissions inspection program in our Northern Virginia localities. This system is decentralized, relies on hundreds of local service stations and automobile dealers, and is coordinated with Virginia's automobile safety inspection program. Any necessary repairs to an automobile's emissions control systems could ordinarily be performed at the same facility that conducted the testing. The low cost and convenience of the program has resulted in widespread acceptance and compliance by the motoring public.

The Clean Air Act amendments would have mandated that the States, on pain of coercive sanctions, implement a costly and unworkable centralized "test-only" regime for automobile emission testing. Maine, New Jersey, Maryland and Texas attempted to comply with this mandate, with disastrous results. The Missouri legislature actually directed that State's Attorney General to challenge this requirement in Federal court.

In Virginia, Governor Allen and I filed suit for a declaratory judgment in the Federal district court, because we felt the draconian sanctions provisions of the Clean Air Act amendments effectively commandeered the legislative and administrative processes of Virginia in a way forbidden by the Tenth Amendment.

These sanctions include cutting off many millions of dollars of Federal highway funds (thus punishing the taxpayers of the State who have paid Federal gasoline taxes), increased offsets for industrial permits, and denial of Federal permits for construction and industrial development. Failure to bend to the Federal will results in economic consequences so severe that few, if any, States could afford to suffer them.

Incredibly, the Federal district court refused even to consider our arguments, and agreed with the Justice Department that Congress had insulated the Clean Air Act from constitutional scrutiny unless a State actually refused to comply with the EPA regulations and faced imminent imposition of sanctions. In this way, the Tenth Amendment can be effectively circumvented. Obviously, if the coercion were effective, no State would ever have standing even to raise the issue in Federal district court.

Another example of grave concern is Virginia's experience with the Federal Department of Education concerning its grant funds for special education under the Individuals with Disabilities Education Act.

Virginia and the Department of Education are currently litigating the merits of Virginia's school discipline policy in the context of special education. I am not here to argue Virginia's legal case on the merits of its policy. I am here to recount to you the "Hobson's Choice" provided Virginia by the Federal Government and the dangers inherent in a Federal system that would permit destruction of State interests.

Virginia has long provided for local control in determining appropriate discipline of students. In the struggle to combat violence and drugs in our public schools, Virginia's educators and local school boards are authorized by State policy to discipline special education students fairly and equally with non-disabled students when disability is proven to have no causal connection to misconduct and where the student is appropriately placed. Despite prior approvals, the Federal Government determined that Virginia's policy violated a new Federal interpretation of law.

Virginia was informed that under the U.S. Department of Education's reading of the statute, the mere fact that a student is classified as a special education student immunizes that student from equal discipline. Virginia was told that it had a choice: Either submit to the Federal interpretation and receive Federal funds, or appeal the Department of Education interpretation but forego the $50 million in Federal assistance allocated to Virginia by the Congress. No State should have to experience the choice of protecting its sovereign interests and concerns at such a price.

At the time, Virginia's public schools were in the middle of the school year operating under a special education plan previously approved by the Federal Department of Education. Federal funds were desperately needed to pay for already contracted special education programs and teachers. Nonetheless, all Federal funds were to be withheld from our public schools, including schools that had nationally recognized special education programs in place.

Virginia successfully obtained an order from the U.S. Fourth Circuit Court of Appeals restraining this abuse of Federal power, and protecting the Commonwealth as it defends the legal merits of its school discipline policy in court.

Virginia was one of the first States in the Nation to provide special education and did so even before the U.S. Department of Education took up the cause. Virginia's special education plan and discipline policy was even approved by the Federal Government as was other States. While the Federal agency has represented that its prior approvals were a mistake, we nonetheless have a disappointing exercise of coercive Federal power by an agency apparently believing that its powers supersede the Tenth Amendment interests of States.

WHY I SUPPORT THIS BILL

In the light of these experiences, I wholeheartedly support the purpose of this bill. It directs Congress and Federal agencies to specifically consider the impact of the Tenth Amendment on their legislative and regulatory actions. It mandates self-examination and specific findings before attempting to extend Federal power further into areas where the States have historically governed and in fact are competent to govern now. It directs Federal courts not to construe Federal law to pre-empt or usurp State functions unless there is an express legislative declaration of intent to do so.

My support for this legislation in no way rests on any outdated notion of "States' rights," a term which has come to mean for some the unbridled power of State government to abuse its citizens. Instead, my views echo those of Alexander Hamilton and James Madison, who regarded the separate existence of individual State governments as a bulwark for the liberties of the people. More recently, Supreme Court Justices Lewis F. Powell, Sandra Day O'Connor, and Anthony M. Kennedy have written eloquently of the need to preserve the balance between national and State power because that balance helps preserve the liberties of all. It is no mere accident of history that the Tenth Amendment takes its place among the other great Amendments that form the Bill of Rights.

The Tenth Amendment Enforcement Act does not limit the power of Congress in any way. However, it does suggest that before Congress and Federal agencies employ that power to the detriment of State regulation, they give serious thought to the implications of their actions.

I expect that one important by-product of this legislation would be to strengthen and preserve the States as laboratories of democracy, in which new ideas and new approaches can be tried and tested in action, so that the best ideas, improved in the light of actual State experience, can then be employed by other States or, if appropriate, extended to the Nation as a whole. This "happy incident of the Federal system," in the words of Justice Brandeis, has served our Nation well for generations. It cannot function, however, in an atmosphere of ill-considered and premature Federal preemption.

This bill represents welcome recognition by Congress that it has, whether knowingly or not, intruded upon State functions in the past. It directs that any future such actions touching upon areas of traditional State functions be knowing and intentional. In that respect, it parallels the requirement already established by the Supreme Court to protect States from judicially implied waivers of *Eleventh Amendment* immunity from suits in Federal courts. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court specifically held (473 U.S. at 246) that when Congress chooses to subject States to Federal jurisdiction (such as through its exercise of the Fourteenth Amendment), it must do so specifically.

This bill would legislatively extend the same protection to States with respect to the Tenth Amendment. Most important, it sensitizes the entire Federal legislative and regulatory process to the fact that it is only a part, albeit an important part, of a larger Federal system. The rights of the States must be recognized first, then protected. This bill represents a good first step in that direction and I am pleased to support it.

Chairman STEVENS. Thank you very much, Mr. Gilmore.
Mr. Condon.

TESTIMONY OF HON. CHARLES CONDON, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA

Mr. CONDON. Senator Stevens, it is good to be with you and Senator Levin. After hearing General Gilmore's great introduction by Senator Warner, I was out there looking for Senator Thurmond to help me out here. I was very impressed by that.

Senator LEVIN. Actually, Senator Thurmond is chairing the Armed Services Committee right now, and that's where Senator Glenn went and that's where I'm supposed to be leaving too, so I hope you will excuse Senator Thurmond and Senator Hollings both. They are tied up.

Mr. CONDON. We understand.

It is a thrill for me to be here to hear about Tenth Amendment discussions, and to me though, in terms of a personal experience, the core of the matter lies in the sound of a crying baby. Several years ago when I was the district attorney or circuit solicitor in Charleston, South Carolina, a local hospital approached me with a plea, help us do something about crack babies.

In increasing numbers, pregnant women are abusing crack cocaine and giving birth to addicted newborns, and I have seen many of those babies. The image is one that you would like to forget but cannot. The frail infants cry and shake uncontrollably. They refuse to take food. Too often, ultimately they die in intensive care.

Moved by the plight of these babies who suffer through no fault of their own, I worked with the hospital, the local police chief, who happened to be an African American, to develop a program that aggressively confronted the women with consequences of their drug abuse. Over several years we presented all pregnant women who tested positive for cocaine with a choice: Seek drug treatment or face arrest and jail time.

Now, before the program was in place about two dozen women a month tested positive for cocaine. Two dozen. Virtually none of them would seek free drug treatment voluntarily.

But that changed when the women were faced with tough sanctions. With our amnesty program, most of the women agreed to receive drug treatment. Some were arrested, but charges were dropped when they later agreed to seek help. Only two continued to refuse help, and they were ultimately placed on probation.

The program was undeniably successful until the Federal Government, the central government, intervened. Without offering any reasonable alternative solutions for saving these sad babies, Federal officials came to Charleston and yowled about discrimination and privacy rights.

When we refused to back down, as Attorney General Gilmore talked about, they resorted to blackmail. They threatened to defund the entire Medical University of South Carolina if we continued with the program.

So now once again crack babies' cry unconsolably in Charleston, thanks to the Federal Government's intrusion where it had no business.

Had Federal officials paid any attention to the Tenth Amendment before bullying their way into Charleston, they might have realized that what they were doing was illegal.

The Constitution does not empower the Federal Government to decide if it likes the way South Carolina deals with crack babies, but the Constitution does empower States to solve problems affecting their citizens. And that's what we are doing, and doing it successfully.

As Attorney General of South Carolina, I can see first-hand the trouble that arises every time the Federal Government oversteps its boundaries and intrudes on States rights, and the rights of the people of South Carolina.

While the crack baby program is the most egregious example of the Federal Government meddling in States' affairs and the affairs of the people of Charleston with disastrous results is by no means the only example.

The Federal Government is increasingly trying to expand its power and limit the authority of the States. But the fact is the Constitution gives the Federal Government limited power, very limited power. Everything else is up to the States and the people of South Carolina. And that's the way it is supposed to be.

The legislation that is before you promises a meaningful solution, I believe, to the Federal Government's continued disregard of the Tenth Amendment. I fully support this Act, and I really thank you for bringing this to the attention of the Congress.

Along those lines, I want to share with you a personal story that occurred about a year ago. Attorney General Gilmore and I had an opportunity, along with the other State attorney generals of the country, to meet with the Attorney General of the United States of America, Attorney General Reno.

And last year I had the opportunity to ask her in this meeting, Attorney General Reno, have you thought about the Tenth Amendment policy that you might adopt as the Attorney General of the United States of America?

Do you know what her response was? Her response was that she had never thought about it.

Now, to her credit she did call me several weeks later and ask that I get involved with helping her develop a Federal policy. So through our National Attorney General's Associations, I'm now head of our Tenth Amendment Committee. We are in fact meeting here next week.

And I would really like to work with you and your Committee to get a dialog going with the chief legal officers of the States, because I think it is something that we really need to look at in terms of this country, and I'm thrilled that you have taken the leadership in doing something about revitalizing the Tenth Amendment, which, as Attorney General Gilmore talked about, is in the Bill of Rights.

Thank you Senator Stevens, thank you Senator Levin.

[The prepared Statement of Mr. Condon follows:]

PREPARED STATEMENT OF CHARLES MOLONY CONDON

My name is Charlie Condon, and I am the attorney general for the State of South Carolina. Thank you for the opportunity to speak to you today on behalf of the Tenth Amendment Enforcement Act of 1996. It is, I believe, one of the most important pieces of legislation to come before Congress this year.

There are many legal arguments to be made in support of this act, which will guarantee that the Federal Government honor the Constitution and leave the

States' business to the States. But for me, the core of the matter lies in the sound of a crying baby.

Several years ago, when I was a solicitor in Charleston, South Carolina, a local hospital approached me with a plea: Help us do something about crack babies.

In increasing numbers, pregnant women are abusing crack cocaine and giving birth to addicted newborns. I've seen many of these babies. The image is one that you'd like to forget, but cannot. The frail infants cry and shake uncontrollably. They refuse to take food. Too often, ultimately, they die in intensive care.

Moved by the plight of these babies, who suffer through no fault of their own, I worked with the hospital to develop a program that aggressively confronted pregnant women with the consequences of their drug use. Over 5 years, we presented all pregnant women who tested positive for cocaine with a choice: Seek drug treatment or face arrest and jail time.

Before the program was in place, about two dozen pregnant women each month tested positive for cocaine. Virtually none of them would seek help voluntarily.

But that changed when the women were faced with tough sanctions. With our amnesty program, most of the women agreed to receive drug treatment. Some were arrested, but charges were dropped when they later agreed to seek help. Only two continued to refuse help, and they were ultimately placed on probation.

The program was undeniably successful—until the Federal Government intervened. Without offering any reasonable alternative solutions for saving these sad babies, Federal officials came to Charleston and yowled about discrimination and privacy rights. When we refused to back down, they resorted to blackmail. They threatened to defund the Medical University of Charleston if it continued with the program.

So now, once again, crack babies cry unconsolably in Charleston—thanks to the Federal Government's intrusion where it had no business.

Had Federal officials paid any attention to the Tenth Amendment before bullying their way into Charleston, they might have realized that what they were doing was illegal. The Constitution does not empower the Federal Government to decide if it likes the way South Carolina deals with crack babies. But the Constitution does empower States to solve problems affecting their citizens. And that's what we were doing—and doing successfully.

As attorney general of South Carolina, I see first hand the trouble that arises every time the Federal Government oversteps its boundaries and intrudes on States' rights. While the crack-baby program is the most egregious example of the Federal Government meddling in States' affairs with disastrous results, it is by no means the only example.

The Federal Government is increasingly trying to expand its power and limit the authority of the States. But the fact is, the Constitution gives the Federal Government limited power; everything else is up to the States. At least that's the way it's supposed to be.

The legislation that is before you promises a meaningful solution to the Federal Government's continued disregard of the Tenth Amendment. I fully support this act, and I respectfully urge each of you to do the same. As you decide, think not of my voice here today, but of the pained cries of the babies in Charleston.

Thank you for your attention and for this opportunity to be heard.

Chairman STEVENS. Thank you. I have to tell you that I don't always read to many Supreme Court opinions, but in connection with research on this matter we did a lot of reading of Supreme Court opinions.

And I was struck with this statement. This is the Lexus case, right? It is *Gregory v. Ashcroft,* filed against Senator Ashcroft when he was governor.

But this statement appears in that opinion: "Congressional interference with this decision of the people of Missouri defining their constitutional officers would upset the usual constitutional balance of the Federal and State powers. For this reason, it is incumbent upon the Federal courts to be certain of Congress' intent before finding that Federal law overrides this balance. If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."

Then it says see a bunch of cases, etc., and: "Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States. In traditionally sensitive areas, such as legislation affecting the Federal balance, the requirement of a clear statement assures that legislation has in fact faced and is intended to bring into issue the critical matters involved in the judicial decision. This plain statement rule is nothing more than acknowledgement that States retain substantial sovereign powers under our constitutional scheme, powers which Congress does not readily interfere."

And I would urge Senator Levin to take a look at some of these basic decisions recently where the Court has not only invited but in fact required Congress to take some action to determine how that intention is disclosed to the courts.

Senator LEVIN. If I could quickly comment on that. The language in this unfunded mandates legislation which requires there to be a statement relative to preemption was my amendment, so I'm very much aware of it.

I'm also aware that the committees haven't complied with the law that requires them to make that statement, by the way.

So we have a law on the books already which the committees are ignoring. Here are the committee reports. You won't find any of the statements they are supposed to make under the unfunded mandates law relative to preemption.

But that language relative to preemption, Mr. Chairman, is my language, so I'm very much aware of the courts saying that State laws are preempted at times when there is no clear intent on the part of Congress to preempt those State laws.

And it was my bill, with Senator Durenburger, which would have made the requirement that Congress state its intent to preempt State laws, or that there be a direct conflict before a court could find that in fact there was such preemption.

So I'm very much aware of that issue and I think I have read those same opinions that the Chairman has.

The problem here isn't with the preemption issue. The problem here is with this certification and the question of whether every amendment has got to have certain boilerplate language in it in order to avoid a point of order. I think that's where the difference is focused.

Chairman STEVENS. Well, we can work that out.

Mr. Tymkovich.

TESTIMONY OF HON. TIMOTHY TYMKOVICH, SOLICITOR GENERAL, STATE OF COLORADO

Mr. TYMKOVICH. Mr. Chairman, thank you. My name is Tim Tymkovich and I'm the Solicitor General from the State of Colorado.

Gregory v. Ashcroft, from which you just quoted, was one of the great victories for the States, and the attorney generals of the 50 States have been in the forefront of bringing cases against the Federal Government construing the Tenth Amendment that will return power to the States.

The three of us at this table have been involved in such cases in our tenures in State government, and there are more and more

cases in the pipeline that will ask the Federal court and the U.S. Supreme Court to restore power back to the States.

But litigation alone won't do it, and that's why Attorney General Gale Norton from Colorado strongly supports the Tenth Amendment Enforcement Act of 1996. It is time that Congress got into the act also and provided some legislative support for this important component of the Bill of Rights.

Colorado has been in the forefront of efforts to restrain overreaching Federal power. We, too, have a State unfunded mandates law which has directed our State Attorney General to examine and challenge any laws, regulations, and practices of the Federal Government to the extent they infringe on the State of Colorado's sovereignty or authority over issues affecting its citizens. That's our General Assembly directing us to work with Congress in this form, or through the courts, to challenge overreaching Federal power.

The Tenth Amendment Enforcement Act of 1996 will help stop a process that has imposed over 195 Federal mandates on our State, costing us tens of millions of dollars in compliance costs.

The States are the cornerstone of the Nation, a bulwark against expensive central power. The Constitution envisions a government closer to the people which would be amenable to change.

General Gilmore and Senator Hatch have cited from the Federalist Papers, and James Madison, the drafter of the Constitution and one of the Framers of the Bill of Rights, recognized that powers should be reserved to the States because, in the words of Justice Brandeis, we are the laboratories of democracy, we are a force for progressive change that can provide experiments that can later lead to national legislation.

Every State has vast numbers of examples of Federal laws and regulatory actions which have interfered with State powers and objectives. I will mention just a few examples from Colorado.

The Federal Government has been especially intrusive into State affairs in the area of the environment. As General Gilmore indicated, Virginia and Colorado have had to fight centralized emissions testing programs that have no proper place in a very comprehensive State regulatory scheme that preexisted the EPA's involvement.

The country faces many environmental problems, from air quality problems to hazardous waste cleanups. States are diligently working to solve these problems while taking into account local needs and concerns. Federal interference with State efforts often result in less protection to the environment and less experimentation by the States.

In addition to the centralized emissions testing program that General Gilmore mentioned I have another example that is particularly extreme. Our State has developed strategies to deal with air quality for years. Colorado is a high elevation State, so we have different needs and different concerns and different types of regulatory techniques than other low altitude States like Virginia.

In two areas, one involving the emissions testing and the other in the way we test our water quality, the EPA has precluded Colorado from coming up with new and innovative programs that would achieve greater protection for the environment at less cost.

Colorado has also been in the forefront of litigating against the Federal Government involving two of our hazardous waste sites in Colorado, the Rocky Mountain Arsenal and the Rocky Flats plutonium manufacturing facility. Both of those facilities are run by the Department of Energy but are regulated by both State and Federal environmental officials.

The Federal Government in both of those instances has hidden behind Federal environmental laws to avoid working with the States to achieve a balanced cleanup.

In Colorado, in the State of Washington, and in the State of Ohio, our local officials have all come up with programs that would protect the environment at a lesser cost than the Federal Government, but the Federal Government has refused to work with local officials to achieve sensible environmental experimentation.

The Tenth Amendment Enforcement Act will turn the tide in favor of the States involving these issues and others. Particularly noteworthy is the proposal's focus on agency rulemaking. This is important in two respects.

First, many of the most intrusive instances of Federal preemption come not by virtue of congressionally-enacted legislation, but through extensive regulations promulgated by administrative agencies expanding upon congressional authorization.

This bill will provide a necessary break and self-examination by the agencies before such regulations are enacted that may preempt State authority.

Second, and maybe even more importantly, the provision that directs the Federal courts to enact a presumption in favor of State sovereignty will provide us many litigation advantages in cases that the attorney generals now are involved in through the Federal court process.

I strongly urge the Congress to look favorably on that proposal. In at least two of the cases that we have litigated, such a proposal would have facilitated a positive ruling in favor of the States and against the Federal Government in those cases.

In conclusion, this proposal is a special opportunity for meaningful and needed reform in an area where Congress has long ignored States' interests. States truly are the laboratories of democracy and we need to unleash their creativity and learn from their experiments.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Tymkovich follows:]

PREPARED STATEMENT OF TIMOTHY M. TYMKOVICH

I appreciate the opportunity to testify concerning the proposed Tenth Amendment Enforcement Act of 1996. Colorado Attorney General Gale A. Norton has been a strong supporter of restoring the balance of power to the States. The proposal is an important part of the continuing effort to return to the States matters which properly belong within their control.

My State has been in the forefront of efforts to restrain overreaching Federal power. We enacted the Colorado Unfunded Mandate Act of 1994, which directed the Colorado Attorney General to "examine and challenge" any:

> "Federal mandates, court rulings, the authority granted to or assume by the Federal Government, and laws, regulations and practices of the Federal Government to the extent they infringe on the State of Colorado's sovereignty or authority over issues affecting its citizens."

The Tenth Amendment Enforcement Act of 1996 will help stop a process that has imposed over 195 Federal mandates on my State, costing us tens of millions of dollars in compliance costs.

The States are the cornerstone of the Nation; a bulwark against expensive central power. The Constitution envisions a government closer to the people which would be amenable to change.

James Madison said in *The Federalist* that "the powers reserved to the States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States."

Every State has a vast number of examples of Federal laws and regulatory actions which have interfered with State powers and objectives. I will mention just a few examples from Colorado.

The Federal Government has been especially intrusive into State affairs in the area of the environment. The country faces many environmental problems, from our quality problems to hazardous waste cleanups. The States are diligently working to solve these problems, while taking into account local needs and concerns. Federal interference with State efforts often results in less protection to the environment and less experimentation by the States.

For example, in 1994, Colorado passed legislation which was intended to encourage businesses to perform voluntary audits of their environmental compliance and to promptly correct any violations found. In exchange for these voluntary efforts, State regulators will not impose penalties for the violations. This program, which will be of great benefit to the environment, is severely hampered by the Federal Environmental Protection Agency's refusal to give the same assurances, that is, to refrain from prosecuting companies that voluntarily report and correct violations.

Another example of EPA hindering State efforts at experimentation concerns Colorado's attempts to put in place a unique water quality testing program. Colorado was one of the first States to attempt to employ a different biomonitoring test. Rather than encouraging these efforts, EPA continuously rejected Colorado's regulation implementing the program until the State rule was drafted to be word-for-word like a comparable Federal regulation.

Another example in the area of the environment concerns air quality. Our State has been developing strategies to deal with air quality issues for years. But our problems and solutions are unique since Colorado is a high elevation State. A Federal "one size fits all" approach does not work here. The Environmental Protection Agency's answer—a centralized emissions testing program—has created large implementation costs and reduced State flexibility in addressing pollution problems. Even though Colorado drivers will expend hundreds of millions of dollars in testing costs over the next few years, State officials have no practical alternatives if the program does not work or if better solutions are discovered.

Another example of Federal intrusion into matters of State concern arose recently in Colorado with regard to the medicaid program. As you know, Congress' 1993 change to the Hyde Amendment made Federal funds available for abortions terminating pregnancies resulting from rape and incest, but did not require that States pay for any abortions. However, an official at the Federal Health Care Financing Administration wrote a letter concluding that States must pay for the disputed abortions. Based solely upon this letter, and without any change in Federal statutes or regulations, several Federal appellate courts have required States to pay for these procedures, notwithstanding State laws to the contrary.

Colorado State officials are in an impossible dilemma because our State constitution forbids the use of public funds to pay for these procedures. To avoid violating the State constitution but still be consistent with Federal mandates, State officials must either (1) withdraw from the Medicaid program and forfeit hundreds of millions of dollars in Federal funds, thereby denying thousands of low income Colorado residents access to needed medical care or (2) face contempt citations from Federal judges. This problem could have been avoided if Federal officials clearly understood their own responsibility to protect State prerogatives.

The Federal "motor voter" law presents a different type of intrusion. This law doesn't treat States just like the private sector, it actually imposes special burdens simply because they are States. As the Supreme Court recognized in *Oregon v. Mitchell*, 400 U.S. 112 (1970), it is peculiarly the right of States to establish the qualifications of voters in State elections. In the absence of a constitutional violation such as an outright denial of the right to vote, the States should have control over voter registration. This sort of unfunded mandate is simply not justified, particularly since even though this law unquestionably interferes with the States' internal affairs, it has not appreciably increased turnout at the polls.

The Tenth Amendment Enforcement Act helps turn the tide in favor of State prerogatives. Particularly noteworthy is the proposal's focus upon agency rulemaking. This is important in two respects. First, many of the most intrusive instances of Federal preemption come not by virtue of congressionally-enacted legislation, but through extensive regulations promulgated by administrative agencies expanding upon the congressional authorization.

Second, statutes seeking to limit subsequent congressional enactments are of limited efficacy, since each subsequent Congress is not bound by the acts of its predecessors. However, focusing upon the regulatory process does not present this problem. My only suggestion would be to include a review or sunset provision requiring every agency to ensure that all of its current rules comply with this new requirement by some date certain, or risk having them invalidated. This would ensure that agencies review the numerous existing Federal regulations currently impinging upon Tenth Amendment values—which is, after all, what led to this proposal.

In conclusion, this proposal is a special opportunity for meaningful and needed reform in an area where Congress has long ignored State interests. States truly are "laboratories of democracy." We need to unleash their creativity and learn from those experiences.

I sincerely thank the Committee for the opportunity to present our views.

Chairman STEVENS. Thank you very much. I certainly agree with you in that last statement. It does seem to me that if you deal with a basic philosophy of the Framers of the Constitution that the Federal Government should be one of limited and delegated powers and the balance of the powers that the people wish to give to government are reserved for the States, the presumption portion of this bill is probably one of the most important parts of the bill.

Mr. TYMKOVICH. I see it as very critical in the Rocky Mountain Arsenal case that I mentioned. Such a presumption would have ended the litigation several years before the case in fact ended, and I think would have convinced the Justice Department not to appeal that case all the way to the U.S. Supreme Court.

We prevailed there but it costs us millions of dollars unnecessarily and we are back where we started with, which is a cooperative State-Federal solution for those facilities. This bill would have strengthened and accelerated that process in a positive way.

Chairman STEVENS. I don't have time to tell this story, but I'm reminded of President Reagan's favorite comment, that if you have a good hog you don't eat him all at once. It may be that we will have to separate this bill down into separate bills in order to have Senator Levin and a few others join with us on the first portions, and maybe the second portions, before we debate the third one.

But in any event I'm really very pleased you are taking the time. I only have one comment really in the form of an inquiry. I know you are meeting here next week, the attorney generals are. And you do have a Tenth Amendment group.

Could we ask you to see if it is possible that some of your colleagues that have not responded might give us their points of view? And we readily accept criticism, as you can tell. That is a normal state of affairs here in this Committee. So if they have any critical comments we would like to have them too.

Would you have the time to take that up with them this time?

Mr. CONDON. Yes, we intend to get very much involved. We have discussed it in terms of getting our group to actually vote on this and see how we feel about it. Because it does cut both ways. It is not a partisan issue. It does enhance the powers of the States' chief legal officers and the States themselves.

Along those lines, I'm sure you are aware of what goes on out there in the country. The most powerful political figures these days—and I use that word guardedly—are now Federal judges, because they in effect—I'm sure General Gilmore can speak to this—they run our prisons, they run our schools, they run everything.

Of course, they get their powers, and they have a lifetime appointment, from you.

So that's the key, I think, in terms of this Tenth Amendment. If we can be cognizant of the fact, I think, that in our Federal system we want the States to be preeminent, that's all we are asking for.

Chairman STEVENS. Well, I would be pleased to ask our Tenth Amendment team to come confer with your people in your Tenth Amendment Committee if you desire to do that. And we could tell you some of the gyrations we went through in limiting this bill to what is in there now. There were other suggestions too, and you might have some suggestions for additions. We would look forward to receiving those.

Mr. CONDON. We thank you.

Chairman STEVENS. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

There are a whole bunch of areas where both the States and our Federal Government cooperate. Education is one of them. You folks are dominant in the area of education, but we obviously do some education funding, such as Headstart.

Do you think the Federal Government makes a useful contribution with our Headstart funding, General Gilmore?

Mr. GILMORE. I think that the Federal Government can make a contribution, and I believe that they do make contributions, and they often do that very successfully.

On the other hand, we have concerns over nationalization of all policy in terms of education. As we move ahead to the 21st century, it is going to be very clear that there is a need for greater diversity. And in the 50 States, the advantage and genius of our system is that we have 50 States that can serve as laboratories in order to experiment and find new and innovative and diverse ways to improve on education as we move to the 21st century.

Goals 2000, on the other hand, being used often as a weapon for the depriving of Federal funds, education funds, unless we straightjacket into a particular approach is not a productive approach.

Senator LEVIN. I'm just talking about Headstart.

Mr. GILMORE. I think that the Headstart program is a very good one and makes a real contribution in the United States, but it is important to remember that the States have opportunities to make a contribution to the advancement of education as well as an overall policy.

Senator LEVIN. Now, if Headstart is a useful program, it is clear that the States also are competent to be involved in the same area, are they not?

In other words, just because we make an appropriation for a Headstart program doesn't mean that the States aren't competent to participate in that same area, does it?

Mr. GILMORE. States can often make important contributions hand-in-hand in a cooperative partnership with the Federal Government.

Senator LEVIN. Are you familiar with the Title One program in education? We provide funds that supplement math and science teachers, for instance, in most school districts, and most school districts want that money, use that money very, very well for math and science teachers?

I haven't found any objection to that funding coming in, but all it does is supplement the math, science and other teachers that the local school districts and the States provide.

Do you have any problem with that that you know of?

Mr. GILMORE. We are always in favor of cooperative efforts in which we can have funding made available to the States to improve education.

Senator LEVIN. But in order for me to vote for Headstart, do you think it should be necessary that I certify that we have greater competence than the States?

Mr. GILMORE. We believe that a bill like this will provide for important self-examination and provide for the Congress to make a definite, careful, deliberate examination of whether or not their activities, their programs and legislation works cooperatively hand-in-hand and respects the Tenth Amendment rights of the States, or whether or not it is instead going off into some rather extreme areas, such as the ones that we have defined here today.

And I think that that ability to do that examination would be very constructive, and that's why we support the legislation.

Senator LEVIN. Do you think the Federal Government has a greater degree of competence than the States to govern in the area of Headstart?

Mr. GILMORE. Do I believe that the Federal Government has a greater degree of competency? I believe there is competency in all areas.

Senator LEVIN. My question is do you think that the Federal Government has a greater degree of competence than the States to govern in the area of Headstart?

Chairman STEVENS. Well Senator, my bill doesn't raise that question. It raises the question of preemption.

Senator LEVIN. I'm just reading your bill.

Chairman STEVENS. All right. But it raises the question of preemption.

Senator LEVIN. I'm just reading the bill.

Chairman STEVENS. Only in connection with preemption though. That's only when the government intends to preempt the States.

Senator LEVIN. I'm just asking a question of the Attorney General. If this bill doesn't provide that, fine, then the question is irrelevant

But in the meantime I'm asking a question of the Attorney General, whether or not you believe that the Federal Government, or the Congress, has a greater degree of competence than the States to govern in the area of Headstart. That's my question.

Mr. GILMORE. I think that I would have to see the provision that you want to address.

Senator LEVIN. Forget the provision. I'm asking you a question. According to the sponsor of the bill that's not what the provision reads. So forget any provision in the bill.

My question to you is whether or not you believe that the Congress has a greater degree of competence than the States to govern in the area of Headstart. That's my question.

Mr. GILMORE. I believe that my response would be that if the U.S. Government believes that it should preempt the States in a specific program such as that, then they ought to be deliberate about it and make that decision and put it down on the record, and I think that's what the bill addresses.

Senator LEVIN. If we could just forget the bill for a minute, I'm just asking you your opinion in terms of your strong feelings about the States.

Do you think that the Congress has a greater degree of competence than the States to govern in the area of tort liability?

Mr. GILMORE. I believe that there are places where a national policy is appropriate, but the States also have the ability to make important policy decisions within their own States as well.

Senator LEVIN. Do you believe that——

Mr. GILMORE. I'm just not sure where you are going, Senator.

Senator LEVIN. I know you are not.

General Condon, do you believe——

Mr. CONDON. I'm the next one up.

Senator LEVIN. Do you believe that the Congress has got a greater degree of competence than the States to govern in the area of——

Mr. CONDON. See, what I like about your questions is that you are asking the questions, and that's all we are asking is that you do that. I would add, by the way, you are spending our money that you don't have, and I think that is an important thing to be thinking about.

But the dialog is wonderful.

Senator LEVIN. Good. Let me repeat my question then.

My question is do you believe that the Congress has a greater degree of competence than the States to govern in the area of tort liability? That's my question.

Mr. CONDON. I'll answer your question with a question. That's not for me to answer. You are the elected person up here in Washington, sent by the people of Michigan, to answer that.

Senator LEVIN. But you are the witness that I'm now asking a question. I don't know why we can't get just straightforward answers out. It is not a tough question.

Do you believe that Congress has a greater degree of competence than the States to govern in the area of tort liability?

Mr. CONDON. I have tried a couple of cases in my life. All you are trying to do is lead me down a primrose path——

Senator LEVIN. I'll stop right there if you will give me a yes or no answer to that.

Mr. CONDON [continuing]. On a very popular program. And what I want to tell you from a witness' standpoint is the purpose of the bill is to get you in the Senate to answer these questions before you foist legislation upon the United States of America. That's all we are asking you to do with this one, and that's why it is a wonderful act.

Senator LEVIN. You are giving me your opinion as to the purpose of the bill, OK?

Mr. CONDON. That's my testimony, yes, sir.

Senator LEVIN. But I'm asking you a question. You are an expert on State law. States have traditionally handled tort liability.

I am simply asking you a question, as a person who is an Attorney General, whether or not in your view the Congress has greater competence than the States to govern in the area of tort liability.

I mean, you want us to ask ourselves that question. Now, that's fine. We asked ourselves that question. And what do we do? We go to folks like you and we say, what is your opinion on it? Do you think we just ask these—so now I'm asking your opinion so I can try to reach a conclusion myself. You are an expert.

Mr. CONDON. My point is we are changing from a Tenth Amendment hearing to a tort liability hearing, correct? Which would be wonderful. So my opinion in tort liability, if you are asking me to——

Senator LEVIN. We have a product liability law in front of us. We are voting on this thing in 20 minutes. We have to make a decision as to whether or not we want to get involved in the area of product liability. OK. That's a decision we have to make.

Now I'm asking you, you are an expert.

Mr. CONDON. With all due deference to the Senate, I think the State of South Carolina can handle tort liability better than the Federal Government. That would be my personal answer.

Senator LEVIN. Thank you.

Mr. TYMKOVICH. Mr. Chairman, the Senate already, of course, has national standards on many consumer issues and tort issues. The FDA and the FTC already provide national regulation involving certain product standards. So it is not unusual for the Federal Government to act.

What this bill does is force Congress to make an explicit statement of preemption and let us know that that's what they are going to do and that the agencies have a limited range of authority.

That would greatly help the States in knowing what the rules of the game are. If you want to preempt, do it clearly, tell us that you are doing that, and tell it to the agencies. And this bill accomplishes that.

Chairman STEVENS. You might be interested to know that that's one of the cases where Congress has followed S. 1. It did make specific findings and it has complied with all the court cases that I have mentioned so far.

Senator LEVIN. And by the way, that was the Levin-Durenburger bill of 2 years ago, to require a statement that if we were going to preempt, that it is our attention that we preempt.

That is exactly what that bill did.

Mr. CONDON. We thank you.

Senator LEVIN. That's a part of the bill in front of us. That's not the part I'm asking you folks about.

The part I'm asking you folks about is that we are also required under another section of this bill to make a judgment that we find that we have a greater degree of competence than the States to govern in the area addressed by the statute. I'm reading from the bill.

The part of the bill you are talking about is the part of the bill which basically I support. It has changed a little bit of the lan-

guage in Levin-Durenburger, but basically I think it is on the right track.

It is what Senator Hatch was talking about. If we are going to preempt the States from passing a law, we ought to say that that's our intent. We shouldn't leave it up to a court to try to divine what the intent of the Congress was, unless there is a direct conflict, obviously, OK?

But that's not the part of the bill I'm focusing on. What I'm focusing on is the other part of the bill, which is what relates to the questions, which is the certification thing, and I was just trying to get some expert advice as to whether or not you folks think that we are more competent than you are in the area of tort liability.

Chairman STEVENS. Gentlemen, we are going to have to stop this. We have 45 minutes before we have to vote on three separate matters and we will not be able to come back.

Senator LEVIN. Could I get Mr. Tymkovich just to answer that last question?

Chairman STEVENS. What question was that?

Senator LEVIN. Do you think the Congress is more competent than the States to govern in the area of tort liability.

Chairman STEVENS. I think that has been answered redundantly now and I'm ready to stop this.

Senator LEVIN. Excuse me. Mr. Tymkovich hasn't answered it. I haven't asked him that question. It was answered by Mr. Condon.

Chairman STEVENS. But you have exceeded your time by about 20 minutes. I have let you go 25 minutes in your questioning, and it is time for us to go on with these hearings.

Now, you gentlemen are excused, and the next panel is Eldon Mulder from Alaska, Patrick Sweeney from Ohio, and James Lack from New York.

Senator LEVIN. Perhaps we could get the answer for the record. Thank you, Mr. Chairman.

Chairman STEVENS. Gentlemen, as I indicated, we do have a problem here now. We have 45 minutes and we have five witnesses. That means we will have about an average of 9 minutes for each one of you, including the questions. So I'm just going to be arbitrary and say we are going to listen to you, and each one of us will have 5 minutes for questions. And then we will take the next panel and we'll have a total of 5 minutes for the questions, and we will be able to vote by 12:15.

Senator LEVIN. Mr. Chairman, because I'm running to the Armed Services Committee, you will have all the time that I would have utilized for other purposes.

Chairman STEVENS. You are kind. Thank you very much.

Mr. SWEENEY. Don't deny us the opportunity to answer the question?

Senator LEVIN. If you really feel like answering them, please do.

Mr. SWEENEY. The answer is no.

Chairman STEVENS. We did get the attention of people about that competence question, and I think that phrase has served its purpose already.

Let me state that Mr. Mulder is an Alaska State legislator, and we are pleased to have you come all this way to participate in this hearing this morning. Thank you.

TESTIMONY OF HON. ELDON MULDER, ALASKA STATE LEGISLATURE

Mr. MULDER. Thank you, Mr. Chairman. I really appreciate the opportunity to testify on perhaps one of the most important issues facing Alaska today.

For the record, my name is Eldon Mulder. I'm a member of the Alaska State House of Representatives, and I'm here to testify on behalf of the President of the Senate and the Speaker of the House.

We applaud this effort to focus on the Tenth Amendment to the U.S. Constitution, an amendment intended to protect State sovereignty.

Quite frankly, many of us in Alaska have concluded that the Tenth Amendment has been conveniently forgotten. Yet, it is the foundation of any meaningful and effective partnership between the Federal and State governments.

Alaska is particularly susceptible to misguided Federal control, as you know, Mr. Chairman.

Known as the last frontier, Alaska contains more Federal land than any other State in the union. Unfortunately, that fact often leads to overzealous Federal intrusion into areas specifically reserved for State control.

Alaska has specifically endured the abuses of unwarranted Federal preemption. Marine mammal management by our State was specifically preempted by Congress at a time when political rhetoric was rampant and the extreme animal rights organizations were advocating a theme of total protectionism. The results have been less than outstanding.

Steller sea lion populations have plummeted, and harbor seal populations have also declined significantly. Alaska's first-class marine mammal research and management was virtually eliminated. And successful programs designed to maximize social and economic benefits from harvesting marine mammals were, for all practical purposes, dismantled.

By and large, the marine mammal species in Alaska are in worse condition today under Federal management than they were under State management.

In 1980, Congress passed the Alaska National Interest Lands Conservation Act. Not only did Congress withdraw and classify millions of acres of Federal land for single purposes, such as National Parks and National Wildlife Refuges, it also initiated authority for the Federal Government to manage fish and wildlife on Federal lands for subsistence purposes.

Nowhere, Mr. Chairman, did Congress provide the Federal agencies with preemptive power to extend their jurisdiction onto adjacent State and private lands and waters.

Despite this lack of congressional delegation of authority, the Federal agencies and Federal courts have inevitably developed Federal preemptive authorities which, at least on the surface, appear to directly conflict with the intent and purpose of the Tenth Amendment.

For example, I read in the paper this morning, Mr. Chairman, that recently drafted Department of the Interior, and Department of Agriculture regulations relating to fish and game management in Alaska purport to preempt State management of fish and game.

Mr. Chairman, that's a recipe for disaster. You recall, Mr. Chairman, several years ago the Federal Government managed fish, the management of fish in the State of Alaska. Up until that time Alaska had managed it.

Alaska's annual salmon run during Federal management plummeted to an all-time low of thirty million fish. Under State management, however, our salmon resources have rebounded, and we have reached record level harvests of almost 200 million fish.

I might add, Mr. Chairman, we both enjoy the abundance of that resource every summer. But it has happened only, Mr. Chairman, under the management of the State authority. That is threatened today by the unwanted intrusion by the Federal Government.

Alaskans continue to believe that our State is truly unique. Like most other States, we are convinced that in many cases solutions to our problems require unique and innovative approaches.

Unfortunately, under a growing centralized Federal system that has been created, those unique solutions are frequently discarded because they are not consistent with the policies developed in the confines of Washington, D.C.

There is little doubt that the recognition of concurrent jurisdictions and States' sovereignty will provide a true impetus to create effective governmental partnerships.

The Endangered Species Act, Mr. Chairman, would be much more effective if the Federal Government would recognize responsibilities and authorities of the respective States and local governments.

The U.S. Supreme Court has repeatedly held that Congress is not free to legislate such functions such that, "matters essential to the States' separate and independent existence are impaired."

Mr. Chairman, virtually every matter essential to the State of Alaska has been impaired by Federal oversight in some way. Prime examples of this sort of unwarranted Federal interference include fish and game management, oil and gas development, timber management, wetland development and protection, and education.

Certainly Congress should and does exercise a reasonable level of control over some activities in Alaska. These areas, however, have become virtually eclipsed by all Federal actions, essentially eliminating effective partnerships between the Federal and State governments.

If we are to remain as viable sovereigns under the Federal umbrella, it is critical that Congress check its power over these and other areas.

As a former Mayor of Anchorage once stated, it is local government where the rubber hits the road. We in local and State government interact most directly with the people we serve.

Mr. Chairman, give us the tools to do that more effectively. I think, Mr. Chairman, that in so doing, by so removing the obstacles that the Federal Government has placed upon the State of Alaska, we will remove some of the cynicism that has begun to develop within the people, specifically the people from Alaska.

Mr. Chairman, on behalf of the majority in the Alaska State Legislature, we thank you for giving us this opportunity to appear and testify at this important hearing. As you can tell from my testi-

mony, we strongly support the passage of the Tenth Amendment Enforcement Act of 1996.

Thank you very much.

[The prepared statement of Mr. Mulder follows:]

PREPARED STATEMENT OF REPRESENTATIVE ELDON MULDER, ALASKA STATE LEGISLATURE

Mr. Chairman, Members of the Committee, I want to thank you for the opportunity to testify today on one of the most important issues facing us today: State sovereignty and the Tenth Amendment to the U.S. Constitution.

For the record, my name is Eldon Mulder. I am a member of the Alaska State House of Representatives. I am presenting testimony today on behalf of the Speaker of the Alaska State House and the President of the Alaska State Senate.

Mr. Chairman, we are here to testify in support of the proposed Tenth Amendment Enforcement Act of 1996.

We applaud this effort to focus on the Tenth Amendment to the U.S. Constitution—an amendment intended to protect State sovereignty. Quite frankly, many of us in Alaska and other States as well have concluded that the Tenth Amendment had been conveniently forgotten. Yet, it is the foundation for any meaningful and effective partnership between Federal and State governments.

The Tenth Amendment is the embodiment of Jeffersonian Democracy. It establishes the structure that is necessary for the proper functioning of American government—that is, local governments working in harmony with a common Federal body. It is intended to prevent the Federal system from usurping State powers.

The amendment expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a Federal system. The drafters of the Constitution listed the powers delegated to the Federal Government; the rest were intentionally left to the individual States—important functions, but functions best served by the people who live and work in the affected State—not by a centralized government sometimes thousands of miles away.

Alaska is a State particularly susceptible to misguided Federal control. Known as "The Last Frontier," Alaska contains more Federal land than any State in the Union. Unfortunately, that fact often leads to over-zealous Federal intrusion into areas specifically reserved for State control.

There are attributes of sovereignty attaching to every State government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. The Tenth Amendment guarantees that Congress will not abrogate a State's plenary authority over matters essential to the State's separate and independent existence. The Federal Government is affirmatively precluded from effecting the utter destruction of a State as a sovereign political entity.

Alaska has specifically endured the abuses of unwarranted Federal preemption. Marine mammal management by our State was specifically preempted by Congress at a time when political rhetoric was rampant and the extreme animal rights organizations were advocating a theme of total protectionism. The result has been less than outstanding. Stellar sea lion populations have plummeted and some harbor seal populations have also declined significantly. Alaska's first class marine mammal research and management program was virtually eliminated and successful programs designed to maximize social and economic benefits from harvested marine resources were, for all practical purposes, dismantled. By and large the marine mammal species in Alaska are in worse condition today under Federal management than they were under State management.

In 1980 Congress passed the Alaska National Interests Lands Conservation Act. Not only did Congress withdraw and classify millions of acres of Federal land for single purposes such as National Parks and National Wildlife Refuges, but it initiated authority for the Federal Government to manage fish and wildlife on Federal public lands for subsistence purposes to benefit a specific group of people in Alaska. Nowhere did Congress provide the Federal agencies with preemptive power to extend their jurisdiction on to adjacent State and private lands and waters. Despite this lack of Congressional delegation of authority, the Federal agencies and the Federal courts have innovatively developed Federal preemptive authorities which, at least on the surface, appear to directly conflict with the intent and purposes of the Tenth Amendment. For example, recently drafted Department of Interior and Department of Agriculture regulations relating to fish and game management in Alas-

ka purport to preempt State fish and wildlife management on ALL lands in Alaska—not just Federal public lands. Please tell me and the rest of Alaskans how this is in any way consistent with the Tenth Amendment reservation of State powers.

There are numerous examples where States have developed performance track records which far surpass those of the Federal agencies. In Alaska, the most outstanding example and justification for maintaining State jurisdictions is the phenomenal turnaround in fisheries following statehood in 1959. At that time, Alaska's annual salmon catch had plummeted to an all-time low of 30 million fish. Under State management, our salmon resources have rebounded and we have reached record annual harvest levels of almost 200 million fish.

Alaskans continue to believe that our State is truly unique. Like most other States, we are convinced that in many cases solutions to our problems require unique and innovative approaches. Unfortunately, under the growing centralized Federal system that has been created, those unique solutions are frequently discarded because they are not consistent with policies developed in the confines of Washington, D.C. There is little doubt that the recognition of concurrent jurisdictions and State sovereignty would provide a true impetus to create effective governmental partnerships. The Endangered Species Act would be much more effective if the Federal Government would recognize the responsibilities and authorities of the respective States and local governments.

While we support this effort to elevate the importance of the Tenth Amendment, we suggest that the provisions should not be limited to only those actions by Congress occurring after the date of signing. Violations of the Tenth Amendment and improper court interpretations conflicting with the Tenth Amendment which are occurring today should be corrected. Providing some mechanism to reassert States' rights and sovereignty should be a high priority for a Congress which has recently responded to public demands for decentralized and limited Federal powers.

The U.S. Supreme Court has repeatedly held that Congress is not free to legislate State functions such that "matters essential to [the State's] separate and independent existence are impaired." Virtually every matter essential to the State of Alaska has been impaired by Federal oversight in some way. Prime examples of this sort of unwarranted Federal interference include: Fish and game management; oil and gas development; timber management; wetland development and protection; and education.

Certainly, Congress should and does exercise a reasonable level of control over some activities within Alaska, as with all American States. These areas, however, have become virtually eclipsed by Federal actions, essentially eliminating effective partnerships between the Federal and State governments. If we and other States are to remain viable sovereigns under the Federal umbrella, it is critical that Congress check its exercise of power over these and other areas.

As a former mayor of Alaska's largest city once said, "It is the local government where the rubber meets the road." We in local and State government deal most directly with the electorate. Help us all do our job better and restore faith in the system for all elected officials.

Mr. Chairman, on behalf of the majority in Alaska's State Legislature, we thank you for giving us the opportunity to appear and testify at this important hearing. As you can tell from my testimony, we strongly support the passage of the Tenth Amendment Enforcement Act of 1996. Thank you.

Chairman STEVENS. Thank you very much.

Our next witness is Senator James Lack, the Minority Leader of the New York State Senate. He is the President of the National Conference of State Legislators.

TESTIMONY OF HON. JAMES LACK, NEW YORK STATE SENATOR

Mr. LACK. Good morning, Mr. Chairman. Thank you very much for having us here.

I couldn't help noticing that Senator Dole was here with his Tenth Amendment card. All the times that he has appeared before us at NCSL he has brought with him his card with the Tenth Amendment over the years. I can't thank you and him enough for finally bringing the issue of federalism to the fore, and for this hearing this morning.

I have filed formal testimony with the Committee, and I would ask that it be made part of the record.

Chairman STEVENS. All the statements will be made part of the record, and proceed as you wish, Mr. Lack.

Mr. LACK. I'll just make a couple of remarks.

Senator Hatch, of course, quoted our fourth President, President Madison, with a quote from the Federalist.

If I may sir, may I give you another one? "That different governments will control each other. At the same time they will each be controlled by itself."

Madison said that in Federalist 51 and, of course, that is the intent of the Federal Constitution.

I'm afraid that we, the members of the State legislatures, let you down in controlling our part of the bargain.

Senator Nickles correctly mentioned that it was the passage of several amendments to the Constitution which destroyed the balance between the State and Federal Government. The two most important, as he mentioned, occurred in the exact same year, 1913.

We first passed and authorized the Sixteenth Amendment, which gave the Federal Government the power to collect money. And as Senator Nickles also pointed out, you now get 56 percent of the revenue, which would answer Senator Levin's question on Headstart.

We, the States, are probably much better able to govern it, but since you collect the money you are better able to fund it.

In the same year, 1913, we also got rid of the appointment of U.S. Senators by State legislatures and gave that over to direct election. I can only think that in 1913 our prior colleagues in State legislatures were very happy with themselves having thrown off the yoke of general taxation and appointment of Senators and given it over to the people and to the Congress.

I would dare say though, sir, that if any of our colleagues from 1913 were back now, we would be sitting here talking about recall provisions for amendments to the U.S. Constitution, and those two would probably head the list.

But with respect to the Tenth Amendment, one of the reasons it is the Tenth Amendment and not the First Amendment or the Ninth Amendment was that Madison and others thought that it was superfluous. There was no reason to draft an amendment that everything that is not given to the Federal Government would per chance be with the States. That would never come up. The two governments were supposed to exist on a parallel. Again, my apologies for not holding up our end of the bargain.

As we see the Tenth Amendment Enforcement Act of 1996, which you have sponsored, it is an tempt to restore the balance.

I won't reiterate many of the remarks made by prior witnesses. I would like to, however, mention one point that has yet to come up, and it affects both Section 3 of the bill, with the affirmative declarations, and Section 4 with respect to point of orders.

And that is that by having such affirmative declaration and the ability to raise a point of order, Mr. Chairman, you focus in the debate on the substantive matters of the bill, whether or not the Constitution with respect to the Tenth Amendment is being followed.

And that is very important from the standpoint of the legislative record that is thereafter compiled. No less distinguished democratic

jurist than Chief Judge Abner Mikva, when he was Chief Judge, a former member of this Congress, and, of course, President Clinton's former counsel, has stated in many Law Review articles that the ability to compile and have a legislative record, particularly outside the Committee report, is of huge necessity.

He has been joined in that by Judge Shirley Abramson of the Wisconsin Supreme Court, and my own chief judge, Chief Judge Judith Kay, Chief Judge of the State of New York, both of whom have written law review articles again pointing to the necessity for a complete legislative record in order to make fair judicial interpretation of matters that have been passed on by the U.S. Congress.

Senator Stevens, I congratulate you for bringing this effort to the fore to include as part of whatever debate that goes on substantive matters with respect to any bills, the procedural matters as to Congress' ability to act, and under what grounds they are acting as to subsequent judicial interpretations.

Besides the language contained in your bill, it is important that what will be before the courts, assuming passage and signing of this legislation, is a complete delineation of what it is Congress thought it was doing prior to having to wait for judicial interpretation which, of course, occurs many years after Congress has acted, and the courts then look for things that were perhaps never really discussed in terms of congressional debate in their decision as the matters wind their way through the Federal courts.

So for those reasons I consider the affirmative declarations in Section 3 and the point of order in Section 4 to be to a necessity in this legislation.

[The prepared statement of Mr. Lack follows:]

PREPARED STATEMENT OF SENATOR JAMES J. LACK, NEW YORK SENATE, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Good morning. I am Senator James Lack. I serve as Chairman of the Judiciary Committee of the New York Senate and President of the National Conference of State Legislatures. Today, I am presenting testimony on behalf of the Nation's State legislatures.

It is gratifying to come before this Committee of Congress and endorse the concept of the proposed "Tenth Amendment Enforcement Act of 1996." NCSL has for many years been urging Congress to act on the issue of Federal preemption of State law. NCSL policy on federalism calls for the strengthening of political safeguards of federalism by various means. Among them are the following precepts: (1) notify States of intent to preempt; (2) examine preemption's impact on State law; (3) avoid regulatory preemption; and (4) consider preemption only as a last resort. The bill proposed by the Chair furthers these goals and would have a salutary effect on federalism.[1]

The Tenth Amendment Enforcement Act is a complement to Public Law 104–4, the Unfunded Mandate Reform Act. The Unfunded Mandate Reform Act reformed the rules of the Congress to increase the awareness of the fiscal impact on the States of Federal legislation. The Tenth Amendment Enforcement Act would provide similar procedural protections to ensure that Congress is fully aware of the preemption impact of proposed Federal legislation.

At its base, the Unfunded Mandate Reform Act reflects the principle that the level of government that proposes action should consider the full potential cost to voters. When the Federal Government avoids consideration of cost-shifts to the States, it jeopardizes public confidence in government. NCSL worked hard for its enactment,

[1] The Advisory Committee on Intergovernmental Relations completed an exhaustive survey of Federal preemption in 1992. It recommended that statutes contain an explicit statement of the intent to preempt and that preemption notes accompany legislation and set forth the justification and scope for the preemption. "Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues," (ACIR, 1992).

but we know that it is only one step in revitalizing federalism. It is time to take the next step and to address the preemption issue.

The Unfunded Mandate Reform Act requires a statement of the extent of preemption in the Committee report. The proposed legislation expands that protection appropriately by inserting a point of order to delay consideration of legislation if the intent to preempt is not clearly stated, by curtailing unauthorized preemption by administrative agencies, and by providing guidance to the courts on preemption. Each of these elements is important to restoring accountability to government.

The Tenth Amendment Enforcement Act is essentially an attempt to balance the Tenth Amendment and the Commerce Clause. Whether the Tenth Amendment is a dynamic part of the Constitution will be most readily discerned in the context of the legislation enacted pursuant to the Commerce Clause. The conflict was brought to a head in *United States v. Lopez*, 115 S.Ct. 1624 (1995). In *Lopez*, the law creating a Federal offense for possession of a gun within 1,000 feet of a school was found to exceed Congress' authority.

In its *amicus* brief in *United States v. Lopez*, the National Conference of State Legislatures, along with other State and local organizations, argued that Congress may regulate local activity under the Commerce Clause only "if it exerts a substantial economic effect on interstate commerce." The Court agreed that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *United States v. Lopez*, 115 S.Ct. 1624 (1995). In his concurrence, Justice Kennedy notes that virtually any activity might be considered to have a commercial origin or consequence. Yet congressional authority was never intended to extend that far. He writes, "If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional State concern." It is the goal of the Tenth Amendment Enforcement Act that the inquiry into State powers will occur throughout the legislative process.

Fittingly, it was a preemption case in which the Supreme Court expressed renewed interest in the Tenth Amendment. In *Gregory v. Ashcroft*, the Court upheld Missouri's mandatory retirement for State judges against a challenge under the Age Discrimination in Employment Act. While fortifying its rule requiring a clear statement of congressional intent to preempt, the Court went out of its way to offer a lesson in federalism.

> "The federalist structure of joint sovereigns preserved to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in the democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting States in competition for a mobile citizenry."

Gregory v. Ashcroft, 501 U.S. 452 (1991). The Court emphasized the benefits inherent in a Federal system and noted that the Tenth Amendment embodies these principles.

Statement of Constitutional Authority

The provision requiring a statement of constitutional authority can be salutary because it would require an examination by Congress of its own authority. The importance of Congress taking a good hard look at its own authority in the legislative process was emphasized by a report issued by President Reagan in November 1986 entitled "The Status of Federalism." The primary recommendation of the report was that Congress be required to include a statement of constitutional authority and a federalism assessment of all legislation. The *Lopez* decision underscores the importance of examining constitutional authority. We would still run the risk of Congress merely stating that the enactment was for the General Welfare or pursuant to the Commerce Clause, so it is important that this process neither become *pro forma* nor lead to boilerplate assertions of authority.

Point of Order on Preemption

Discussion of constitutional power is often neglected when Congress considers preemptive bills. Proponents or opponents sometimes use federalism as an argument, but are usually result-oriented. The point of order would require Congress to declare that it specifically intends to preempt State powers and that the preemption is necessary; it does not threaten the ability of Congress to act in the national interest. It would move Congress beyond the rhetoric of federalism to a more careful consideration of specific State laws that would be preempted. Congress and the States

would engage in a conversation on the appropriate distribution of power and responsibility between States and the national government.

The point of order on preemption notification is necessary because of the failure of existing political safeguards of federalism and because of the courts' sweeping interpretation of the Commerce Clause. Prior to the adoption of the Seventeenth Amendment, Senators were selected by the State legislatures. Under that process, a level of accountability to States was institutionalized. With Senators being popularly elected, there is no longer a direct tie to State legislatures and their interest in preserving federalism. Moreover, State interests are lost from sight as congressional races become nationalized. Not only are candidates understandably directing their appeals to the popular vote, but expensive campaigns increase the reliance on funding from outside the State.

Prior to the expansive interpretations of the Commerce Clause, the Congress would have considered more carefully before treading on State authority and invading State legislative prerogatives. While the point of order does not prevent Congress from enacting legislation that diminishes State powers, it would require more careful deliberation of such action and acceptance of responsibility for the consequences. The goal should be to enhance the constitutional debate on issues of federalism. The point of order provision is one important step in that direction.

Point of Order on Findings of Fact

One of the safeguards proposed by this bill is the requirement that Congress make specific findings that preemption is "necessary." NCSL concurs that such a requirement would elevate the discussion of preemption issues. Committee reports have unarguably taken on importance for courts interpreting congressional intent. It would be useful for the bill to include language that limits the scope of a report's statement of preemptive intent in such a way that the use of sweeping boilerplate language is avoided. For example, the statute might include the following language: "Nothing in the report shall expand or be construed to expand the scope of preemption beyond that which is expressly and clearly stated in the statute."

Federal judges across the spectrum agree that language in committee reports can be helpful to the courts. When Judge Abner Mikva served on the Circuit Court for the District of Columbia, he wrote of the importance of committee reports to guiding judicial decision-making. "The committee report is the bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute." Abner Mikva, "Reading and Writing Statutes," *University of Pittsburgh Law Review*, 48:627, 631 (1987). Judge Roger Miner recommended that committee reports describe the specific types of State legislation to be displaced through the preemptive bill. "Preemptive Strikes on State Autonomy: The Role of Congress," Heritage Foundation.

NCSL strongly endorses the effort to bring a fuller discussion of federalism into congressional debates by requiring the statement of constitutional authority and by noting the extent of preemption intended.

Judicial Rule of Construction

The language of the bill relating to judicial construction can be helpful with the judicial branch much as the rest of the bill seeks to attune the Legislative and Executive Branches of government to federalism issues. The bill directs courts to read legislation narrowly to avoid unnecessary preemption.[2] The proposal would reinforce a recent trend in the Supreme Court to construe Federal statutes more narrowly. NCSL believes that the effort to bring courts back to referee federalism in Tenth Amendment cases can have a positive impact on federalism. At the same time, NCSL believes this legislation is necessary to curb judicial activism when it takes the form of court decisions preempting State law in the absence of a clear statement by Congress of its intent to preempt.

Conclusion

The Tenth Amendment Enforcement Act of 1996 takes several important steps toward restoring the balance of federalism. The requirement of explicit statements of intent to preempt afford opponents of preemption a better opportunity to place federalism arguments on the table. It also dovetails with the rationale for the clear statement rule in *Gregory v. Ashcroft*. The proposed statement of constitutional authority offers an opportunity to engage in a debate on constitutional federalism, not only in terms of what is allowed, but also in terms of what is appropriate. The provi-

[2] A bill to curb preemption through judicial interpretation was introduced in the 102nd Congress as "The Preemption Clarification and Information Act of 1991." (S. 2080). Introduced by Senators Levin and Durenberger, the bill included a rule of construction and a requirement for an annual report on preemption.

sions related to instructions to the courts will help ensure that the judicial branch does not overstep its appropriate role by striking down State laws that Congress had no intention of preempting. NCSL looks forward to helping this bill become law.

Thank you for the opportunity to express the support of the Nation's legislatures for this legislation and for the conversation that you have begun with this hearing.

Chairman STEVENS. Thank you very much, Mr. Lack. Senator, pardon me.

Our next witness is Representative Patrick Sweeney from the Ohio House of Representatives. And I note that you are speaking on behalf of the National Conference of State Legislatures in your appearance. Having been a member of that group, I welcome you. Thank you very much.

TESTIMONY OF HON. PATRICK SWEENEY, MINORITY LEADER, OHIO HOUSE OF REPRESENTATIVES

Mr. SWEENEY. Nice to be here, Senator. It is a delight to appear on this issue.

As you know, the National Conference of State Legislatures has been a long and strong proponent of identification of our legislative role in the federalism itself, that we have over the years asked for clarity that would give both the agencies and the courts clarification and assist us.

As you have listened to the litany from the attorney generals of the various States, we get beat up with great frequency on issues, and it is usually the agencies. They come in and they threaten us and we have to either cajole or lose Federal funds.

That happens so routinely that we don't often end up in court. It is hard to adjudicate it, but if there were clarity, and that's what this debate, I think, is all about.

We thank you enormously for your help on S. 1. The mandates bill was a long time coming, and I think this Congress has made some very significant moves in making that Senate Bill 1.

This bill, S. 1629, I think does exactly as you indicate in the first opening statement. It gives teeth to the provisions of Senate Bill 1.

We applaud you for that, and we support very enthusiastically this Congress moving in that direction.

I just want to quote one brief statement from the Supreme Court decision in *Blue Cross of New York v. Travelers.*

The Court advised that Congress must state a clear and manifest purpose to supersede historic police powers of the State.

That statement alone seems to me to add urgency to this measure, and I would urge you to continue dialog and hearings, and we are enthusiastic about our support for your efforts.

[The prepared statement of Mr. Sweeney follows:]

PREPARED STATEMENT OF REPRESENTATIVE PATRICK SWEENEY, OHIO HOUSE OF REPRESENTATIVES, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Good Morning. I am Representative Patrick Sweeney of Ohio. I am the Minority Leader of the Ohio House of Representatives. Today, I speak on behalf of the National Conference of State Legislatures to endorse the bill entitled "Tenth Amendment Enforcement Act of 1996." NCSL is a bipartisan organization representing the Nation's legislatures. The policy that forms the basis for our advocacy in Washington is adopted by extraordinary majorities requiring bipartisan agreement. NCSL has strong policy in favor of legislation of this kind, which would curtail the steady erosion of State legislative authority resulting from Federal preemption.

The National Conference of State Legislatures has a long history of activism on preemption issues. Our activism is aimed at preserving a strong State government as a counterweight to Federal power. If the Federal system is to be a security against governmental abuses, then there must be a proper balance between State and Federal Governments. As Justice O'Connor reminded us in *Gregory v. Ashcroft,* "[t]hese twin powers will act as mutual restraints only if both are credible." 111 S.Ct. 2395+ (1991). We have worked to maintain State powers and to avoid Federal preemption in such areas as insurance, banking, health care, labor standards, securities, telecommunications, taxation and consumer protection. That we have had to defend our sovereignty on such a range of issues shows that broader protections are necessary if States are to remain credible centers of political power.

NCSL's fight against unnecessary preemption is often made more difficult because Congress is not explicit about which State statutes it intends to preempt and because congressional debate focuses on policy results and not on the structure and process of our Federal system. We only occasionally hear a meaningful debate on the federalism implications of preemptive bills. In addition, unclear statutory language can be an invitation for administrative agencies or activist judges to expand the scope of preemption well beyond the true intent of Congress.

Because of the lack of clarity in Federal legislation, the courts may unjustifiably find that the law implied preemption or that Congress "occupied the field," barring State legislative action altogether in an important area of public policy. Eventually, many of the cases relating to preemption appear before the Supreme Court. For more than 10 years, NCSL has participated as a "friend of the Court" in briefs prepared by the State and Local Legal Center opposing preemption.

One of the early preemption cases briefed by the Legal Center was in the case of *Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. 707 (1985). In *Hillsborough County,* the question was whether Federal regulations on the collection of blood plasma preempted a local ordinance's standards that did not conflict with Federal law. The Supreme Court unanimously agreed that the local ordinance was not preempted. The Court came close to accepting the Legal Center's argument that agency preemption should require an explicit statement of preemptive intent.

A decade later, the victory in *Hillsborough County* remains a useful touchstone, as we strive to limit preemption by administrative agencies. In *Medtronic, Inc. v. Lohr,* No. 95–754, the Supreme Court is once again faced with the issue of whether Congress intended to preempt State law through a regulatory agency. Once again, NCSL argues that Congress must "state clearly its intention to expand national power at the expense of the States. . . ." *Brief of Amicus NCSL et al.* p. 3. The argument for the States is buttressed by the Supreme Court's recent decision in *New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1676 (1995), where the Court advised that Congress must state a "clear and manifest purpose" to supersede historic police powers of the State.

The reasons for announcing the intention to preempt are manifest: Only when States know of the intent of Congress or administrative agencies to supersede a particular State law will the States be prepared to defend their sovereignty. Only then will the States be able to assert constitutional arguments and explain the consequences of diminishing their authority.

The congressional effort to curb administrative preemption is long overdue. In 1987 President Reagan promulgated Executive Order 12612 relating to federalism. It requires each agency to examine proposed regulations and assess the impact on federalism. Presidents Bush and Clinton both reaffirmed the importance of agencies consulting with State and local government.

Administrative agencies left to their own devices are tempted to exercise more power than has been authorized. We recently filed comments with the U.S. Department of Transportation objecting to its proposed rule that would reverse an important holding for State powers in *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658 (1993). In *Easterwood,* the Court held that the Department had not issued regulations covering safety devices at crossings and therefore had not preempted State safety requirements with respect to crossings. On the other hand, where the agency had issued regulations regarding safe speeds, State law on excessive speed was preempted. Interests disappointed in the State's partial win have urged the agency to issue rules that would preempt State law on safety devices.

The Tenth Amendment Enforcement Act provides a way to increase accountability in government by setting up a procedural framework for raising federalism issues. It creates a process that will improve the ability of States to participate in the debates occurring in administrative agencies. The Advisory Commission on Intergovernmental Relations introduced the concept of notice of proposed rule-making nearly 30 years ago in order to improve intergovernmental accountability. The measure builds on the earlier requirement of advance notice of proposed rule-making by try-

ing to insure that notice of preemption is effective. This bill goes beyond the mere notice of regulations in the Federal Register and acknowledges that States are indeed special when preemption is under consideration. Direct notice to State leaders is a proper way of recognizing the presumption that power should remain with the States unless necessity requires national attention. Whether State legislatures retain the authority to respond to their constituencies is important. It is a decision that goes to the core of accountability in government. Such a choice should not be left to unelected administrators in Washington D.C., few of whom display much understanding or sympathy with federalism.

The acceleration of Federal preemption in all fields of law makes passage of the Tenth Amendment Enforcement Act critically important. An ACIR study found that more than half of all preemptive legislation enacted over the history of our Republic became law after 1970. Add to that the expansive preemption through the administrative process and one begins to see how deeply State legislative authority is being undermined. Each time a State law is preempted, it means that an expression of democracy is extinguished. State legislatures find they have less and less authority to respond to the needs and demands of their constituents. Citizens of our States find their right to local government steadily restricted.

At NCSL, we hope that legislation such as the Tenth Amendment Enforcement Act will generate debate on the constitutional issues of federalism and reinforce in the public mind the importance of maintaining the autonomy of State governments and the right of local self-government. The Federal Government must stop intruding on State powers. As Justice O'Connor said in *Gregory v. Ashcroft*, "In the tension between Federal and State power lies the promise of liberty." When the Federal Government impairs State powers through Executive, Legislative and Judicial preemption, then the sovereignty of States is impaired and the liberty of the people is threatened.

Chairman STEVENS. Thank you very much.

Gentlemen, I regret to say that time is running out. I did have some questions I intended to ask you about specific examples.

Let me make this request of you, though. We are going to have hearings throughout the country. Senator Dole has requested that we go get the proof from the States of the problems.

So if you have any suggestions from the National Conference of State Legislators as to where those hearings would be most appropriate, we would be pleased to have your comments.

Mr. SWEENEY. In the macro, Senator Stevens, I would ask that when you design it, involve the legislative side. Because if it is left to the bureaucracy it will continue. The bureaucracy at State levels is no significantly less of a bully than those at the Federal level, and we would want a role to play, and I think that is a very important component of this bill.

Chairman STEVENS. Well, that's what we intend to do. We would like to confer with the National Conference and see if you have suggestions where we might hold hearings where legislators from several States could come together and give us some information about situations that they know have developed in their region with regard to really a failure to observe the intent and purpose of the Tenth Amendment.

Mr. LACK. Senator, I'm President of NCSL, and as NCSL's President, I would not only offer that, and that we would be more than happy to work with legislators in both parties to make sure that they attended such hearings and work out where the hearings should be.

Senator we also have a federalism Task Force which we have had in place for several years and would like to have that task force, if we could, work with your Committee staff in the development of this legislation as it goes on.

Chairman STEVENS. Senator, I'll ask that that be done. We'll try again. We have made the offer they come down and confer with you, but we will make sure they work with you and your staff to assure participation in those hearings of the members on a bipartisan basis throughout the country as we go out to the regions of the country.

Thank you very much for coming.

Our last panel this morning is Professor Nelson Lund. Mr. Lund has a Ph.D. from Harvard University and a law degree from the University of Chicago.

Mr. Lund was a clerk with Supreme Court Justice Sandra Day O'Connor, and was Associate White House Counsel for President Bush, and is now a professor at George Mason University Law School.

And we have Professor John Kincaid, a professor at Meyner Center for the Study of State and Local Government, Lafayette College in Easton, Pennsylvania. Professor Kincaid has also served on the Advisory Committee in Intergovernmental Relations, which has been instrumental in the study of the effects of unfunded mandates on State and local governments.

I welcome you gentlemen. I'm sorry that we have put you at the end where other people have gone to other pursuits, but I welcome your testimony. We'll put it in full in the record, and I want to hear what your comments are.

Dr. Lund.

TESTIMONY OF NELSON LUND, PROFESSOR, GEORGE MASON UNIVERSITY LAW SCHOOL

Mr. LUND. Thank you, Mr. Chairman. I'm honored to be here this morning.

I begin with two propositions that were articulated by James Madison. First, if angels were to govern men, neither external nor internal controls on government would be necessary.

Second, in a republican government the legislative authority necessarily predominates.

Madison accordingly concluded that it is against the enterprising ambition of the legislative department that the people ought to indulge all their jealousy and exhaust all their precautions.

There is a second set of reasons that led Madison to believe that it was critically important to carefully limit the power of the Federal legislature.

In discussing the appropriate size of political jurisdictions, Madison observed that there is a tension between encouraging responsiveness in legislators and fostering parochialism.

The Federal Constitution, he said, forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particularly to the State legislatures.

Madison might have added, though he did not, that this happy combination was something easier to describe in words than to maintain in practice, nor has it proved as durable as Madison and the other Framers may have hoped.

Powerful centripetal forces operating with relentless energy have caused the Federal Government to assume an increasingly intru-

sive authority over matters that were originally considered wholly within the power of the several States.

The principal legal constraint on these centralizing forces, of course, is supposed to be the principle of limited and enumerated legislative powers, a principle reflected in Article I, Section 8, and reinforced by the Tenth Amendment.

But this has not worked. The courts have interpreted the provision giving Congress the authority to regulate interstate commerce so broadly that it became a license to meddle in virtually anything. The emblematic decision was a 1942 case where the Court upheld a regulation forbidding a farmer to grow wheat on his own farm for his own consumption. The rationale was that if lots of farmers did the same thing, the price of what moving in interstate commerce could be affected. It is easy to see that this rationale really has no limits.

Last year the Court did conclude, for the first time in 60 years, that there must be some kind of limit, and that Congress had exceeded its authority under the Commerce Clause.

It is too soon to know whether this case will prove to have anything more than academic significance, but I think there is certainly no reason to expect that the Court will enforce anything remotely resembling the meaningful constraints that the Framers thought they had put in place originally.

The Supreme Court's closely related jurisprudence of the Tenth Amendment has followed a similar course. In 1985, the Court essentially retired from the role of enforcing constitutional restraints on the authority of Congress to invade the sovereignty of the States.

As with the Commerce Clause, the Court subsequently took some very small steps in the other direction, but without any sign that it was prepared to give meaningful protection to State sovereignty.

Part of the Court's rationale for leaving Congress unchecked was the Court's belief that the structure of the Federal system creates adequate political restraint.

I, myself, have trouble believing that this claim could have been anything other than naïve or disingenuous. But given that this seems to be the Supreme Court's considered position, two implications appear to follow.

First, because the Supreme Court has decided to abdicate its role in enforcing the Constitution, Congress ought to take its own role in interpreting the Constitution much more seriously than it sometimes has in the past.

It is not true, and never was, that Congress should simply allow the courts to decide what is and is not constitutionally permissible. But Congress' responsibility to restrain itself from overstepping its constitutional bounds becomes immeasurably more grave and pressing when the Supreme Court announces that it will no longer try to say what those limits are.

Second, the Supreme Court's abdication means that especially serious consideration should be given to inventing new legal devices for controlling congressional expansionism.

Today's hearing, and the bill that is the subject of the hearing, are, I think, welcome indications that there is a real appreciation of these implications within Congress.

As I understand the bill, it is not meant to be a complete solution to all the distortions created by decades of questionable congressional exertions of power and of judicial acquiescence in those exertions.

There may be no possibility of such a solution short of a series of constitutional amendments, and perhaps even that would not prove adequate. What ordinary legislation might do, and what I believe that this bill aims at, is to create some obstacles to the inadvertent exercise of powers that do not legitimately belong to Congress.

I have difficulty in seeing what objections could reasonably be raised, in general terms, to the type of obstacles that would be created by this bill.

Surely Congress ought not to exercise powers that can only be authorized by the Constitution, without even giving serious consideration to whether the Constitution in fact grants the powers being exercised. And surely Congress ought not to exercise the awesome power to nullify or displace the laws of the sovereign States without even a formal recognition that it is doing so.

And finally, if Congress itself ought not to take such actions, is it not even more inappropriate for Congress inadvertently to authorize courts and executive agencies to do so?

The provisions of this bill thus aim to institutionalize very modest forms of congressional self-restraint. If a bill along these lines is enacted and it proves to have truly major effects, I believe that would be evidence primarily of just how badly it was needed. And it would also be a fitting confirmation of Tocqueville's prediction that in the dawning centuries of democracy individual independence and local independence will always be the products of art. Centralized government will be the natural thing.

Thank you very much.

[The prepared statement of Mr. Lund follows:]

PREPARED STATEMENT OF NELSON LUND

Mr. Chairman, and Members of the Committee, I am honored to be here this morning.

I begin with two propositions that were articulated by James Madison. First, "if angels were to govern men, neither external nor internal controls on government would be necessary."[1] Second, that "[i]n republican government, the legislative authority necessarily predominates."[2] Madison accordingly concluded that "it is against the enterprising ambition of [the legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions."[3]

There is a second set of reasons that led Madison to believe that it was critically important to carefully limit the power of the Federal legislature. In discussing the appropriate size of political jurisdictions, Madison observed that there is a tension between encouraging responsiveness in legislators and fostering parochialism. "The Federal Constitution," he said, "forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures."[4]

Madison might have added, though he did not, that this "happy combination" was something easier to describe in words than to maintain in practice. Nor has it proved as durable as Madison and the other Framers may have hoped. Powerful centripetal forces, operating with relentless energy, have caused the Federal Gov-

[1] *Federalist* No. 51, p. 322 (C. Rossiter, ed. 1961).
[2] *Id.*
[3] *Federalist* No. 48, at 309.
[4] *Federalist* No. 10, at 83.

ernment to assume an increasingly intrusive authority over matters that were originally considered wholly within the power of the several States.

The principal legal constraint on these centralizing forces, of course, was supposed to be the principle of limited and enumerated legislative powers, a principle reflected in Article I, Section 8 and reinforced by the Tenth Amendment. This has not worked. The courts have interpreted the provision giving Congress the authority to regulate interstate commerce so broadly that it became a license to meddle in virtually anything.

The emblematic decision was a 1942 case where the Court upheld a regulation forbidding a farmer to grow wheat on his own farm for his own consumption.[5] The rationale was that if lots of farmers did the same thing, the price of wheat moving in interstate commerce could be affected. It is easy to see that this rationale really has no limits.

Last year, the Court did conclude, for the first time in 60 years, that there must be some kind of limit and that Congress had exceeded its authority under the Commerce Clause.[6] It is too soon to know whether this case will prove to have anything more than academic significance, but there is certainly no reason to expect the Court to enforce anything remotely resembling the meaningful constraints that the Framers thought they had put in place originally.[7]

The Supreme Court's closely related jurisprudence of the Tenth Amendment has followed a similar course. In 1985, the Court essentially retired from the role of enforcing constitutional restraints on the authority of Congress to invade the sovereignty of the States.[8] As with the Commerce Clause, the Court subsequently took some very small steps in the other direction, but without any sign that it was prepared to give meaningful protection to State sovereignty.[9]

Part of the Courts rationale for leaving Congress unchecked was the Court's belief that the structure of the Federal system creates adequate political restraints. I have trouble believing that this claim could have been anything other than naive or disingenuous. But given that this seems to be the Supreme Court's considered position, two implications appear to follow.

First, because the Supreme Court has decided to abdicate its role in enforcing the Constitution, Congress ought to take its own role in interpreting the Constitution much more seriously than it sometimes has in the past. It is not true, and never was, that Congress should simply allow the courts to decide what is and is not constitutionally permissible.[10] But Congress' responsibility to restrain itself from overstepping its constitutional bounds becomes immeasurably more grave and pressing when the Supreme Court announces that it will no longer try to say what those limits are.

Second, the Supreme Court's abdication means that especially serious consideration should be given to inventing new legal devices for controlling congressional expansionism.

Today's hearing, and the bill that is the subject of the hearing, are welcome indications that there is a real appreciation of these implications within Congress.

As I understand the bill, it is not meant to be a complete solution to all the distortions created by decades of questionable congressional exertions of power, and of judicial acquiescence in those exertions. There may be no possibility of such a solution short of a series of constitutional amendments, and perhaps even that would not prove adequate. What ordinary legislation might do, and what I believe this bill aims at, is to create some obstacles to the inadvertent exercise of powers that do not legitimately belong to Congress. I have difficulty in seeing what objections could reasonably be raised, in general terms, to the type of obstacles that would be created by this bill. Surely Congress ought not to exercise powers that can only be authorized by the Constitution without even giving serious consideration to whether the Constitution in fact grants the power being exercised. And surely Congress ought not to exercise the awesome power to nullify or displace the laws of the sovereign States without even a formal recognition that it is doing so. And if Congress itself ought not to take such actions, is it not even more inappropriate for Congress inadvertently to authorize courts and executive agencies to do so?

The provisions of this bill thus aim to institutionalize very modest forms of congressional self-restraint. If a bill along these lines is enacted, and it proves to have

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[5] *Wickard v. Filburn,* 317 U.S. 111 (1942).

[6] *United States v. Lopez,* 115 S. Ct. 1624 (1995).

[7] *Cf id.* at 1642–51 (Thomas, J., concurring).

[8] *Garcia v. San Antonio Metro.* Transit Auth., 469 U.S. 528 (1985).

[9] See *New York v. United States,* 112 S. Ct. 2408 (1992).

[10] For a more extended discussion, see Charles J. Cooper and Nelson Lund, *Landmarks of Constitutional Interpretation,* 40 Policy Review 10, 12–14 (1987).

truly major effects, I believe that would be evidence primarily of how badly it was needed. It would also be a fitting confirmation of Tocqueville's prediction that "in the dawning centuries of democracy, individual independence and local liberties will always be the products of art. Centralized government will be the natural thing."[11]

Thank you very much.

Chairman STEVENS. Thank you.

Dr. Kincaid, we are pleased to have your statement now, sir.

TESTIMONY OF JOHN KINCAID, PROFESSOR, LAFAYETTE COLLEGE, EASTON, PENNSYLVANIA

Mr. KINCAID. Thank you, Mr. Chairman. I appreciate the opportunity to testify before this Committee in support of the Tenth Amendment Enforcement Act.

Let me add as well that my sister and brother-in-law are longtime residents of Alaska and I have had many opportunities to visit your great State.

In my view, the bill is a positive step toward restoring a better balance of responsibility in our Federal system. I think the bill is also a healthy step backward toward a recovery of cooperative federalism that once prevailed in the relations between the Federal Government and the States.

Cooperative federalism was wedged into a small corner of the political universe in the late 1960s by the emergence of an era of coercive federalism which continues today.

I referred to this era as one of coercive federalism because Federal policymaking for the past 30 years has been marked by unprecedented intrusions into the affairs of State and local governments.

Congress has enacted more preemptions of State powers since 1969 than it did from 1789 to 1969. More mandates and conditions of aid have been enacted by the Congress during the past 30 years than during the previous 177 years of our Federal history.

In addition, we have seen the Federal Government enter huge fields of domestic law previously reserved to our State and local governments, such as the astonishing federalization of criminal law during the past three decades.

Moreover, the Supreme Court has generally deferred to this congressional construction of coercive federalism as reflected in the Garcia decision in 1985 on the Tenth Amendment, and the Court's ruling in *South Dakota v. Dole* on conditions of Federal aid.

While our forebears from George Washington to John F. Kennedy managed not merely to get along for 170-some years, but to build the greatest civilization in history without all of these conditions, mandates, preemptions and other paraphernalia of Federal power, then why have we needed them for the past 30 years. What happened in the late 1960s that suddenly made the legislative judgments of 535 Members of Congress so superior to the thousands of people we elect to our State legislatures, county commission and city councils.

There was no constitutional change in the 1960s to bring about this transformation. Instead, what happened I think is K Street, television, political action committees, and the politics of ambition. Special interests stormed the constitutional ship and sent it careen-

[11] Alexis de Tocqueville, *Democracy in America*, p. 674 (J.P. Mayer ed., 1969).

ing through the harbor of federalism, swamping the State and local boats engaged in the day-to-day business of keeping the country afloat.

Meanwhile, public trust and confidence in the Federal Government plummeted during this 30-year period, and has spilled over now into distrust of all governments in the Federal system.

The Federal Government has run an unprecedented string of annual budget deficits during this period. Real wages have stagnated for the average Americans, and citizens feel less safe and snug in their homes than they did 30 years ago.

Every measure to take and to assert Federal power has ardent defenders, and every measure has been justified as good for the country.

Indeed, we have realized important benefits from these measures, not the least of which is a new level of individual rights protection. But like medication, two pills are not necessarily better than one pill.

The Federal Government has popped so many power pills during the last 30 years, all in the name of one or another cure-all, that our Federal system, I think, has gone into convulsion. We need, therefore, to restore the health of the Federal Government, as well as our State and local governments, at the same time.

I support the intentions of this bill, in part because I believe it represents a step toward a kind of Hamiltonian Federal Government harnessed to a Madisonian Constitution.

We need, as the Founders argued, an energetic Federal Government. To achieve this objective, the people of the States delegated to the Federal Government powers relevant to the general interests of all Americans. The Constitution gives the Federal Government a rather focused mission, and the power to carry out that mission while reserving, as the Tenth Amendment reiterates, all other powers of government to the States or to the people themselves.

The Constitution does not give the Federal Government a general police power, and the Congress was not intended to function like a super city council attending to every pothole in the body politic.

I think the bill also addresses the predicament of the States following the *Garcia* decision, in which the Court opined that the States must rely on the national political process rather than on judicial enforcement of the Tenth Amendment to protect their powers.

This bill I think would resuscitate federalism in the legislative process, at least as a key point of debate, and perhaps nudge the Supreme Court to advance its newly emerging, but still hesitant, federalism jurisprudence.

The bill is also important for its provisions on preemption, an exponentially growing body of Federal law which until recently went largely unnoticed.

The bill incorporates key concepts stemming from recommendations of the Advisory Commission on Intergovernmental Relations, and from the Preemption Clarification and Information Act that was introduced in 1991 by Senators Levin and Durenburger.

I do, however, have reservations about the title of the bill, the Tenth Amendment Enforcement Act. I think it sends somewhat of

a misleading signal. The bill actually goes, in my mind, more to the necessary and proper clause in Article I of the Constitution than to the Tenth Amendment.

In essence, the bill very nicely points the Congress back to its limited delegated powers, which are interpreted through the prism of the necessary and proper clause.

The bill cannot guarantee enforcement of the Tenth Amendment, but it seeks to guarantee due consideration of the constitutional limits of Federal power within the Federal system, which is already an obligation of the necessary and proper clause.

Congress is not limited to its expressly delegated powers, but it is obligated to limit its lawmaking to measures necessary and proper for executing those powers.

This is, in the final analysis, a matter of self-restraint, and given that the Congress has had difficulty restraining it appetite for the past 30 years, this bill is a necessary dietary regimen.

The Congress rarely considers the constitutional limits on its powers, and it too often neglects to consider the prudential limits on its powers. Even when the Congress can be said to have the constitutional authority to act, State governments may be better suited to legislate on certain matters.

The key question in our Federal system is not simply whether government should act on a particular matter, but equally important, which government, Federal or State, should act on that matter.

By directing the Congress to address the constitutional basis and prudential wisdom of its action, therefore, this bill might more accurately be called the Necessary and Proper Congressional Conduct Act of 1996.

I believe that a message of self-discipline and self-restraint would resonate better with the sentiments of the general public.

Mr. Chairman, I have some specific recommendations on the bill, but I'll pass over those at this point because I do, in general, support the bill. Thank you.

[The prepared statement of Professor Kincaid follows:]

PREPARED STATEMENT OF JOHN KINCAID

Thank you Mr. Chairman. My name is John Kincaid. I am the Robert B. and Helen S. Meyner Professor of Government and Public Service at Lafayette College, Easton, Pennsylvania, and former Executive Director of the U.S. Advisory Commission on Intergovernmental Relations, Washington, D.C. (1988–94).

I appreciate the opportunity to testify before this Committee in general support of the proposed bill entitled the "Tenth Amendment Enforcement Act of 1996." My authority to present this testimony is that of a citizen. I represent no institution, interest group, or political party. I have had a long-standing interest in federalism as a citizen; I co-edit an academic journal, *Publius: The Journal of Federalism*, which marked its 25th anniversary last year; I have written on matters of federalism; and I had the privilege of chairing the Scholars Advisory Committee to the Federalism Summit held last October.

RESTORING BALANCE AND COOPERATION IN THE FEDERAL SYSTEM

In my view, this bill is a very positive, if modest, step forward toward restoring a better balance of power and responsibility in our Federal system. The bill is also a very healthy step backward toward a recovery of the substance and spirit of cooperative federalism that once prevailed in relations between the Federal Government and the States.

Cooperative federalism was wedged into a small corner of the political universe in the late 1960s by the emergence of an era of coercive federalism, which continues

today. I refer to this era as one of coercive federalism because Federal policymaking for the past 30 years has been marked by unprecedented intrusions into the affairs of State and local governments, mainly through conditions attached to Federal grants-in-aid, mandates placed on State and local governments, and preemptions of State and local powers. The Congress has enacted more explicit preemptions of State powers since 1969 than it did from 1789 to 1969. More mandates and conditions of aid have been enacted by the Congress during the past 30 years than during the previous 177 years of our Federal history. In addition, we have seen the Federal Government enter huge fields of domestic law previously reserved to our State and local governments, such as the astonishing federalization of criminal law during the past three decades. Furthermore, the U.S. Supreme Court has generally deferred to this congressional construction of coercive federalism, as reflected in the Court's 1985 holding in *Garcia v. San Antonio Metropolitan Transit Authority* on the Tenth Amendment and in the Court's ruling in *South Dakota v. Dole* (1987) on conditions of Federal aid.

If our forebears from George Washington to John F. Kennedy managed not merely to get along for 170-some years, but to build the greatest civilization in the history of the world, without all of these conditions, mandates, preemptions, and other paraphernalia of Federal power, then why have we needed them for the past 30 years? What happened in the late 1960s to make the Members of Congress suddenly so much wiser, more virtuous, and more enlightened than the great men and women who had served in Congress during the previous 170-some years? And what happened to make the legislative judgments of the 535 Members of Congress suddenly so superior as to justify their displacement of the legislative judgments of the thousands of people elected to our State legislatures, county commissions, and city councils?

There was no constitutional change in the 1960s to bring about this transformation. Instead, what happened was K Street, television, political action committees, and the politics of ambition. Special interests stormed the constitutional ship and sent it careening through the harbor of federalism, swamping the State and local boats engaged in the day-to-day business of keeping the country afloat.

Meanwhile, public trust and confidence in the Federal Government plummeted during this 30-year period of coercive federalism, and spilled over into public distrust of all governments in our Federal system. The Federal Government has run an unprecedented string of annual budget deficits since 1968. Real wages have essentially stagnated for most Americans, and our economy has been jolted by many shocks from global competition. Citizens feel less safe and snug in their homes than they did 30 years ago, and we feel less confident about the future. So many issues have become nationalized that our political process has become polarized and embittered in the white heat of interest-group competition inside the beltway. From what, then, has all this frenetic Federal activity rescued us?

Every measure taken to assert Federal power during this era of coercive federalism has ardent defenders, and every measure has been justified as good for the country. Indeed, we have realized important benefits from these measures, not the least of which is a new level of individual-rights protection of historic significance. But like medication, two pills are not necessarily better than one pill. The Federal Government has popped so many power pills during the past 30 years, all in the name of one or another cure-all, that our Federal system has gone into convulsion.

We need, therefore, to restore the health of the Federal Government and of our State and local governments at the same time.

A Hamiltonian Federal Government Harnessed to a Madisonian Constitution

I hesitate to bring up the name of Alexander Hamilton in this context, but I support the intentions of this bill because I believe that it represents a step toward a Hamiltonian Federal Government harnessed to a Madisonian Constitution. We need, as the Founders argued, an energetic Federal Government. To achieve this objective, the people of the States delegated to the Federal Government powers relevant to the fundamental, general interests of all Americans and their several States. The U.S. Constitution gives the Federal Government a rather focused mission and the power to carry out that mission while reserving, as the Tenth Amendment reiterates, all other powers of government to the States or to the people themselves. The Constitution does not give the Federal Government a general police power, and the Congress was not intended to function like a super city-council attending to every pothole in the body politic.

The bill also addresses the predicament of the States following the *Garcia* decision in which the Court opined that the States must rely on the national political process

rather than on judicial enforcement of the Tenth Amendment to protect their powers in the Federal system. This bill, if enacted, would resuscitate federalism in the legislative process, at least as a key point of debate, and perhaps nudge the U.S. Supreme Court to advance what is already a newly emerging, but still hesitant, jurisprudence of federalism.

The bill is also important for its provisions on preemption, an exponentially growing body of Federal law which, until recently, went largely unnoticed and unaddressed by students of federalism and by actors in the Federal system. The bill incorporates some key concepts stemming from recommendations made by the U.S. Advisory Commission on Intergovernmental Relations (ACIR) about 5 years ago and from the "Preemption Clarification and Information Act" introduced into the Senate by Senators Carl Levin and David Durenberger in 1991.

The Necessary and Proper Congressional Conduct Act of 1996

I do, however, have reservations about the title of the bill. The "Tenth Amendment Enforcement Act" sends an overly broad and somewhat misleading signal. In my view, the bill actually goes more to the necessary and proper clause in Article I of the Federal Constitution than to the Tenth Amendment. In essence, the bill very nicely points the Congress back to its limited, delegated powers, which are interpreted through the prism of the necessary and proper clause. The bill does not, and cannot, guarantee enforcement of the Tenth Amendment; instead, it seeks to guarantee due consideration of the constitutional limits of Federal power within the Federal system, which is already an obligation of the necessary and proper clause. The Congress is not limited to its expressly delegated powers, but it is obligated to limit its lawmaking to measures necessary and proper for executing its delegated powers. This is, in the final analysis, a matter of self-restraint, something the Congress was generally able to exercise for some 170 years. Given that the Congress has had difficulty restraining its appetite for the past 30 years, this bill is, perhaps, a necessary dietary regimen.

The Congress rarely considers the constitutional limits on its powers, and it too often neglects to consider the prudential limits on its powers as well. Even when the Congress can be said to have the constitutional authority to act, State governments may be better suited to legislate on certain matters. A key policymaking question in our Federal system is not simply whether government should act on a particular matter but, equally important, which government—Federal or State—should act on that matter. By directing the Congress to address the constitutional basis and prudential wisdom of its actions, therefore, this bill might more accurately be called "The Necessary and Proper Congressional Conduct Act of 1996." I believe that a message of self-discipline and self-restraint would resonate better with the sentiments of the general public.

Section 3. Congressional Declaration of Constitutional Authority

Section 3 would require the Congress to investigate, identify, and declare the constitutional bases of its authority to enact any particular statute. This is a matter of no little significance, given the Congress' general inattention to constitutional matters of federalism in recent decades.

One concern, though, is whether the required declarations of constitutional authority will simply become *pro forma* boilerplate statements needed to avoid a point-of-order challenge. If a majority of either house of the Congress is intent on passing a bill, boilerplate language will likely be accepted as compliance with this bill. The point-of-order rule in Section 4 applies only in the absence of a declaration of constitutional authority, not to incorrect or questionable declarations of constitutional authority—although such questionable declarations would likely trigger debate on the floors of the House and the Senate. Nevertheless, it might be advisable to beef up paragraph (b) of Section 3 along the lines suggested by the Federalism Summit so as to elicit more thorough factual findings and federalism impact assessments from congressional committees.

We can probably assume that unless the Congress directs the courts to the contrary (which the draft bill does not do), the courts will be free to uphold a Federal statute on any basis. Even if the Congress attempted to direct the courts to the contrary, the courts might refuse to be bound by the Congress's direction. However, the courts might very well uphold statutes on grounds not identified by the Congress. More likely, though, so long as the Congress does not attempt to direct the courts, the courts will be fairly deferential to congressional identifications of its constitutional authority, and will be reluctant to uphold statutes on grounds not identified by the Congress.

A deeper concern for State and local governments is whether the proposed statute will lead to expansive constructions of Federal power both in the Congress and in the courts. Although the bill admonishes the Congress to recognize its limited powers, "limits" lie in the eye of the beholder, and congressional perceptions of such limits may be more expansive than State or public perceptions of those limits. Federal statutes, moreover, ordinarily come to the courts with a presumption of constitutionality, and if the elected representatives of the people in Congress can be said to have investigated, interpreted, and declared under this bill what they regard as their constitutional authority for any particular enactment, the courts would be pressed to uphold the Congress' determination. If congressional declarations of authority become boilerplate, it might be all that much easier for the courts to uphold broad constructions of congressional power. Of course, no one knows for sure how the dynamic between the Congress and the Supreme Court might develop pursuant to this proposed statute; hence, we cannot be certain of the outcome of the bill's required declaration of constitutional authority.

Section 4. Point of Order on Constitutional Authority Declaration

The point of order adds considerable strength to the bill's fundamental requirement that Members of Congress pay attention to their constitutional authority to act on any particular matter.

The super-majority requirement in Sec. 4(a)(2) gives the bill teeth, although it may be a hurdle to enact because the Congress has generally been unwilling to hold itself to super-majority rules, and did not do so in the point of order incorporated in the Unfunded Mandates Reform Act of 1995. However, given that the rule itself could be overturned by a simple majority vote of the House or the Senate, the three-fifths rule is wholly reasonable. Furthermore, I believe that regardless of the super-majority question, the Congress could always pass a statute by a simple majority in disregard of this bill, and there would be no judicial remedy.

Consideration should be given, however, to requiring a recorded roll-call vote to waive or suspend the constitutional declaration requirement so as to ensure transparency and accountability on important questions of federalism.

Section 5. Executive Preemption of State Law

Section 5 of the bill is an important provision because it addresses the problem of implied preemptions of State powers by Federal agencies. The section follows upon the recommendation of the Federalism Summit and earlier recommendations made by ACIR. The provision is intended to ensure that preemptive rule-making by executive departments and agencies, as well as independent agencies, does not exceed the intended preemption explicitly stated in Federal statutes or exceed preemptions needed to resolve clear and unavoidable conflicts between Federal and State law.

Sec. 5, §560(a) is intended to establish standards for executive preemptions of State law in light of the inherent difficulty of articulating a clear and definitive standard for such preemption. The language is somewhat vague, but it may be the best that can be achieved under the circumstances and without an unduly cumbersome list of criteria.

The provision in paragraph (b) is intended to alert Federal regulators as well as State and local officials of the intended scope of any regulatory preemption and also to prevent creeping preemption through gradually expanding bureaucratic interpretations of rules and regulations. It may sometimes be difficult to describe the intended scope of preemption precisely, but executive departments and independent agencies should make good-faith efforts to do so.

In paragraph (c), which is intended to ensure a State and local voice in rule-making, consideration should be given to exempting these proceedings from the Federal Advisory Committee Act, which can be a barrier to effective State and local participation in rule-making.

Paragraph (e) requiring periodic department or agency review of preemptive rules and regulations is quite useful. Without such review, rules and regulations can become immortal and obstructive of progress in a dynamic society. Given that the bill would not apply retroactively to current agency constructions of current statutes, this review process would at least enable agencies to reconsider long-standing rules and regulations in light not only of their continuing utility but also of the objectives of this bill.

SECTION 6. CONSTRUCTION

Section 6 reflects and reinforces a recent trend on the U.S. Supreme Court to construe Federal statutes more narrowly than in the recent past and in a manner that reduces undue Federal interference with State law. This provision, I believe, would be judicially enforceable. At the very least, it would direct, though probably not require, the courts to interpret Federal statutes and administrative rules in ways that preserve State authority whenever possible.

Paragraph (a) of this section, moreover, would apply only to statutes enacted, or rules adopted, after the effective date of the provision's enactment. This prospective approach avoids unsettling expectations in many areas, such as the relationship between State and Federal securities laws, that could spawn widespread litigation or have damaging effects on existing contracts and other standing arrangements. Paragraph (b) would apply to current laws, though only to ambiguities in current law; consequently, it is not likely to have an unsettling effect on standing law.

Another approach here, however, would be to require the inclusion of this bill's rule of construction in every future statute and to allow a point of order to lie against any bill or resolution not containing such a rule of construction. The point of order would not be judicially enforceable, but the rule of construction included in future statutes would be judicially enforceable.

This is an important consideration because it is not clear whether the general statutory rule of construction in Section 6 directing the courts to construe all future Federal laws narrowly in order to preserve State powers will be regarded as binding on future Congresses, be taken seriously by the courts, or be any more effective than the Tenth Amendment's existing rule of construction. Like the Tenth Amendment, the U.S. Supreme Court might interpret such a statutory rule of construction as a "mere truism."

CONCLUSION

In summary, I support the basic intentions of this bill as a modest but important step toward revitalizing our federalism and reviving our rights of State and local self-government, which were never delegated to the Federal Government in the first place.

Chairman STEVENS. Thank you very much. I have noted those and we will confer with you on those.

Let me ask you—and time is running on me, I'm sorry to say—but do you agree that we need some specific provision in our law to meet the general statements of the Court that Congress should make clear its intent if it intends to enter fields that otherwise would be reserved to the States?

Mr. KINCAID. Yes, I do think we need that kind of clear expression of intent, and I think we also need a statement from the Congress on the scope of the entry into the field, or the scope for preemption, so that States understand where the boundaries are.

Chairman STEVENS. But we obviously have a problem here because of the reference to the bill's application to amendments.

But I'm reminded of the time I was managing the Defense Appropriations bill and suddenly it had the Crime bill added to it. It had several other full pieces of legislation that had been debated and debated and were stalled. And before we were through, the Defense Appropriations bill was an omnibus legislative package which our portion of the appropriations concept was smaller in terms of content and really national scope.

I think we have to find some way to make certain our amendments are subject to the same discipline.

But Dr. Lund, being from where I am, I have had some feelings about the congressional limitations on our exports. I don't know if you are familiar with that.

But Congress limited the power of the State of Alaska to authorize exports of oil from our State alone. No other State had that imposition.

There is a specific provision in the clause about requiring our vessels to go into another State before they are cleared for export, but this is an area that is sort of cloudy.

We were never really able to get the Congress to determine the source of its claim of power to prevent the export of Alaskan oil. They just said because the pipeline went across Federal land, that was their power.

Now, I think a bill like this would require people that have amendments like that to come forward and assert what constitutional power gives Congress the authority to so invade the commerce of an individual State.

Are you familiar with any such circumstances in your research that would give us enlightenment and further purpose for this bill?

Mr. LUND. I think, as you, yourself, mentioned earlier in one of the earlier panels, and as several witnesses have pointed out, the Supreme Court, with the clear statement rule in *Gregory v. Ashcroft,* gave an indication that it was somewhat sensitive to the need to find some kind of substitute, once it had abdicated its responsibility really to enforce the Tenth Amendment.

And I think one of the great virtues of this bill, Mr. Chairman, is that it takes account of the receptivity of the court to demands for a clear statement in legislation, as evidenced in *Gregory v. Ashcroft,* and pushes that a little farther.

I think that we can expect that to receive a fairly warm welcome in the courts, and they won't be trying to evade the intent of the legislation if it is enacted, and I think for that reason it will have particularly good effect.

Chairman STEVENS. Well, Dr. Kincaid is right, that it goes beyond the Tenth Amendment. The requirement of a statement of congressional authority is certainly more than just enforcement of the Tenth Amendment.

And we'll review your suggestion with regard to the title of the bill, because I clearly do not want to limit it to just the Tenth Amendment applications. I believe the Congress should state clearly in a preamble to a bill, or somewhere, that it finds it has authority under a specific delegation of authority in the Constitution to proceed to enact legislation of the type that it proposes.

And lacking that, I think that the courts ought not to go around and search and find that the basis in their opinion existed.

It does seem to me that we should be more attuned to our requirement, as Senator Hatch and others have stated. When we lift our hand and swear to uphold and defend the Constitution, we ought to do that in our daily lives. As far as the bills we consider, they ought to be specific on what is our power that we are pursuing as derived from the Constitution itself in this limited Federal Government.

I hope we are successful. We look forward to working with you, gentlemen. I thank you for taking the time to be here. I apologize for the long delay. It was not intended. But thank you very much.

[The prepared statement of Senator Coats follows:]

PREPARED STATEMENT OF SENATOR COATS

Over the years we have gradually witnessed greater encroachment by the Federal Government of the powers of States and local governments. The Tenth Amendment is rather clear in stating the purposes of the Framers of the Constitution:

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

What we have seen, however, is the gradual expansion of Federal power and a usurping of State authority. Federal involvement usually began with financial aid directed to achieve national goals. However, this quickly has turned into mandates on the States.

What this legislation does is reaffirm the Tenth Amendment. It would prohibit Congress from passing any law which usurps local power unless it states its constitutional authority to so do. It is the next step in the process of turning back Federal abuse of power that began last year with passage of Unfunded Mandates Reform.

Federal requirements on States which also carry a price tag encompass 200 mandates, involving 170 Federal laws. Court rulings on State and local governments number decisions at 3,500, related to more than 100 Federal laws.

The costs of Federal regulation on the national economy has been estimated at $500 billion a year. Mayor Goldsmith of Indianapolis has said that this translates to $1 billion a year drained from the local economy of Indianapolis just to comply with Federal regulations. "When it comes to mandates from Washington, we in Indianapolis have no choice but to carry the burden." Another Indiana mayor characterized this as the "my way, but you pay" approach to Federal policy.

As an experiment, the Mayor of Columbus, Ohio, requested copies of new regulations printed in the Federal Register for 6 months. Of 524 new or proposed rules which would affect local governments, he received copies of just 207. The resulting pile of paper amounted to a staggering 7,067 pages of rules and 9,490 pages of support documents.

Cities in Indiana spend significant amount of money in order to comply with Federal regulations:

In 1993: Anderson, $6.9 million; Columbus, $1.4 million, Elkhart, $2.2 million; Fort Wayne, $5.8 million; Hammond, $1.1 million; Lafayette, $132,000; Mishawaka, $162,000; South Bend, $2.8 million; Terre Haute, $152,000.

We currently pass laws that State and local leaders are forced to deal with first, not with local concerns, but Washington's agenda. When we require State and local government to respond to Washington priorities, we preempt the spending priorities of local communities, regardless of their urgency. When a Federal mandate comes down, it moves to the top of the list. Complying with Federal regulations, as well as the liability exposure resulting from mandates and regulations, adds billions of dollars every year to basic business costs.

The Federal Government needs to get out of the business of imposing burdensome regulations on States. Rather, it is time to begin to foster the conditions in the States for competition and private sector initiative. Continued Federal domination in this area will ensure just the opposite.

It is critical that Congress pass this legislation and return the power to States and communities to deal effectively with their problems and their priorities. I believe that the Framers of the Constitution intended power to reside with local government, which is more responsive to the needs of its citizens and more accountable than the Federal Government in Washington.

I urge the Committee to act quickly on this legislation so we can begin to give back to the people the guarantee of limited Federal Government promised in the Tenth Amendment.

[Whereupon, at 12:10 p.m., the hearing was adjourned subject to the call of the Chair.]

S. 1629—THE TENTH AMENDMENT ENFORCEMENT ACT OF 1996

MONDAY, JUNE 3, 1996

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The Committee met, pursuant to notice, at 9 a.m., in The Freedom Forum, First Amendment Center, Vanderbilt University, Nashville, Tennessee, Hon. Ted Stevens, Chairman of the Committee, presiding.

Present: Senators Stevens and Thompson.

OPENING STATEMENT OF CHAIRMAN STEVENS

Chairman STEVENS. Since there's a delay, but if we could—I think we should proceed on time, if that's agreeable to you, Senator?

Senator THOMPSON. That's fine.

Chairman STEVENS. All right. I'm delighted to be down here with you, Fred. I was told on the way in that you've just celebrated your 200th anniversary of becoming a State here.

Senator THOMPSON. That's right.

Chairman STEVENS. We haven't reached 40 yet. So I guess——

Senator THOMPSON. We look pretty good for 200 years.

Chairman STEVENS. Yeah, you are doing pretty well for 200 years.

When I became Chairman of this Senate Committee on Governmental Affairs, I made a commitment that one of our top priorities would be working on ways to return the power to the States and to the people. I believe that we needed an act of Congress that would require recognition of the Tenth Amendment, and a policy of enforcing it.

The bill before our Committee now is the Tenth Amendment Enforcement Act of 1996. It has bipartisan support including 28 Senator cosponsors already. One of the earliest and most enthusiastic cosponsors was your own Senator, Senator Fred Thompson, who is our host today. We have also received support from governors and attorney generals from around the Nation. Resolutions supporting the bill have now been passed in State legislatures including my own State of Alaska, Florida, Alabama, New York, and Kansas. This bill is supported by the National Conference on State Legislatures and the Council of State Governments.

In 1991, when Justice Sandra Day O'Connor delivered the majority opinion of the Supreme Court in *Gregory v. Ashcroft,* Congress was given some very instructive language. In delivering the opinion

of the Court, Justice O'Connor stated: "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute. Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States. In traditionally sensitive areas such as legislation affecting the Federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

This Tenth Amendment Enforcement Act is intended to require Congress to take the action that Justice Sandra Day O'Connor and the Supreme Court suggested.

I thank you, Fred, for allowing us to come to Nashville, and Claudia McMurray and Bob Davis of your staff for your help. Senator Douglas Henry, and Nancy Russell here, I thank you also for your support of our staff, and look forwarding to being with you today.

I have brought with us two members of the team of the Governmental Affairs Committee. They are in the back of the room, Christine Ciccone, who is our Deputy Staff Director, and Paul Stockler, who is here on my left. He is an attorney from my home in Anchorage who I asked to come to Washington to work specifically on this project, and he has really put together a schedule on trying to get this matter before Congress.

I do thank you all for joining us today. I am going to turn this over to Senator Thompson. After this hearing is over, I would like the opportunity to say hello to each of you. Fred?

OPENING STATEMENT OF SENATOR THOMPSON

Senator THOMPSON. Thank you very much, Senator Stevens. First of all, I want to welcome you to Tennessee, and those who are accompanying you, and express my appreciation for not only your being here and holding this hearing today, but for your leadership on this important issue; this issue that as with so many others as you have taken the leadership role on in the U.s. Senate. It is of great importance, and I am pleased that you wish to hear from some Tennesseans on this issue, and I think it will be very enlightening, because everyone knows the Tenth Amendment restricts the authority of the Federal Government of those powers that are specifically delegated in the Constitution. Everything else basically belongs to the States and the people.

The witnesses here today are from a broad range of areas in the State and local government in Tennessee, and I might add from both political parties. They will relate to us the difficulties they have experienced over the years in keeping the Federal Government basically out of the areas of traditional local concern. I certainly look forward to their testimony.

From my first days in Congress, I, along with many of my colleagues, have recognized the importance of the Tenth Amendment, and have voted to shift power out of Washington and return it to the States. We started out by passing legislation prohibiting the Federal Government from imposing unfunded Federal mandates in the future on State and local governments without sending the money along with it, as well as the private sector. Then we went

on to pass changes in our Welfare and the Medicaid laws that would have given States broader authority to make their own policy choices, based on the local heeds. Unfortunately, only the unfunded mandate legislation has become law so far.

This year, I hope we can supplement those efforts by passing S. 1629, the Tenth Amendment Enforcement Act, which would begin to reign in unaccountable Federal power by reminding Congress, Federal agencies, and the courts that the Tenth Amendment's principle of limited government must be obeyed.

Specifically, the bill requires Congress to state the precise source of the constitutional authority for any proposed law it considers. In addition, the agencies must consider preemption issues, and the proper sphere of State authority when promulgating regulation. The courts must interpret Federal laws and regulations so as not to preempt State or local laws unless the congressional intent to preempt them is explicitly articulated.

For too long in my view, the Federal Government has Federalized the solution to far too many problems, problems that are best resolved at the local level. We had a recent example of the issue of guns in schools. Nobody wants guns in schools. In 1990, Congress passed the Gun-Free School Zone Law, which made it a Federal offense for any person to possess a gun in a school zone, notwithstanding the fact that every State in the Union had a law on the books on this subject. And then the Supreme Court in the *United States v. Lopez* struck down the law because it exceeded the power granted to Congress to regulate interstate commerce. So we have learned, hopefully, that even in this day and age, there is some limitation to the interpretation of the interstate commerce laws. And the court found that the gun possession is not an economic activity that substantially affected interstate commerce. And please, some of us think that the FBI has got better things to do than go under schools in every locality around the country.

I wholeheartedly agree with the Supreme Court decision in the *Lopez* case, and the Gun-Free School Zones as a law is just one example of the Congress' repeated disregard of the Tenth Amendment over the last several years. And it is my hope the Congress can begin to undo this disturbing trend of Federalization by passing the Tenth Amendment Enforcement Act.

Thank you, again, Mr. Chairman, for holding these hearings, and I look forward to continuing to work with you on this issue and this project.

Chairman STEVENS. Well, thank you very much, Senator.

Our first witness is the Chairman of the Senate Finance Ways and Means Committee, a Council of State Governments to the National Conference of State Legislatures. As I said, two national bipartisan organizations that support the Tenth Amendment Enforcement Act, called to tell us that we would not find a State senator who was more supportive of States' rights or more knowledgeable on Federalism than the Hon. Douglas Henry—Senator Henry. And why don't we call up at the same time, if we may, Dr. Green, as President of the Tennessee Advisory Council on Intergovernmental Relations. Dr. Green is also a member of the Executive Committee of the National Conference of State Legislatures, and

has recently returned from the annual meeting which I understand was held in Anchorage.

Dr. GREEN. Yes, sir, it was.

Chairman STEVENS. I had my staff members there. I couldn't get up. Dr. Green, I am happy to have you with us too, and I hope you enjoyed your trip to Alaska.

Dr. GREEN. Thank you.

Chairman STEVENS. Senator?

TESTIMONY OF HON. DOUGLAS HENRY, A MEMBER OF THE STATE SENATE, AND CHAIRMAN, SENATE FINANCE WAYS AND MEANS COMMITTEE, STATE OF TENNESSEE

Mr. HENRY. Mr. Chairman, Senator Thompson, it is indeed an honor to appear before you. Mr. Black, I am sorry——

Mr. STOCKLER. Stockler.

Mr. HENRY. Mr. Stockler. I am sorry.

Chairman STEVENS. Senator, you may take a seat.

Mr. HENRY. As you please, Mr. Chairman. Mr. Stockler was telling me how he was practicing law in Alaska before the meeting began, and I enjoyed his account of that.

Mr. Chairman, it falls out that yesterday was—and last weekend was by statute in Tennessee the two days observance for Tennesseans who fought and fell in the war between the States. Last week, on the Union side where Senator Thompson spoke eloquently at the National Cemetery, and mentioned Admiral Farragut who was our great hero on the Union side in the war. And I attended that one. Yesterday I attended its counterpart of the Confederate soldiers at the place called Confederate Circle here. And I was thinking that how those Tennesseans were vigorously divided in that war and fought hard on both sides. Even a Tennessean who most vigorously advocated the constitutional position of Mr. Lincoln at that time, if he could see today the relationship between Tennessee and the U.S. Government, would be astounded, I do believe. And that is the background against which I speak.

People throughout history, Mr. Chairman, have forcibly removed the tyrant's heel and proclaimed freedom, only to find liberty short lived.

Three centuries ago, the Roundheads of England did so to the Stuart monarch. Cromwell was elevated to "Protector of the Commonwealth", and shortly, by reason of his regime's excesses, it gave way to the Stuarts.

Two centuries ago, the Parisian mob guillotined the Bourbon king and the aristocrats. They proclaimed "Liberty, Equality, Fraternity." And France was first paralyzed by the avenging zeal of revolutionary tribunals and then exsanguinated by the ventures of the emperor erected to restore order and greatness, Napoleon Bonaparte.

From South America to Russia, the story was repeated. And you mentioned your brief history. Not so, Mr. Chairman. I think Russia and America began about the same time the territories south of the Ohio, so we have an equal heritage.

So liberty can be achieved, Mr. Chairman, but hardly held, unless people of political sophistication and experience employ forethought. Why? Because human nature is such that, with the best

of intentions, the liberators will use their power as only they think best, even at the expense of others' freedoms.

How then to restrain the liberators? By providing that they alone are not to be the sole source of government power. And how to do that? By dividing government power, or sovereignty, among more than one sovereign.

Federalism is a tested method of doing this. Federalism, of course, is not infallible. Failed examples include the German Empire of the Hohenzollerns, Brazil, Mexico, and the Soviet Union.

On the other hand, the experiences of the United States, Canada, Switzerland, and Australia demonstrate how the Federal system nurtures and protects liberty.

Federalism is not static, but changes with conditions. Our country's first federation was the Articles of Confederation. When the Articles' decentralization proved impractical, the Constitution was born.

But practicality is a tricky compass, speaking of the Gun-Free School Zones. Mussolini boasted that he "made the trains run on time." Fascism ranked well on the scale of the practical.

Our Nation's founders were sophisticated men. They drew a Constitution that was practical, but, mindful of the dismal history of undivided power, amended the document to limit the central government's authority. The Tenth Amendment reads, "The powers not delegated to the United States by the Constitution nor probited by it to the States, are reserved to the States respectively, or to the People."

As the United States evolved, the voices of practicality called for greater centralization. The range of the commerce clause widened. The taxing power and the general welfare provision of the preamble has been used by Congress and the courts in a "practical" manner to achieve broad ends of public policy. The due process and equal protection clauses of the Fourteenth Amendment have had far broader and beneficial consequences, but with the effect of transferring more authority to the central government.

Nevertheless, through all those changes, the Tenth Amendment, reserving the undelegated powers to the States and people, has rested and remained in the written Constitution and in general understanding, as a limit beyond which the central government cannot pass.

The *Federalist Papers* written to induce the ratification of the Constitution, assured only certain powers would be delegated to the central government.

Even so, the Tenth Amendment was insisted upon as a safeguard against excess by the central government.

The Constitution in Article 1, Section 8, empowers Congress "to establish post offices and post roads" and "to regulate commerce with foreign nations, and among the several States, and with the Indians tribes." Yet, the Congress has passed wide-reaching statutes regulating use of the mails, and under the commerce clause, the Racketeer Influenced Corrupt Organizations Act (RICO) to fight crime. Under postal and RICO laws, State and local officeholders can be charged with corruption and convicted by the United States. From the prosecutor to the judge, every Federal official involved is appointed, not elected. Not a single constituent's vote is

cast for any of the Federal officials whose combined acts can deprive the defendant of liberty and property. If the defendant were tried by the State, at least the functionaries who effect the conviction would have to stand the test of the ballot box.

While the Tenth Amendment remains in the Constitution, one might say that the limitation still stands and in a proper case can be relied upon.

But that belief today is hardly tenable. In *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 1985, the U.S. Supreme Court responded to a Tenth Amendment argument:

"Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the commerce clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of commerce clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of State autonomy.'"

Thus the Court deprived the Tenth Amendment of any significance as a substantive limitation upon Congress or the Federal Executive Branch. Three years later, that Court said, "Where, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated." (*South Carolina v. Baker,* 485 U.S. 505)

How gross a contrast with the soothing prediction of Madison in *Federalist*, No. 45:

"The powers delegated by the proposed constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State."

How wide a departure from Madison's words in *Federalist,* No. 51:

"First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivides among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

Of the U.S. Constitution, Article 8, Section 18 (the necessary and property provision) and Article 6, Section 2 (the supreme law of the land provision) Hamilton said in *Federalist,* No. 33:

"They are only declaratory of a truth which would have resulted by necessary and unavoidable implications for the very act of con-

stituting a Federal Government, and vesting it with certain specified powers."

Yet a casual survey of the annotations will show that the supreme law of the land provision has been extensively relied upon by the courts in upholding Federal authority, whereas in *Garcia* and *South Carolina,* the Tenth Amendment has been reduced to a condition of impotence.

Garcia dealt with labor law; *South Carolina* with taxation of bond interest. But those topics are not of transcendent importance.

The emasculation of the Tenth Amendment, adopted to reserve without question to the States their authority in all matters not delegated, first among which is personal liberty, is the most dramatic constitutional event of our time. So cavalier a holding, that States' citizens must beg relief from a far-off Congress from whatever that Congress may have voted to do to them, staggers belief and would have been dismissed as airy speculation not only by the advocates of the Tenth Amendment, but by Madison as well.

One may say, "I rest content for the preservation of my liberty upon the good judgment of the people and their elected officers." What then of the taxpayer's pocketbook? As fiscal necessity throttles Federal grants, may we assume that Congress will accordingly suspend its mandating of costly programs upon cities, counties, and States?

The Members of Congress are elected, as they see it, to legislate, and legislate they will as do we in the legislature. Under *Garcia* and *South Carolina,* there is absolutely no constitutional protection against their "meeting a need" (unmet "needs" are as easy to find as vocal constituents) by mandating a national program upon all cities, counties or States, and furnishing not one cent to pay for it. Payment will be had by mulcting again local taxpayers through their State and local governments. Those governments cannot create money, as can the Federal Government. The bill must be paid by money exacted from savings or property, and if not paid, will be satisfied by the city, county, or State treasury by a decree from the Federal court.

Although the five-to-four decision in the *Lopez* case (115 S. Ct. 1624) offers some hope, where can relief be found for cities, counties and States made up of their citizens, taxpaying and jealous of their liberties? In humble petition to the Court which has crumpled their shield? In humble application, as the Supreme Court has instructed, to the Congress, to which the Supreme Court has given nearly unlimited license? Hardly so.

The first order of the day must be restoration of the tension between sovereigns, for the preservation of Americans' liberties, and their property as well, under and by means of the Federal system. Constitutional action may well be indicated, but S. 1629 is a splendid step in the right direction.

Thank you for hearing me.

[The prepared statement of Mr. Henry follows:]

PREPARED STATEMENT OF HON. DOUGLAS HENRY

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Chairman STEVENS. Thank you, Senator. We will come back to you in a minute. Dr. Green?

TESTIMONY OF DR. HARRY GREEN, PRESIDENT, TENNESSEE ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS

Dr. GREEN. Thank you, Senators. That is Senator Stevens and Senator Thompson. I want to compliment you on taking the leadership on this bill. For some years now, there have been a lot of interest in trying to bring about restoration and balance in the Federal system. As you two know very well, the big seven public interest groups have mostly taken positions supporting legislation over the past few years has been introduced that would do that, and including support for the Unfunded Mandates Act of 1995. So I do compliment you for taking this leadership. And I also appreciate the opportunity to have been invited here this morning.

And I want to tell you, briefly, a little bit about the Tennessee Advisory Commission on Intergovernmental Relations to explain to the Committee what our interests are. As you might perceive from the title, we are concerned about basically policy issues dealing with intergovernmental issues. And one of the exercises that we at the staff go through periodically is trying to determine if there are any issues in the public sector that are not intergovernmental. We do not often identify any. So we have perspectives of Federal, State, and local on almost every issue.

I wanted to take kind of a whimsical approach this morning and evolve, if I may, in certainly not the same standard of excellence that Senator Henry has done in his erudite presentation.

About 50 years ago, a textbook was written on the Federal Government, a book written by a political scientist named Morton Glaudskins. He was a very prominent scholar of Federalism in his day. He talked about what I call the convectionary theory of the Federalism, and he described Federalism for about the first 150 years in this country as being a layer cake; that is no matter where you sliced it, there were distinct roles for the Federal Government, distinct roles for the State government, and distinct roles for local government. And that continued for almost 150 years of our republic, including defined and an assigned tax basis to carry out those functions.

Well, of course, we know that given the period of the 1920's and the 1930's, and then subsequently after World War II, had an amazing transformation of Federalism. And Dr. Glaudskins referred to this period or the change in it as a marble cake example of Federalism; that when you sliced that cake, you would find that it was different where you sliced it. If you sliced it in New Jersey, or you sliced it in Alaska, or you sliced in Tennessee, you would have different roles for the Federal Government, the State government, and the local government. What you did find is a growing role for the Federal Government everywhere.

In the 1980's, another well-known scholar of Federalism named Woldowski referred to what we had achieved at that time in terms

of the Federalism as fruitcake Federalism. No matter where you sliced it, in Alaska or in Tennessee, that it was all the same, the same ingredients. You had the same involvement. The Federal Government was deeply involved in the conduct of public affairs at the State and local level. If you will, a diffusion of Federal authority despite the Tenth Amendment.

We have reached now, what I call the rancid nut cake period where no matter where you slice the cake, everybody is unhappy and dissatisfied with Federalism and what it has become, particularly at the State and local level.

I have just come back from Alaska, Senator Stevens, and I had a wonderful time in that magical State of yours. It is fascinating. We did discuss briefly this bill, and Paul Stockler made a presentation to the Executive Committee of the National Conference of State Legislatures. As you know, there are members of the leader—Senator Lack of New York has already made a public statement by the support of NCSL for this legislation and similar kinds of legislation.

I think that what has happened to Federalism in this country is that it is been nationalized. It has not been Federalized. In a sense, we had Federalism, but we have nationalized Federalism so that we have given the Federal Government what has become a preeminent role, and that has to be changed.

The Advisory Commission in Tennessee is composed of State and local officials, and private citizens; and we have been talking about these issues for many years. Senator Henry is a member from the Senate side, and Representative Bragg, who is not here this morning, is a member from the House side. We have ten legislators, two members from the Executive Branch appointed by the governor, and five private citizens, four county officials, and four municipal officials. And there has never been an issue brought before the Commission to tackle a position to restore the traditional balance of power in our Federalism that has not been adopted unanimously.

Senator Thompson hasn't been in office very long, but I know that he has received a lot of letters from the Commission in which we have taken positions and sent resolutions to him, so that he knows what this particular group of leaders in Tennessee, legislative, executive, and local government, feel about the problems of Federalism.

We have on our agenda tomorrow—we are meeting this week, as you know, Senator, this afternoon and in the morning. Tomorrow, we have on our agenda a review of some work that we have done—the staff has done for the Commission on the issue of the impact of Federal unfunded mandates in Tennessee.

You also are aware from the research that is conducted by your organizations: the Congressional Research Service, the Congressional Budget Office, and a recent study by the US–ACIR, you know that there are vast differences of opinion about what these impacts are when you convert them into dollar terms. And it is very, very difficult to do that because these are very complex issues.

We have taken some of the studies that have been done and applied them to Tennessee. Two studies, one commissioned by the

U.S. Conference of Mayors, one commissioned by the National Council of County Governments—we have taken those two studies, plus one that has been done in Tennessee, plus some work that we ourselves have done, plus the work that was done annually by the Department of Finance Administration in the State of Tennessee. The Department of Finance Administration is responsible for producing the executive budget every year, and has made it their responsibility for a number of years to include in that budget, an assessment of the impact of Federal mandates on the State of Tennessee, not including local government. We have tried to put all that together. And looking toward this next fiscal year, Fiscal Year 1997, when we look at our data, our estimate of this impact on State and local governments in Tennessee is approximately half a billion dollars. Now, granted that there is controversy about any of these costing methods, if we take that into consideration and even cut it in half, every year this number grows. So if we said that the impact in Tennessee on State and local governments is in the neighborhood of $250,000 to $500,000 every year, that is a significant amount of money. Compare that with the money that we are putting into our educational reform package which has been 5 years of funding. We are putting about $100 million a year, each new year into that reform. The unfunded mandate burden is considerably more than that.

So in summary, I think we can say to you that this initiative you are taking is a very important initiative. Many of us in Tennessee certainly want to support this, and we encourage you in this effort. And I thank you again for this opportunity to present these views.

Chairman STEVENS. Well, I like your style of cooking, Doctor.

Senator I would just ask you a couple of questions. Let me preface this by telling you why I got interested in this. One of my great friends over the years became mayor of the City of Anchorage, and he found that—you may have heard about this up there, Dr. Green—he found that the—well, we needed a secondary treatment plant for our local water system in some areas of the city, and so we put that in. And the EPA came along and proceeded to cite the City of Anchorage and was going to fine it, because the Federal requirement was the secondary plant had to take out a specified amount of pollution in order to prove that it was effective. Well, the water coming into a great portion of the city, there it is absolutely pure, so there is no way to take it out. So Tom figured it out. Tom Fink was this fellow's name. He's a good friend still, and he figured out that it was going to cost us a substantial amount of money annually, or we were going to have to find some way to take that pollution out. So we have a fish processing facility on the edge of town there on the inlet. Dr. Green, you have seen that beautiful inlet.

Dr. GREEN. Yes.

Chairman STEVENS. And he did the simple thing of going over and buying fish waste every day, and he dumped it into the intake. Then he took it out, and the EPA said, "Well, it did qualify," and they didn't fine the city. And really, he wrote a paper that led actually to our good friend from Idaho, Dirk Kempthorne who's coming to the Senate—he had been former mayor of Boise—with his concept of unfunded mandates. But when we looked at it, unfunded mandates is just not enough. And I do thank you for your state-

ments, Senator, as Dr. Green said, for your erudite statement. You have served here in the State legislature. I served in the State legislature in our State, and I have strong feelings about being told what we couldn't do when we are members of the State legislature because of the Federal act of Congress passed under the theory that one size fits all.

Mr. HENRY. That's right.

Chairman STEVENS. I don't know how many acres you have in your State. We have 375,000,000 acres, one-fifth the size of the United States as a whole. But Federal Government seems to think that legislation designed to fit your State is very adequate to deal with the problems of the frozen northern tundra.

Mr. HENRY. Well, that's a very good point, Mr. Chairman. I was thinking while you were speaking, now, you take Senator Thompson from his home county of Lawrence. I think it lies against the Alabama border; isn't that right?

Presumably you could have a very legitimate requirement that Tennessee not pollute water that flows into Alabama. I think that's entirely proper. But on the other hand, where you don't touch any other State; I think you touch the Yukon Territory, don't you—or something over there; is that correct?

Chairman STEVENS. That's correct.

Mr. HENRY. And I don't see any justification at all for the Federal Government reaching inside the boundaries of Alaska. And if you all decide that you want a certain level of water pollution or non-pollution in your domestic waters in Alaska, it doesn't affect any other State. I would say that's your business, but that's not so in Tennessee, if we are going to flow into Alabama. That would be my response to what you said.

Chairman STEVENS. Well, we are all for the clean water. The problem is that sometimes people don't realize it is clean already. It is pure already.

Mr. HENRY. Yes, sir. That's very agreeable.

Chairman STEVENS. You are a member of this Advisory Council of Intergovernmental Affairs, Dr. Green, that's involved with this, right?

Mr. HENRY. Oh, yes. Mr. Braggs is the Chairman of the Advisory Committee. Dr. Green is the Director of it.

Chairman STEVENS. Have you had any instances here that we might take back to the Congress of examples of the over-extension of Federal authority as far as your State and your functions within your State?

Mr. HENRY. Well, several years ago, the City of Columbia had to do some right expensive water treatment, and the State had to give them a subsidy to get it done, which we thought—and the engineers thought it was pretty unreasonable. It was the question of water purity, water clarity. And Dr. Green probably carries in his head the instances that have been reported to the Commission. I yield to him.

Dr. GREEN. Well, none as vivid as the one that you recounted, Senator. One of the instances, though, that we have learned about deals with the question of the Americans with Disabilities Act, and one of the requirements of public buildings is that elevator buttons be put at a certain level. And one of the concerns that had been

expressed about that is not an objection to complying with the Americans with Disability Act, but if you have a large bank with elevators or even four, why should every panel have to be changed? You have one elevator that you would delegate to be for persons eligible for special treatment under the ADA, but why change every elevator when the volume of traffic that uses those elevators is not very high? And of course, that's a very difficult question to answer, but it does require an attitude of some flexibility in administrating regulations. It is certainly permissible, for example, to do—to make a correction like that, but without having to do it for six elevators. Do it for one elevator. And there are instances in our larger cities with our large buildings where that has been the case. I am talking here about the public sector, and I am not sure about how that's applied to the private sector. But as you perceived, we would be pleased to do a canvass to try to collect instances that might be helpful to you from Tennessee, if you would like for us to do that.

Chairman STEVENS. That would be very helpful, I think.

Senator Thompson, do you have any questions?

Senator THOMPSON. Yes. Thank you, Mr. Chairman. Gentlemen, thank you very much for coming. You certainly are two of the most knowledgeable people in this area that I know.

I think it is important for people to understand that Federalism is not just a desire, but it is constitutionally required, and that has to do with the Tenth Amendment. It is not just a matter of States' rights as we normally think about it. I mean, it is a part of the Constitution. It is there for a purpose.

The point that Senator Henry made about the court interpretation is, I think, very well made through the interstate commerce clause, the general welfare clause and all that. It seems like through these courts, it is basically saying that the Federal Government is operating the way the courts think they should. Then the Tenth Amendment is basically a nullity. It is only when the Federal Government is not doing a good job, according to the court's interpretation, that it kicks in. And of course, we all know that that's not the way that it is going to be or that it was set up to be.

But what I want to ask you about, in your experience with State government and dealing with the Federal Government, how do we reverse this procedure from a practical standpoint? It seems to me like that so much of this problem has to do with Federal grants and monies coming into the State. My information is over a third of all State expenditures nationwide is devoted to mandating Federal—or to match its Federal entitlements and Federal grants. And of course, there for awhile, you know, we were—the Federal Government was putting out mandates and sending the money. Then they got to where they would send the mandates and not send the money; and hopefully we have done something about that. But from a State standpoint, most of these things we mentioned are tied. The reason the strings are there, the reason the mandates are there, is because it is tied to money that's being sent into the States.

I just got a letter from a person in Chattanooga talking about a program over there whereby retired people are invited in to work with these young children. And I think it is probably one of the

best things going in terms of prevention of juvenile delinquency. We know the problems there. And getting these elderly people in who have a little time and who are capable, to just let them have something to do with these young children, I think it is good for both of them. But they were concerned because there has been a seven percent cutback on the Federal money for that. When did we get into the business of Washington, D.C. deciding how much money Chattanooga ought to be spending to get a retired person across the street or down the street or across town to meet with some children? How do we reverse that process? Or are what we talking about now, we want the money but no strings? Do we still want the money? Or if we cut the money off, we can't do that precipitously. Of course, that leaves the State at greater disadvantage. Do you have in mind a process that we can work our way out of this situation?

Mr. HENRY. Mr. Chairman, Senator Thompson, Dr. Green is much wiser there in these matters, and I yield to him, but let me try to respond to your question. You know before 1935, 1936, or 1937, or somewhere in there, we had no national welfare system. Whatever was done in that area—and this is an offshoot of it, I think you are talking about—was done by cities and counties. Then we put out a national system. And today, Tennessee receives, I think, 75 cents on the dollar of the actual grants that are paid out. Well, obviously, if the subsidy voted by you, gentlemen, is three quarters of the total program, the program, if we elected not to take the subsidy, would cease to exist. So it is all built in as a part of the expectations of the people.

If you gentlemen could prevail upon your colleagues to—I know you can't just send me the money, because your constituents expect you to vote wisely, I understand, just like mine do. But I think this bill you propose here, Mr. Chairman, is the best idea I have seen so far where your folks, your colleagues would have to look at what they are doing as they do it. And maybe over a period that will make them aware of the fact that results, such as Senator Thompson pointed out in Chattanooga, are silly and unintended, and not what the national government is all about, I think it is a great plan. I know Mr. Stockler came and presented at the CSG Executive Committee where I was sitting, and it was generally very well received. But you had some people table there, State legislators who were active enough to get on the CSG Executive, who were dragging their feet and saying, "No, no. We don't want to rock the boat." So that is what you are going to run into locally, as well as in Congress. Were you in CSG, Mr. Chairman? Were you active in CSG when you were in legislature?

Chairman STEVENS. I was active in the State legislatures, but not the CSG.

Mr. HENRY. Okay. Well——

Senator THOMPSON. Dr. Green, do you have any——

Dr. GREEN. I wish I had a solution to that, Senator, but obviously, we are never going to go back to layer cake Federalism. There's always going to be financial ties. Those are never going to be changed entirely. I think in my view, the major problem that we have with resolving some of this is our run-away Federal budget deficit. If we didn't have such pressure from the Federal budget

deficit, we probably could come up with the plan where we could work this out over a period of time. Federal programs probably should be permitted to shrink. Obviously, when there is money in a place like Chattanooga or Nashville, or someplace else that is driving a good program, it is very difficult to accept those reductions. And as we know, most of the reductions have been in those kinds of programs, the discretionary side of the Federal budget. We continue to spend more in the non-discretionary areas, and that is rising. So while we benefit from that as the funds flow through State and local government, what we see is the impact of the cuts in the discretionary programs. That's not going to be accepted easily to reduce those.

Senator THOMPSON. Twenty-three million dollars this year at Federal Government level from last year——

Dr. GREEN. From last year.

Chairman THOMPSON [continuing]. Is being cut all from discretionary.

Dr. GREEN. All from discretionary.

Senator THOMPSON. On the 7-year balanced budget we are talking about, it is all presumed on even more drastic discretionary cuts in the years.

Dr. GREEN. Which is going to have a very significant effect upon State and local governments. Seven years is a very short period of time in which to accept and adjust to those kinds of changes, both at the Federal and State and local levels, in my view, because in some cases, if a program is desirable, and it is going to be continued at something close to its present level of funding, would mean that State and local governments would have to take over that share of the Federal program in this period of time as it is cut. In places like Tennessee, if it is the local government, well, we know that means substantially that it will have to come out of improvement in management. And if we grant a 10 percent improvement there for management, then any other change above that would have to come out of the increased taxes, and that's the property tax in Tennessee. And, as we know, the property tax everywhere is the most hated of all taxes, even more so than the payroll tax for social security. So there is no easy answer to this. I think you have asked a very pertinent and provocative question. And we, at the State and local level, have to be prepared to come up with plans to deal with this as the Federal Government begins to try to downsize their expenditures.

Senator THOMPSON. Maybe we have a situation as we did with unfunded mandates; and that is, we can't go back. We are not going back. Some of us are still going to try to go back there, but we are basically dealing with the future. If we could just from here on, really stop and think about when we sit up there and come up with a Federal program that reaches into the most detailed local activity, this will make us hopefully stop and think about it, and analyze it, and say, "Yes, we can do this better than the State and local government." And maybe it will at least stop it in the future.

Mr. HENRY. I would hope your folks would maybe not make that inquiry: "Can we do it better than State and local government?" I hope they would make the inquiry: "Is this something that the Federal Government is authorized to do?"

Senator THOMPSON. That's part of it too.

Mr. HENRY. I know it is hard for you to make that sale. That is a tough sale to make.

Senator THOMPSON. It would require both. I was reminded when going over this of something I read back last year that made a real impression on me, a book called "Living the American Dream" by Alice Rivlin——

Mr. HENRY. Yes, she's good.

Senator THOMPSON [continuing]. And as you know, who has just, I believe, recently been appointed to the Federal Reserve, but served as President Clinton's OMB director and former head of the CBO. And she's talking about this issue of Federalism, and I was just wondering what you thought about something that she said. She said, "Federal activism in the 1960's and 1970's spread from poverty and civil rights into many other areas. Turning to Washington for help became routine. Pollution, transportation, recreation, economic development, law enforcement, even rat control provoke the same response of politicians: Create a Federal grant. National concerns shifted from one problem to another, but existing grants were never terminated. The result was an accumulation of more than 500 categorical programs, each with detailed rules, formulas for matching and distributing the money; bureaucracies charged with carrying out and overseeing the program; and beneficiaries and professional groups with an interest in perpetuating and enlarging the grants. States and cities learn to tailor to their budgets to maximize Federal funds." Unfortunately, they sometimes neglected more routine activies. Mayor Koch, for example, talked about everyone wanted new roads and bridges, and they did what was necessary to get that, but it lost at the expense of routine maintenance of the unglamorous, but essential kinds of work. Does any of that ring true with you?

Mr. HENRY. During that period, as you gentlemen know, a whole category of professional occupations grew. People were employed because of their ability to pursue these grants. It worked that way, Senator Thompson, and I was on the MAC Commission here to administer the Rat Control Program, and I asked the rat catcher one time, "How are we doing? Are we getting rid of the rats?" "Yeah, we are getting along." I said, "Well, when do you think we'll have the rats all eliminated?" And he hemmed and hawed, and I asked the director about that, but he said, "Well, we will never get them eliminated because then what happens to the rat catcher's job?" And I said, "Well, I understand that too." But they did have that effect. There's no more reason for you, gentlemen, to be funding rat catching in Nashville, Tennessee, than it is the State of Tennessee to be funding the U.S. Navy. That's just not the way the system was designed. And I don't know what to tell you, Senator Thompson, except that you are right on target in trying to reduce the Federal debt. I hope you never waiver in that. I am for that 110 percent, even though it is going to cause some pain here, but I hope you can direct your attention not only to the discretionary expenses, but to some of the non-discretionary expenses other than defense. That's just my pet project. That's an editorial comment. Disregard that.

Senator THOMPSON. As you know, we are doing it the other way around right now.

Mr. HENRY. You are doing it the other way around right now, that's correct.

Senator THOMPSON. I agree with you.

Mr. HENRY. So I hope you all keep your eye on that ball. I think that is very important, even though it causes us some pain.

Senator THOMPSON. Do you have any further statements?

Dr. GREEN. Well, I certainly concur with Alice Rivlin's observations about the evolution of the role of Federal Government there. Obviously, there are interest groups, and you will hear from some of them I am sure, as discretionary funds are cut, who are promoting a single program without some kind of a vision of how that program fits into dealing with larger issues. I think we have a number of those kinds of problems in Tennessee, for example, solving the poverty problem. The grant system is so fragmented that it is impossible to determine whether or not we are really having an impact when we put all the money together. We have no strategy for doing that, and I think that we need to do two things here: One, we need to begin working on eliminating that fragmentation, or maybe some of the programs entirely while focusing on trying to maintain what effective cooperative relationships that need to be made—we need to have between Federal and State governments and local governments.

Mr. HENRY. Mr. Chairman, Ms. Rivlin is a very bright lady. She's on the other side of the political aisle, and how she wound up with this administration, I do not know. But at any rate, they've got her over at the bank now, but it would be worth your while sometime to just have a conversation with her. She's got explicit ideas on this proper division between you all and us, that I thought made good sense when she stated them to our Executive Committee one day.

Chairman STEVENS. I have had extensive meetings with her——

Mr. HENRY. Well, good.

Chairman STEVENS [continuing]. When she was with the Congressional Budget Office.

Senator THOMPSON. She thinks the Federal Government ought to concentrate on balancing the budget——

Mr. HENRY. She's a bright lady.

Senator THOMPSON [continuing]. And let the States and local governments do things traditionally reserved to them. That's all I have to say.

Chairman STEVENS. Well, gentlemen, thank you very much. I might tell you in the next Congress, Senator Thompson is going to be Chairman of this Committe. I will be Chairman of the Appropriations Committee. And one of the reasons I am very interested in this is just what Senator Thompson said. There is just not going to be money to keep up some of these programs, and I think that the mandate concept is going to be stretched to its limits if people want to continue these programs that really mandate that there be these one-size-fits-all type of programs without the money to go buy them. The States are going to be very hard pressed to keep up the turn of the century, I think, unless we find some solutions such as we have in this bill. Thank you for your time.

Mr. HENRY. We thank you, Mr. Chairman, for taking the time to come see us. We look forward to seeing you this afternoon at the meeting.

Chairman STEVENS. Thank you, Senator. Thank you, Doctor.

Dr. GREEN. Thank you.

Chairman STEVENS. We are going to turn now, if it is all right with Senator Thompson, to Walter Bulter, the County Executive of Carroll County, and Robert Foster, Jr., Deputy Director of the Tennessee Division of Water Supply. We have skipped over one panel. We'll get back to them.

Mr. Butler, we appreciate your being here today. We would like to have your comments on the Tenth Amendment legislation we propose. And why don't we proceed first with you, if that's all right.

TESTIMONY OF WALTER BUTLER, COUNTY EXECUTIVE, CARROLL COUNTY, TENNESSEE

Mr. BUTLER. Thank you, Mr. Chairman, Senator Thompson, and Members of the U.S. Senate Governmental Affairs Committee. I want to thank you for inviting me to testify on behalf of a basic fundamental principle we often overlook or have simply forgotten, the Tenth Amendment of the Constitution of the United States of America. Twenty-eight words that simply say to us, "The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Twenty-eight words, that when ratified on December 15, 1791, helped States and the people retain powers to keep the national government from literally swallowing us up. The Tenth Amendment gave assurance that the States or the people retain all powers not given to our national government. With that short background in mind, then why are we here today? Or why do we speak on behalf of the Tenth Amendment Enforcement Act of 1996?

Mr. Chairman, Senator Thompson, this Tenth Amendment Enforcement Act should not be needed, but in reality we all know it has become a necessity. As Chief Executive of Carroll County, Tennessee, (The Bell Wether County of America), home of 28,000 citizens, I often tell people that the big difference between governing Carroll County and the government in Washington, D.C., is that my lobbyists and my consultants are my citizens—the people who literally can walk into my office with a problem, and hopefully leave with a solution. They can and do call me at home. They can and do talk to me at the dairy bar. And they can and do offer me some of the most progressive solutions to the seemingly massive problems that we face. As you know, the last four words of the amendment read, ". . . or to the people."

"Or to the people." Powers reserved to the people. This amendment was written by the people. It was written for the people. I believe the Tenth Amendment Enforcement Act of 1996 will allow the people to benefit by allowing the Federal Government, State and local governments, and the people to all retain the proper balances again between each other. Somehow we have gotten away from that. A farmer in Carroll County watches his cropland or timberland become flooded more and more each year because beavers have damned up the stream on his land. It is his land. The simple solution—remove the beaver damn. Wrong. Federal agencies

require permits to be issued to allow cleaning of creeks or streams. Federal courts back this thinking up. A wetland created by these beavers on John Q. Public's land. Can local homeowners or farmers clean it up to put corn like it was in 1979? No. Have you tried as John Q. Public to get this permit? I ask you to try. The roadblocks are not just Federal agencies; it has become the Federal courts. We all want a healthy environment, a clean environment. We also want corn, timber, and a balance. The Tenth Amendment—". . . or to the people."

No rooms for young people in trouble with the law. Our local juvenile judges were finding teens guilty of criminal acts. Because of no place to put them in State custody, many were turned loose while waiting for a room. And you know the answer. They are in more trouble before they can be put in proper care and detention. Carroll, Henry, Benton, and Weakley Counties Juvenile Courts came up with an innovative day treatment program that began September of 1994. The result—referrals to State custody have already dropped over 35 percent. This program is running at $65 per day per student. These same students that are placed in State custody, costs the State of Tennessee $145 per day. We keep the students at home. And if they do not come to school, we place their parents under arrest. Do you think we have a truancy problem? You know we do not. Our local superintendents, law enforcement officials, and counties love this concept and program. It is working. It is not status quo. Then what's wrong? It was funded 55 percent Federally, 45 percent State, and we furnished the local facilities. Someone forgot to tell the Inspector General, though, that local folks can have good workable ideas. The Inspector General decided that your Federal Title IV–A money should not be spent like this 15 months after we are into the program with $250,000 later after local money has been used to restore a building. And now we are desperately trying to save the most efficient, innovative program I've ever seen. We need your Federal dollars. We can save you and the State of Tennessee money—$80 per day per student. But more importantly, we are saving children before they get into permanent trouble with the law. We keep them at home, give them daily counselling at a student/teacher ratio of eight to one. Their grades, self-esteem, and hopes rise. A program run locally, working and yet now facing extinction, the Tenth Amendment—". . . or to the people."

These are just two brief examples. I urge you to do what you can to pass the Tenth Amendment Enforcement Act of 1996. Make sure power goes back to the people. I think you will find people will respond. Do not sell short the resourcefulness of our citizens. Instead, return Federal programs to us. Give us the resources to do the job, and we will save you money. We will adapt programs to fit our needs and we will have results. If the results are not forthcoming, our citizens will walk into my office and let me know, and we will find a new solution. That's the way "We the People of the United States" meant for it to work all along, don't you think?

Thank you, sir.

[The prepared statement of Mr. Butler follows:]

PREPARED STATEMENT OF WALTER BUTLER

Mr. Chairman and Members of the U.S. Senate Governmental Affairs Committee, thank you for inviting me to testify on behalf of a basic fundamental principal we often overlook or have simply forgotten, the 10th Amendment of the Constitution of the United States of America. Twenty-eight words that simply say to us—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Twenty-eight words that when ratified on December 15, 1791, helped States and the people retain powers to keep the national government from literally swallowing us up. The Tenth Amendment gave assurance that the States or the people retain all powers not given to our national government. With that short background in mind—then why are we here today or why do we speak on behalf of the Tenth Amendment Enforcement Act of 1996?

Mr. Chairman and Members of this Committee, this Tenth Amendment Enforcement Act should not be needed, but in reality we all know it has become a necessity. As the Chief Executive of Carroll County, Tennessee, (the Bell Whether County of America), the home of 28,000 citizens, I often tell people that the big difference between governing Carroll County and Washington D.C., is that my lobbyist and my consultants are my citizens—the people who literally can walk into my office with a problem and hopefully leave with a solution. They can and do call me at home, they can and do talk with me at the dairy bar and they can and do offer some of the most progressive solutions to the seemingly massive problems we face. As you know, the last four words of the amendment read—"or to the people."

"Or to the people." Powers reserved to the people. This amendment was written by the people. It was written for the people. I believe the Tenth Amendment Enforcement Act of 1996 will allow the people to benefit by allowing the Federal Government, State and local governments, and the people to all retain the proper balances again between each other. Somehow we have gotten away from that. A farmer in Carroll County watches his cropland or timberland become flooded more and more each year because beavers have damned up a stream on his land. It's his land! Simple solution, remove the beaver damn. Wrong! Federal agencies require a permit to be issued to allow the cleaning of creeks or streams. Federal courts back this thinking up. A wetland created by these beavers on John Q. Public's land. Can local homeowners or farmers clean it up to put corn back like it was in 1979. No! Have you ever tried as John Q. Public to get this permit? I ask you to try! The road blocks are not just Federal agencies, it has become Federal courts. We all want a healthy environment, a clean environment. We also want corn, timber, a balance. The 10th Amendment—"Or to the People."

No rooms for young people in trouble with the law. Our local Juvenile Judges were finding teens guilty of criminal acts, but because of no place to put them in State custody, many were turned loose while waiting for a room. And you know the answer, they are in more trouble before they can be put in proper care and detention. Carroll, Henry, Benton and Weakley County Juvenile Courts came up with an innovative day treatment program that began in September of 1994. The result—referrals to State custody have already dropped over 35 percent. Thirty-five percent! This program is running at $65 per day per student. These same students if placed in State custody, costs the State of Tennessee $145 per day. We keep the students at home and if they do not come to the school we place their parents under arrest. You think we have a truancy problem? You know we do not. Our local superintendents, law enforcement officials, and counties love this concept and program. It's working! It's not status quo! Then what's wrong? It was funded 55 percent federally, 45 percent State, and we furnish the facilities locally. Someone forgot to tell the Inspector General that local folks can have good workable ideas. The Inspector General decided that your Federal Title IV-A money should not be spent like this and now we are trying desperately to save the most efficient and innovative program I have ever seen. We need your Federal dollars. We can save you and the State money—$80 per day per student. But more importantly, we are saving children before they get into permanent trouble with the law. We keep then at home, give them daily counseling and a student-teacher ratio of 8:1. Their grades, self-esteem, and hopes rise. A program run locally, working and yet now facing extinction. The 10th Amendment—"Or to the people."

"Or to the People"—I urge you to do what you can to pass the 10th Amendment Enforcement Act of 1996. Make sure power goes back to the people. I think you will find people will respond. Do not sell short the resourcefulness of our citizens. Instead, return Federal programs to us, give us the resources to do the job and we will save you money, we will adapt programs to fit our needs, and we will have results. If results are not forthcoming, our citizens will walk into my office and let

me know. And we will find a new solution. That's the way "We the People of the United States" meant for it to work all along, don't you think?

Chairman STEVENS. Thank you very much. The next witness is Robert Foster, as I said, the Deputy Director of the Tennessee Water Supply, a very important position. I am glad you have come to be with us, Mr. Foster.

TESTIMONY OF ROBERT L. FOSTER, JR., DEPUTY DIRECTOR, TENNESSEE DIVISION OF WATER SUPPLY

Mr. FOSTER. Thank you, sir. I am pleased to be allowed this opportunity to contribute to the public debate on this issue. I believe the general public looks to government to be as efficient as possible, and to develop policy and protect them. The public is bombarded daily about terrible events that could happen to them ranging from airplane crashes, the hazards of cryptosporidium, the protozoan that contributed to the deaths of 100 people—approximately 100 in Milwaukee; E. coli in hamburger meat, toxic chemical in the environment, the HIV virus in blood and tissue, and even reports of mad cow disease from other countries. The public wants to drink water without having to worry about its quality. The growth of the bottled water industry suggests that a segment of the public lacks confidence in public water systems, or is unaware that the public systems must give newspaper notice or direct notice if monitoring or reporting requirements, or maximum contaminant levels are not being met. Perhaps some of the public just dislikes the taste of chlorine in water.

There's agreement, I think, by everybody that we have got to have safe water. The question of how safe the water should be leads to the controversy and to the issues I want to talk about. As technology progresses, mankind has learned to detect smaller and smaller quantities of toxic chemicals and pathogenic organisms, which intensifies the debate over how to assure water is safe. Municipalities, utility districts, businesses, and industries that furnish water to the public in addition to the consumers. And the State and local regulators are some of the best examples of those experiencing the impact of the Federal regulations. In 1971, Tennessee's drinking water regulations were printed on 14 pages; in 1988, 68 pages; and now it is contained on 207 pages.

While Congress should be commended for its support of safe drinking water, the Safe Drinking Water Act as amended in 1986 has led to the proliferation of regulations with a corresponding and sometimes unnecessary cost—increasing costs to producers, consumers, and regulators. Congress mandated through the 1986 Safe Drinking Water Act amendments that the Administrator of the Environment Protection Agency promulgate 40 new standards by 1989, and 25 new standards every 3 years thereafter. Absent from this mandate is an explanation as to why this set number of standards was critical to public health.

These additional requirements have resulted in the Tennessee Division of Water Supply having to increase its staff from 28 to 63 persons in order to implement Federal primacy requirements; in other words, to maintain control of water issues in this State, drinking water issues. It also forced public water systems to spend millions of dollars for tests and installation of additional treatment.

The Division of Water Supply's budget figures for the past 9 fiscal years show a threefold increase in State costs and a decrease in Federal support.

On the positive side of these Federal regulations, it was discovered that approximately 40 of the 1,131 water systems in the State had volatile organic compounds at detectable levels. As a result, additional treatment or abandonment of the source or continued monitoring was required.

The time frame allowed for ground water systems under the direct impact of surface water to comply with the Surface Water Treatment Regulations was too short. It was prescribed federally. Only 18 months was allowed for public water systems to fund, design, and construct filter plants. It takes some public water systems longer than 18 months just to come up with the financing. As a result, it has been necessary for public water systems to rush the design and construction of the filter plants likely leading to missed opportunities for economy.

There's some Federal regulations of significance which may not have been fully realized under the Safe Drinking Water Act. The higher price of water forced some apartment complex and condominium owners to sub-meter water to their tenants. The existing act makes an apartment complex owner which resells water, a public water system subject to all the regulatory requirements of the act, requiring a long and expensive paper trail. The provisions of the Safe Drinking Water Act not only placed administrative burdens on the State, but add political liabilities when debated among the law makers.

Until the Safe Drinking Water Act is reauthorized, the courts will continue to agree with the provisions of the act and force the EPA to continue issuing standards.

The EPA, were it not pressed for time to adopt a large number of standards to comply with the deadlines in the Safe Drinking Water Act, could have written its rules in a simpler format and in a manner which would have reduced the burden on States and public water systems, and yet possibly achieve the same or equivalent public health benefit. For the most part, the EPA regulations prescribe an inflexible schedule for public water systems to conduct biological, chemical, and radionuclide testing, and to install additional treatment. A single test for the chemical dioxin in drinking water costs about $550. Testing for all synthetic organic compounds can cost several thousand dollars. For a small water system such as a mobile home park with few customers, the cost can be and are often prohibitive, yet is it fair for rural customers to have less protection than an urban dweller? The prescribed procedures for testing radionuclides and nitrates offer public water systems little or no flexibility, and the public must regularly pay for tests that are likely to find no problem exists. Some of synthetic organic compounds such as the herbicide dalapon were only registered for use in 17 western States. Yet Tennessee must require public water systems to test for this chemical unless it issues a monitoring waiver. A monitoring waiver is good for only 3 years and must be tracked and renewed by the primary agency, adding to our administrative costs.

Under the biological monitoring requirements, a small public water system must collect five additional samples in the month following a positive sample. A single sample is not a violation of the standard. The positive sample requires repeat samples be taken immediately after the contaminant is detected. Repeating the collection of repeat samples doesn't make sense, it just increases the tracking that the State has to do and runs our costs up. Again, when the Division finds previously unregulated water systems that have grown into a regulated size just by the additional few customers or can grow into a regulated size by additional few customers, the system may begin seeking ways to avoid regulation due to the financial, technical and managerial burdens brought on by complying with the Safe Drinking Water Acts. Some successfully avoid regulation by reducing the number of customers they serve to below 25 or reducing the number of their connections to below 15. In earlier times, the small systems wanted to remain regulated in order to have the State run periodic bacteria coliform or coliform bacteria tests. With the recent amendments to the Safe Drinking Water Act, some potential systems are motivated by the increased burden to avoid regulation.

The Federal lead and copper rules revealed about 80 public water systems in Tennessee that supplied water corrosive to pipes and plumbing fixtures resulting in excess lead and copper concentrations. Small systems serving 25 had to take one lead and copper sample for every five people on the system. The City of Nashville, for example, had to collect 100 samples or one sample for about every 6,000 people. There's a differential between the large and small systems. I could go on listing additional details about Federal regulations under the Safe Drinking Water Act, but in the interest of time, I feel I ought to summarize.

While States can benefit from centralized research and standard setting ability of the EPA, in the absence of a crisis or inaction by local government, is it wise for Congress or the EPA to attempt to micro-manage issues it assigns to States to handle, or for Congress to place statutory burdens on the EPA without recognizing that the Courts can use the Congressional Acts to enforce their own environmental agenda? Congress should not pass laws without considering methods to relieve the financial burden on States and regulated community. Congress and the EPA should not assume one regulation appropriate for all States. For example, we have to test for Chlordane. Chlordane is a pesticide used for control of termites just like Alaska does. I rather doubt you would have many termites in permafrost of Alaska.

The Division of Water Supply is encouraged by these recent initiatives of Members of Congress identified in Senate Bill 1629, and also by the EPA, particularly Mike Muse to simplify the chemical monitoring requirements of the regulations, and provide States with flexibility they need to make common-sense decisions. I believe Congress should recognize that Tennesseans care more about their drinking water than anybody in Washington, and will do all they can to ensure its quality is satisfactory at a lower cost to the producer, consumer, and regulator. It has been my experience that regulatory activity is an iterative process. If the regulations are

within the State's domain, then the regulations can be corrected without an act of Congress.

I recall the only two major disease outbreaks associated with drinking water in this State since I have been Deputy Director. Both were caused by cross connections. The control of cross connections has received little or no interest by Congress or the EPA.

I thank you for allowing me to make that statement.

[The prepared statement of Mr. Foster follows:]

PREPARED STATEMENT OF ROBERT L. FOSTER, JR.

I am Robert L. Foster, Jr., Deputy Director of the Tennessee Division of Water Supply. I graduated from Middle Tennessee State University after earning a M.S. with a major in Chemistry. I began work with the State after being released from active military duty in 1967. I have been employed as Deputy Director of the Division of Water Supply since 1989.

I am pleased to be allowed this opportunity to contribute to the public debate on issues considered by this Committee. I believe the general public looks to governmental leaders and other experts to develop public policy designed to make government efficient and protect their interests. The public is bombarded by the media daily about terrible events that could directly impact them. These events include airplane crashes, the hazards of cryptosporidium, the protozoan that contributed to the deaths of approximately 100 people in Milwaukee, E. coli. in hamburger, toxic chemicals in the environment, HIV virus in blood and tissue, and even the reports of mad cow disease in other countries. The public wants to drink a glass of water without worrying about its safety. The growth of the bottled water industry suggests that a segment of the public lacks confidence in public water systems, or is unaware that public water systems must give newspaper or direct notice to their customers if monitoring or reporting requirements, or maximum contaminant levels are not being met. Perhaps some of the public dislike the taste of chlorine in drinking water.

There is general agreement that we must have safe drinking water. The question of how safe should the water be leads to the controversy. As technology progresses, mankind has the capability to detect smaller and smaller quantities of toxic chemicals and pathogenic organisms which intensifies the debate over how to assure the water is safe. Municipalities, utility districts, businesses and industry that furnish water to the public in addition to consumers and the State and local regulators are some of the best examples of those experiencing the impact of Federal regulations. In 1971, Tennessee's drinking water regulations were printed on 14 pages, in 1988, 68 pages and now, in 1996, contains 207 pages.

While Congress should be commended for its support of safe drinking water, The Safe Drinking Water Act as amended in 1986 has led to the proliferation of regulations with a corresponding and sometimes unnecessary increase in cost to the producers, consumers and regulators. Congress mandated through the 1986 Safe Drinking Water Act (SDWA) amendments that the Administrator of the Environmental Protection Agency promulgate 40 new standards by 1989 and 25 new standards every three years thereafter. Absent in this mandate is the explanation of why a set number of new standards was critical to public health.

These additional requirements have resulted in the Tennessee Division of Water Supply having to increase its staff from 28 to 63 persons in order to implement the Federal primacy requirements. It also forced public water systems to spend millions of dollars for tests and installation of additional treatment. Division of Water Supply's budget figures for nine fiscal years showing the threefold increase in State costs and the decreasing percentage of Federal support follows:

Division of Water Supply Budget Figures By Fiscal Year

[In Dollars]

Fiscal Year	Federal	State	Total	Federal Percentage
1988–89	392,100	700,200	1,092,300	36
1989–90	405,400	750,608	1,156,008	35
1990–91	419,100	910,608	1,329,708	32
1991–92	579,000	1,605,900	2,184,900	27
1992–93	598,800	2,205,900	2,804,700	21
1993–94	628,900	2,205,900	2,834,800	22
1994–95	688,800	2,205,900	2,894,700	24
1995–96	688,800	2,205,900	2,894,700	24
1996–97	721,500	2,205,900	2,927,400	25

On the positive side of Federal regulations, it was discovered that approximately 40 of the 1,131 water systems in the State had volatile organic compounds at detectable levels. As a result additional treatment or abandonment of the water source was required.

The timeframe allowed for a ground water system under the direct influence of surface water to comply with the Surface Water Treatment Regulations was too short. Only 18 months were allowed for public water systems to fund, design and construct filters. It takes some public water systems longer than 18 months to locate financing for a major project. As a result it has been necessary for public water systems to rush the design and construction of filter plants likely leading to missed opportunities for economy.

There are some Federal regulations the significance of which may not have been fully realized. The higher price of water has forced some apartment complex and condominium owners to sub-meter water to their tenants. The existing act makes the apartment complex owners which resell water, public water systems subject to all regulatory requirements of the Act, requiring a long and expensive paper trail. These provisions of the SDWA not only place administrative burdens on the State, but also add political liabilities when debated among lawmakers.

Until the SDWA is reauthorized, the courts will continue to agree with the provisions of the act and force the EPA to continue issuing standards.

The EPA, were it not pressed for time to adopt a large number of standards to comply with the deadlines in the SDWA, could have written its rules in a simpler format and in a manner that would have reduced the burden on States and public water systems, and yet achieved the same or equivalent public health benefit. For the most part, the EPA regulations prescribe an inflexible schedule for public water systems to conduct biological, chemical and radionuclide testing and to install additional treatment. A single test for dioxin in drinking water costs about $550. Testing for all the synthetic organic compounds can cost several thousand dollars. For a small water system such as a rural school or mobile home park with few customers the costs can be and are often prohibitive, yet is it fair for rural customers to have less protection than an urban dweller? The prescribed procedures for testing radionuclides and nitrates offer public water systems little or no flexibility and the public must regularly pay for tests that are likely to find that no problem exists. Some of the synthetic organic compounds such as the herbicide dalapon were only registered for use in 17 western States yet Tennessee must require public water systems to test for this chemical unless a monitoring waiver is issued. The monitoring waiver is good for only three years and must be tracked and renewed by the primacy agency adding to the administrative costs.

Under the biological monitoring requirements a small public water system must collect five additional samples in the month following a positive sample. A single positive sample is not a violation of the maximum contaminant level. Repeat samples must be collected immediately after any positive sample to determine compliance. Repeating the collection of repeat samples doesn't make sense. This regulation complicates recordkeeping and increases the cost to the State, the public water system and its customers.

When the Division finds a previously unregulated small public water system, that system may begin seeking ways to avoid regulation due to the financial, technical and managerial burden of complying with the SDWA. Some successfully avoid regulation by reducing the number of customers they serve to below 25 or reducing their connections to below 15. In earlier times the smallest of the systems wanted to remain regulated in order to have the State run periodic coliform tests. With the re-

cent amendments to the SDWA some potential systems are motivated by the increased burden to avoid regulation.

The lead and copper rules revealed about 80 public water systems in Tennessee supplied water corrosive to pipes and plumbing fixtures containing lead or copper. Small systems serving 25 people had to take one lead and copper sample for every five people on the system. The city of Nashville had to collect 100 samples or one sample for about every 6,000 people. I could go on listing additional detail about Federal regulations under the Safe Drinking Water Act, but in the interest of time I must summarize.

While States can benefit from the centralized research and standard setting ability of the EPA, in the absence of a crisis, or inaction by local government, is it wise for Congress or the EPA to attempt to micromanage issues it assigns States to handle, or for Congress to place statutory burdens on the EPA without recognizing that the Courts can use the Congressional Acts to enforce their own environmental agenda? Congress should not pass laws without considering methods to relieve the financial burden on States and the regulated community. Congress and the EPA should not assume one regulation is appropriate for all States.

The Tennessee Division of Water Supply is encouraged by the recent initiatives of Members of Congress identified in S. 1629, and also by the EPA, and in particular Mr. Mike Muse, to simplify the chemical monitoring requirements of the regulations and provide States with the flexibility to make common sense decisions. I believe Congress should recognize that Tennesseans care more about their drinking water than anyone in Washington and will do all it can to ensure its quality is satisfactory at a lower cost to the producer, consumer and regulator. It has been my experience that regulatory activity is an iterative process. If the regulations are within a State's domain, a mistake can be corrected without an act of Congress. I recall only major two disease outbreaks associated with drinking water in this State. Both were caused by cross connections. Control of cross connections has received little or no interest by Congress or the EPA.

That concludes my presentation and I am available to answer questions.

Chairman STEVENS. What is a cross connection?

Mr. FOSTER. A cross connection is when the drinking water line is connected to another fluid of unknown quality such as a sewer, forced main sewer or sprinkler system, chemical feed system, anything of that nature without a back flow prevention device.

Senator THOMPSON. Which would be against State regulation?

Mr. FOSTER. Yes, sir, right.

Chairman STEVENS. Well, I do thank you very much for coming. Mr. Butler, you are right. You know, I've served both State government and the Federal Government. I've never served on a local government, but you are the front line. There's no question about that. And our bill is designed to restore that concept that the basic power of our system ought to be in the local government, and the proper solutions ought to be designed to meet the constituents of governments such as you serve. So we are delighted to have you come and make your comments here this morning.

And Mr. Foster, you are seeing the requirements, as far as I am concerned. We have so many of these examples in some villages where they must comply with certain regulations, but they don't even have a water system. It is one of the strange applications of Federal standards. Do you have any questions, Senator?

Senator THOMPSON. Thank you, Mr. Chairman. First of all, I thank you, gentlemen. I am very familiar with what Walter Bulter is talking about. They have an innovative approach over there dealing with young kids who get in trouble before they really get into serious trouble. It is one of the few things I have seen around the country that's really working. And they were 15 months into their program there and got it all set up, and the people in Washington told them that this was not the correct use of Title IV–A money, I guess, it was basically.

Walter, it may be of interest to you—I know we have talked about this before, but there are 131 Federal programs now dealing with juvenile delinquency. The Department of Agriculture has got five or six. Everybody has gotten in on the act, and nobody has any idea what is working on the Federal level. But you have something that is over there, and we are going to continue to try to straighten that situation out.

Mr. Foster, to what extent do you think we need a Federal standard? Obviously it needs more flexibility, if we have a Federal standard, but really, we are talking about two sides of one coin. Obviously, everybody wants safe drinking water, and to do everything that's reasonable to get it. And you are pointing out now, it sounds to me that like, just to use an oversimplification, that we have reasonably gotten 99 percent of the way there at a reasonable price, and now we are spending a tremendous amount to get that extra 1 percent. To what extent do we need Federal standards? And to what extent do we need each State to be able to make its own determination on the water issue?

Mr. FOSTER. In regard to, in my opinion, the chemical contaminants, specifically the synthetic organic compounds, the herbicides, pesticides, and man-made chemicals, we don't need the Federal Government telling us that every State has got a test for this fixed list of chemicals because, for example, the most commonly detected synthetic organic compound in the State would be atrazine probably, which is herbicide used in corn and bean fields. I seriously doubt if Senator Stevens has many corn and bean fields in the northern portions of his State, and his State doesn't need to be tested for those. So the States need the flexibility if the EPA sets the standards or if Congress wants the EPA to set the standards in assigning priorities to the type of chemical monitoring that must be accomplished.

In regard to the biologicals, Federal research, Federal contribution is going to be beneficial in regard to cryptosporidium, giardia lamblia, some of the more disinfectant resistent pathogens. We need help and can use their help in dealing with those types of issues.

Senator THOMPSON. How long have you been involved in the water?

Mr. FOSTER. I started in 1967 with the Division of Stream Pollution Control working as a stream analyst or water analyst.

Senator THOMPSON. Clearly, a lot has happened since that time. You have seen a lot happen. Speaking for the State of Tennessee—you have seen other States too. There's a notion that States just won't do the right thing if they are left alone, and we have seen some examples of where that has happened. We have also seen some examples where the Federal Government has not done the right thing. But do you think States take their responsibility with regard to clean water seriously to the extent that they need to in light of, I assume, developing situations? I mean, we are in a more polluted environment, I suppose, and I guess that affects the ground water, and maybe we need to continuously upgrade our capabilities. So it is not a static picture, I assume. To what extent are States keeping up with that or would they keep up with that in your experience over the last 30 years?

Mr. FOSTER. I think that the States will do all that they can. There is, of course, competing interests. Most States would like to position themselves for additional economic development. Some major developers are interested in the cleanest possible area they can find to conduct that development. Some may have other interests. The biggest problem with the States is the same problem that the Federal Governments had. That is with finances. If we can—it is not the complexity of the regulation. I think, other than the presence in the field at the site of an enforcement officer of some kind, somebody to go and check and see, are we really complying? The Federal Government has made some good moves, I think, in regard to this issue by—in some of the legislation that they've passed by prescribing a funding mechanism, a fee schedule or whatever, that will support the regulatory agency—the needed regulations that the State has to adopt, so that we have—well, basically, I think we need some uniform standards nationally to prevent States from competing for probably not the best issues, but allow the States then to implement, have the flexibility to meet or achieve those standards, is what I would look for.

Senator THOMPSON. Thank you very much. Mr. Butler, to what extent does your county depend on Federal grants for its operation? Are there several different areas?

Mr. BUTLER. Not near what it used to be. We are working on one in particular now—on the airport project. But compared to 12, or 15 years ago when I first got into county government, very small. The money has just dried up. Now, we are getting some Federal money that is funneled now through the State and not via a direct appropriation to the county. I think that if we could—in some cases, I think if the Federal Government could tell us what they wanted, and let us see how we could adapt it in our county and neighboring county, and then respond back, it might work better. We get, a lot of times, from you either directly or through the State, "It has got to be this way or you don't do it at all." And sometimes that just—well, it might work in Davidson County. It might not work in Carroll. If we could have some broader range goals, let us respond back. "We think we can do it this way with this amount of dollars." I think that might be—I know, it would be a different line of thinking.

Senator THOMPSON. In other words, concentrate more on the end results, but not micro-managing every step.

Mr. BUTLER. Right. Let us do a lot of the management. I think a lot of times, we can save money for you.

Senator THOMPSON. Mr. Chairman, Carroll County is important for several reasons, but one of them is it is the Bellwether County. However, Carroll County goes in the statewide races, the rest of the State always goes.

Chairman STEVENS. Is that right?

Senator THOMPSON. Yes.

Mr. BUTLER. Since 1973, for every Presidential, Senate, and Governor's race, we have hit right on within a percentage point.

Senator THOMPSON. So Carroll County gets lots of attention.

Chairman STEVENS. Well, that's good. The thing that strikes me is that with the information revolution, with the amount of information that's available to anyone who wants to just go into the

Internet or go into some of informational material systems, the public, no matter where you are in the United States, has the ability to ask the questions, get basic information. It has never been there in past history. And I think that the Federal Government has really been sleeping, really not understanding the extent to which questions are asked in the very small, small villages in Alaska, and you would be surprised.

Mr. Foster, I think all we really need to do is to have a Federal statute saying that you have got to post the substances you are testing for. Someone in your community will say, "Well, why aren't you testing for this?" We don't have to tell you that. They will come forward and ask the questions, and that's what this bill is all about. It is based upon the new information capabilities of the American public, the availability of the basic information. We think that we ought to go back to the concept that government closest to the people is going to be the best and the most affordable in the future. We will cut out two or three levels of administrative costs, and you'll have money to do some more testing for specific substances in your area rather than test for substances that may only be used in mine. So I think it is a very important point you have made this morning, and I thank you very much for coming, Mr. Foster. Thank you, Mr. Butler. I don't think it is proper to ask you the way the wind is blowing down there right now, but we'll——

Mr. BUTLER. Okay.

Chairman STEVENS. The next panel is Victor Ashe, the Mayor of the City of Knoxville, Tennessee, and the Hon. Dan Speer, the Mayor of the City of Pulaski, Tennessee. While we are waiting for your colleague, do you know what the Pulaski Light is?

Mayor SPEER. That's a new one on me—the Pulaski Light.

Chairman STEVENS. Well, as you go out of New Orleans going down around the tip of the channel, you'll find the Pulaski Light, which was the place that was put there for the old ships to use to sail around. You had to go to the west of that light in order to clear the shoals there. But it is important for this gathering only because I am a fisherman, and that's one of the best fishing places I know is right now the Pulaski Light. I'll have to take your Senator down there and show him where it is some time, and then maybe he'll show you. That's some of the greatest fishing I know of. It is between the end Keys and New Orleans. If you imagine that gap there, it is about half way.

Senator THOMPSON. I think that's grounds for a fact finding mission.

Mayor SPEER. Not in my budget.

Chairman STEVENS. Would you like to introduce these witnesses, Senator?

Senator THOMPSON. Well, these are two not only outstanding mayors in the country, but award winning mayors, I might add—both of them. They are personal friends of mine, and I can't think of two people who would be able to contribute more to what we are dealing with here. They are very knowledgeable, and I think they are indicative just like on the statewide level with some of the governors who are coming along now. They are indicative of the kinds of mayors that we have, and Mayor Ashe is over a little larger city of Knoxville, Tennessee, and Mr. Speer of a small town in Pulaski,

18 miles from where I grew up over in Lawrenceburg. They are very knowledgeable competent people at the basic level of government. And that's one of the major changes that's taken place, I think, over the last 20 to 30 years in this country, and it certainly contributes to our belief that the directions that you just describe in terms of the government closest to the people is the best one. So Mayor Victor Ashe of Knoxville, Tennessee, and Mayor Dan Speer of Pulaski.

Chairman STEVENS. Mayor Ashe, may we ask you to be first?

TESTIMONY OF HON. VICTOR ASHE, MAYOR, CITY OF KNOXVILLE, TENNESSEE

Mayor ASHE. Thank you very much, Mr. Chairman, and Senator Thompson. It is a pleasure for me to be here and join Mayor Speer of Pulaski as well. And first of all, let me commend the Committee for holding this hearing here in Tennessee and dealing with this particular issue because certainly the whole issue of Federalism, while it might seem to be a dry academic subject to some in terms of the practical impact on the taxpayers, and cities, and counties across the country, it is a very important one. I mean, if you ask most Americans what the Tenth Amendment is, I suspect you might get a yawn. But you ask people what their property taxes are, and they could pretty well tell you, particularly in this State around the first of October when the bills goes out.

The Tenth Amendment, as we know, says, "The powers reserved to the Federal Government by the Constitution. Powers reserved to the State by the Constitution. Powers not directly addressed by the Constitution," are issues that are involved there. But I would submit that the whole issue, which this relates to, unfunded Federal mandates, is one that basically gives rise to property tax increases across the country. And while the Congress has dealt effectively with future mandates, the Kempthorne bill, Senate Bill 1, which is one of the first bills that you passed, the issue of current unfunded Federal mandates, to be blunt about it, has not been dealt with. We have resolved what hasn't yet happened, but we haven't dealt with those that are happening. And many of the prior mandates that were passed are still kicking in, in terms of deadlines to be reached, I mean, January 1, 1997, 1998, 1999, where cities and counties are having to face deadlines that were passed perhaps by the Congress in 1985 or in 1988, or some governmental agency has granted the right for an extension, so they get extended a couple of years. And then cities and counties are left with the question of, "Well, do you think it will get extended again, or do we go ahead and spend millions of tax dollars dealing with it now?" Then you find out it does get extended, and maybe you didn't have to spend all that money in the first place. Or maybe they modified it in such a way that you didn't have to do everything that you did. But the fact is Senate Bill 1629 which is, I believe, the proposed agenda of this Committee meeting, is one that's designed to protect the rights of States and the people from abuse, and to restrain Federal agencies from exceeding their authority. I think this is urgently needed, particularly as it relates to unfunded Federal mandates, because a different complexion and makeup of the Congress in future years might very well modify the Kempthorne legislation. And I think

the whole idea that one-size-fits-all is a ridiculous one. To suggest what's appropriate for Alaska is appropriate for Tennessee, on its face is a foolish proposal, just as other situations might be as well.

Often the laws that we refer to in terms of Federal mandates relate to a noble purpose. Senator Thompson, I overheard a discussion earlier dealing with clean water. I am not sure anyone would get up and say they were for dirty water. We are all for clean water. We are for water that's safe to drink. The question is, how clean must it be to be safe? And once you have reached that standard, do you then have to go beyond that standard? And what are the public benefits derived from doing versus the public costs that must occur? And when you have the public costs that must occur for offsetting program that did not occur, or the change that must be made in this city budget in order to meet the mandated Federal priority versus the desired local priority, which are not at all necessarily the same.

I've often said that Congress should not pass the buck to local governments and make us do something they are unwilling to pay for. It is a little like going to a restaurant for lunch, ordering lunch, and finding you can send the bill to the guy at the next table. It is the easiest mandate of all to pass, if you pass the mandate and say, "By the way, you figure out how to pay for it. It is not our job." And I have the feeling that in the era of declining Federal revenues in an effort to balance the Federal budget, there may be those who will pursue that agenda even more, because we know the Federal money is not there to pay for the mandates. But you have this insatiable desire by some to impose the mandate anyway, because you know better than I do as mayor what's good for Knoxville.

The question you were asking, the question of, you know, some people make the argument, "Well, States and cities and counties just aren't capable of setting their own standards." Outlying that notion is an arrogance that I find very offensive. It suggests to a mayor and a council member, and people who live in Knoxville or Pulaski, that somehow we have a lesser standard of care for our fellow citizens where we live than someone who lives in Washington, D.C. and the District of Columbia. I just don't accept that. To suggest that people have a more noble understanding of what's going on in Knoxville than people who live in Knoxville is one I find offensive, and I would hope the Congress would as well.

To give you one example of an unfunded mandate is one dealing with rain. Most people consider it a blessing when it rains. I am sure they would in Texas right now. But mayors in cities all across the country see dollars going down the drain each time it does rain. That's because the Federal Government has decided it wants to regulate where rain water can go after it hits the ground. It is called Storm Water Runoff. To comply with the Federal rain runoff requirements, our city Engineering and Service Department in Knoxville will be adding ten additional employees and the short term budget requirements of $1.7 million over the next 2 years. Now, remember, our city budget in Knoxville is $118 million a year. So $1.7 million is in rough terms one and a half percent of the total budget for 1 year. That represents nearly 10 cents on the property tax rate. That amount of money could have hired 50 new police officers. It could have paved more than 40 miles of additional

city streets, or it could have reduced the local property tax rate. Those would have been alternative policy discussions that members of the City Council and the Mayor could have had, but that wasn't permitted.

Now, we have already spent about a million dollars just doing wonderful consultant reports to comply with this. Now, it has been a dream for consultants and a nightmare for taxpayers. I think some of these special interest groups that push these mandates must be on the side of working for some consulting group because they know once they apply to half the cities our size—and we are a medium-size city. I think we are 102, 103, if we were doing a list of population of cities in the United States. And we have a certain amount of expertise, but we don't have full expertise in all these areas. And as a result, when something comes along such as the ADA, which has created a new cottage industry in consulting, we have to go hire somebody because we don't have people on staff. And you know, they start at $50,000 and work their way up in terms of what they are willing to charge or are going to charge to come tell Knoxville what to do to be in full compliance. And invariably, what they tell us to do is the Cadillac version. They've never seen a Chevrolet. They come and tell us because they want to say, "Well, Mayor, you want to be immune from lawsuits." Well, I mean, I've been around long enough to know you are never immune from lawsuits anyway, so don't give me that line. What I am suggesting is that they come with the most extensive version of compliance they can, and invariably they have someone to suggest to utilize, to carry out their recommendations. And I am not saying there's anything underhanded or wrong. I am just saying that they tend to have somebody that can fulfill Recommendation 2, 3, 4 and 5. And the point is I am not sure the City of Knoxville is that much better off today as a result of having spent already a million dollars for a stack of reports and very little to show for it, and the rain is still falling and it is still running off, and Knoxville is still there, and it is going to be there.

Now, remember, it is not just city government that gets hit. County governments get hit too. Knoxville is part of the County of Knox, and the county government has to comply as well. The same mandates have an impact on the Knoxville Utility Board, which is our water, electricity, lights. It has the same impact on the Tennessee Valley Authority. It has the same impact on the University of Tennessee, so public agencies all across the board are getting hit. But the real person who's getting hit is the local taxpayer who has to pay. And we all know the property tax, which is the main source of funding—and the sales tax for local governments is perhpas the most regressive, the least elastic, "unfair." Now, you can relate that one way or another, but the point is, that is the major source of revenue for local governments, at least in Tennessee. And that is where you have to push in order to keep that going.

Now, these are tough issues to talk about, because a lot of the issues, the mandates are ones that, as I say, deal with noble goals—the right to vote, the Motor Voter Bill, the Clean Water Bill, Americans with Disability Act, Clean Air. I mean, you can go down the whole list, and all of the purposes by which the argument was

made to enact them is one that, in general in philosophy, you would say, "Gee, that's good. That makes sense. I didn't know cities and counties were doing such a terrible job in that area. We must step in and solve this for them. We must set up new guidelines for them."

Again, I think what you have found—what we have found is that mayors and council members are just concerned about having a nice park for their kids to play in, having safe streets to drive upon, having clean air to breathe, having safe water to drink as anyone else, and we certainly don't need somebody outside our areas doing that.

Let me talk about two other areas, and again these politically are sometimes sensitive, but the fact is as you move along the road, you are going to have to deal with them, Americans for Disability Act, which is still kicking in. Basically what it says is you must provide the disabled the same services you provide to able-bodied people. Take our public bus system in Knoxville. Now, in Knoxville, our bus system is a necessity for the people who use it. To be honest, 70 percent of the people of our city never step foot on a bus. All our budget surveys show that. But of the remaining 30 percent that ride the Public Bus System in Knoxville, only four of that 30 percent ride it regularly. Now, for them it is a necessity. It is truly a safety net. They don't have a car. They couldn't get to work any other way. That is what is needed. For disabled people, we have a lift service; that is, you call up and say, "Will you send the lift out to my house on Maple Street?" We'll pick you up and we'll take you to work if you are in a wheelchair or in some other way disabled. But we are told that's not adequate. They've got to be able to have the regular bus, drive by on the regular route. And we have a certain number of years to get that done, and we need to retrofit our buses. And when you buy a bus, it is not like a personal car. A bus is going to last 20 years. You are not going to trade it after 3 years or 4 years, if you can help it.

I would think that a lift system to pick someone up who is wheelchair-bound should be adequate. And if there's not enough lifts, then maybe we need to go purchase more lift vans as opposed to rerouting the entire system at a much greater cost.

Now, we do have a way of complying with ADA. We could go out of the public bus system in Knoxville because if we no longer are offering it to able-bodied people, then we don't have an obligation to offer it to disabled people. And politically, after all, 96 percent of our people in our city don't use it. I mean, 70 percent don't even get on it. Of that remaining 30, only 4 percent use it regularly. We already subsidize our bus system. Better than 50 percent of it comes from the general tax rate because it doesn't generate enough revenue to pay for itself. Now, that's not unusual. Very few bus systems anywhere in the country pay for themselves. They have to be subsidized, and I don't know people necessarily object to that. But there reaches the point at which the subsidy will become so high, those taxpayers who've never used it, that 70 percent may say, "Wait, that's just not a public service that we need to be providing anymore." So how have you helped the disabled by cancelling out the public bus system? In the name of helping the disabled, you may have severely harmed low income disadvantaged,

but physically able people. Again, just something to throw out and I think people need to look at.

It is Tip O'Neill that said, "All politics are local," or is supposed to have said that. I would suggest that all solutions are local. They are not out of Washington. They are local. And I would hope this legislation, if enacted, is something that could help in that direction. And that ought to be where the country is headed in letting local governments free themselves from the burdens of mandates, and be set free in terms of devising their own solutions to their own locally set priorities. And if this Committee can get more public discussion going on this issue than what we have had in the past at the national level, then I think you have rendered a tremendous service, and I appreciate Senator Stevens and Thompson holding this hearing today. Thank you very much.

[The prepared statement of Mr. Ashe follows:]

PREPARED STATEMENT OF VICTOR ASHE

Welcome to all.

It is a pleasure to have this opportunity to discuss what I think is one of the most important issues facing Federalism today.

A lot of the discussion around the Tenth Amendment is somewhat academic.

Powers reserved to the Federal Government by the Constitution.

Powers reserved to the States by the Constitution.

Powers not directly addressed by the Constitution.

What I want to discuss today is how this academic discussion turns into property tax increases for millions of Americans.

These property tax increases are caused by unfunded Federal mandates, which I think are the greatest usurpation of the powers of State and local government by the Federal branch of the government today.

Senate Bill 1629 begins by saying it is intended to protect the rights of the States and the people from abuse by the Federal Government . . . to restrain Federal agencies from exceeding their authority and to enforce the Tenth Amendment to the Constitution.

There is no greater need for this type of legislation then when it comes with dealing with these unfunded Federal mandates.

Unfunded Federal mandates grant the Federal Government the authority to raid the city treasury of millions of dollars each year to pay for projects the people in Washington think are important.

They are a one-size fits all remedy to the problems of the Nation that are often in conflict with State and local priorities and projects aimed at solving those same problems.

Unfunded Federal mandates are laws passed by Congress and regulations propagated by Federal agencies requiring action by local governments without supplying any of the funding necessary to pay for the compliance.

Often these new laws have a noble purpose, such as clean air and clean water. But if the purpose is so noble, then Congress should provide funding for it and not place the burden on the local property tax rate that is already strained to the limit to pay for teachers, police officers, road paving, parks, garbage collection and many other essential municipal services.

Congress should not pass the buck to local governments which are required by law to balance their budgets each year, something Congress hasn't done in decades. Maybe Congress should be asking local governments how to operate within a budget, instead of trying to stick us with the bill for their actions.

It's a little like going in a restaurant, ordering lunch, and finding you can send the bill to the guy at the next table. Once you've figured you can get away with it, you stop worrying about how much the lunch costs.

There are many examples of unfunded mandates, but let me talk about the impact on Knoxville's budget of just one mandate, the one dealing with rain. Most people consider it a blessing when it rains, but mayors in cities all across the Nation now see dollars going down the drain each time it rains.

That's because the Federal Government has decided it wants to regulate where rain water can go following a storm.

To comply with these Federal rain run-off requirements in the near future, Knoxville's Engineering and Public Service departments are adding 10 additional employees with the short term budget requirement of $ 1.7 million in the next two years.

That represents nearly ten cents on our property tax rate.

That amount of money could have hired nearly 50 new police officers, paved more than 40 additional miles of city streets or reduced our local tax rate.

Now I am not a constitutional expert by any means, but I don't see anywhere in the Constitution where it mentions regulation of rain water.

Unfunded Federal mandates are nothing more than back door tax increases that rob Knoxvillians of the ability to determine local priorities.

And that is where we need to, as S. 1629 says, restrain Federal agencies from exceeding their authority.

Our finance department recently ran the latest numbers. In our current fiscal year, the cost of these unfunded mandates stands at $3.1 million dollars.

That's roughly 3 percent of our general fund . . . the equivalent of 17 cents on our property tax rate.

And that's hardly where the bill ends for people in Knoxville.

County government also gets hit with most of the same mandates, so everyone who lives in Knoxville, since they also live in Knox County, pay a higher property tax to the county.

And the same mandates have a huge impact on the Knoxville Utility Board, so our gas, water and electric bills go up. And of course, KUB buys it's electricity from TVA, which is hit by the same mandates, forcing it to raise it's costs to KUB.

Lots of acronyms . . . lots of agencies . . . but one bottom line, the cost always ends up on the backs of the local taxpayer.

One of the most difficult problems we have with dealing with the financial issues involved in unfunded mandates is that it's hard to speak out against them.

Does anyone here want to come up to the microphone and speak against clean water? Or against more rights for the disabled? Does anyone want to try and tell the public they will stand in solid opposition to a clean air act?

No . . . you don't. And frankly, neither do I.

But these mandates are such a tremendous drain on local budgets that mayors and county executives across this Nation spoke in a unified voice against unfunded Federal mandates forcing Congress to pass and the president to sign the Unfunded Mandate Reform Act of 1995.

One of reform act's main sponsors was Senator Kempthorne, a former mayor who is also a sponsor of S. 1629.

This bill restricts Congress's ability to impose future unfunded mandates and finally recognizes that the challenge facing the Federal Government is to exercise power to resolve national needs while, at the same time, honoring State and local rights to govern their own affairs and set their own budget priorities.

But this bill only deals with future mandates leaving a complex quilt of existing regulations and mandates that covers State and local government like the dew on a spring morning.

The U.S. Advisory Commission on Intergovernmental Relations studied existing mandates and found that:

- There are more than 200 separate mandates which included about 170 Federal laws that reached into every nook and cranny of State and local activities.
- An ACIR report on Federal court rulings involving State, local and tribal governments in 1994 identified 3,500 decisions involving State and local governments relating to more than 100 Federal laws.
- And that State and local officials must comply with 33 Federal laws to receive non-construction Federal grants.

Relief from existing Federal mandates will be especially important if State and local governments are to assume greater responsibilities from the downsizing of the Federal Government.

Here is a list of some of the current mandates on the books. You can see that they really do cover every nook and cranny:

- Fair Labor Standards Act
- Family and Medical Leave Act
- Occupational Safety and Health Act
- Metric Conversion for Plans and Specifications
- The Boren Amendment to Medicaid
- The Clean Water Act
- The Endangered Species Act

- Americans with Disabilities Act
- The Clean Air Act

These show the diverse, complex, and troubling challenges that Federal mandates poses for the intergovernmental system.

Unlike Congress, every other governmental entity in the United States, from the smallest city to school boards to counties, has to balance their budget each year. Unfunded mandates are making it very difficult to provide the essential public services our citizens require and to balance our budget as the law requires.

And in many cases, the mandates might not even make much common sense. For example, let me talk for a minute about the Americans with Disabilities Act, and how it's affecting public transportation in Knoxville.

We operate a lift service as part of our transit program. Any disabled person can call, and we send a van out to pick them up and transport them to where they need to go. It's a good program.

But the regulators enforcing the ADA says that is not enough . . . we need to offer accessible bus service on all our routes, all the time.

Now according to our annual budget survey . . . a professionally conducted poll of Knoxvillians . . . only 4 percent of our population ever rides public transit. For those 4 percent, it's critical . . . but most people don't use it. And it loses a lot of money. Begin to add on top that hundreds of thousands more for ADA compliance, and it becomes tough to justify.

Some of our buses are 15 years old, and it doesn't make sense to retrofit them with lifts. We get lifts on all our new buses, but it will be a long time until the entire fleet is replaced.

So what should we do?

The reality may come down to this: By eliminating some bus service, we eliminate the need for compliance, and we stay within our budget. Economics may end up dictating that because of ADA, we might reduce the number of days bus service is offered.

All this because sending a van out to anyone who calls and needs it isn't good enough.

If S. 1629 can help us to repeal or modify some of these existing mandates, then I support its passage.

The time has come for those who live outside the Beltway to stand and say we are partners in the solutions to America's problems.

A famous statesman, I believe he was a Democrat, said a few years back that "All Politics Are Local."

I would like to update that concept for the 1990s by saying that "All Solutions are Local."

The message concerning existing mandates is loud and clear from America's mayors.

We know our cities. We know our problems . . . and we know a lot of the solutions.

Let's let the Tenth Amendment help us to lift unnecessary Federal burdens from those who are dealing with America's problems.

Thanks.

Chairman STEVENS. Thank you.

Mr. Speer?

TESTIMONY OF HON. DAN SPEER, MAYOR, CITY OF PULASKI, TENNESSEE

Mayor SPEER. Thank you, Senator Stevens. And I would like to welcome you to middle Tennessee, and hope you get to visit often. And if you ever get down close to where Senator Thompson was raised, please visit Pulaski. We consider Lawrenceburg.a suburb of Pulaski, Senator Thompson.

When asked to participate in this hearing on the Tenth Amendment and Senator Stevens' bill that would require the Federal Government to adhere to the Tenth Amendment by restricting its legislative and regulatory activity to those powers delegated to Congress by the Constitutiion, I immediately thought on the local level

of unfunded mandates. I also understand to some degree the impact on Welfare and Medicare reform.

In the past 2 years, there's been a lot said about unfunded mandates, and thanks to the work of individuals like Mayor Victor Ashe, Congress has promised no more unfunded mandates, and we appreciate your support in these. But as Mayor Ashe said, we are still feeling the impact.

Also when I was asked to participate, and I found out that Mayor Ashe was going to be on the panel with me, I threatened to make a sign that said, "Me, too," and I was going to hold it up every time that Mayor Ashe hit the strong points, and he did hit the strong points.

I am here today representing the bottom of the political food chain, the small cities. And being at the bottom of that food chain, we have learned to survive through being proactive, resourceful, innovative and responsible. Pulaski, Tennessee has a population of 8,000 people. We are too small to comply to the Storm Water Runoff so far. And we are your typical rural Tennessee community. As a community, we are concerned and focus a great deal of our energy on educating and recreating our youth, fighting crime, strengthening economic base, and generally trying to improve the quality of life in our community. Pulaski City Government by Tennessee law must operate on a balanced budget. We have limited resources. If we don't have the money to spend, we don't spend it, period. The City General Government has an operating budget of 43.3 million, of which $600,000 is generated by a $1 property tax, and another $620,000 is generated from the local sales tax. The remaining of our budget is from various other local, State, and intergovernment revenues. Increasing the local property tax rate is the only method of increasing city government revenue without direct consent of the voting public. And I say that in reference to Mayor Ashe's statement of spending political dollars where you can, for instance, is ten cents on his water runoff. The Pulaski Water and Sewer Department has an operating budget of $1.2 million with all revenues generated from the sale of water and sewer services. The City of Pulaski deals with solid waste through two funds. The first is solid waste collection funded through the implementation of residential and commercial garbage collection fees or user fees. And the second is a solid waste disposal fund or better known as the "money pit." Since 1990, according to the City of Pulaski's engineering firm, we have incurred total costs due to unfunded mandates and regulations of $9 million, $7.2 million of that has been local funds. That annualizes out at 7 percent over a 20-year period of $680,000. I think you can see the impact of that. And by the way, I think Mr. Foster's report was excellent. In 1985, the State of Tennessee sent the City of Pulaski a letter and said, "If you do not implement the Cross Connection Program, we will not only cut funds, but we will take your 'Safe Drinking Water' sign off your city limits." And by the way, being at the bottom of that food chain also puts us at the mercy of State unfunded mandates, correct?

Mayor ASHE. Correct.

Mayor SPEER. I am a tree-hugging, card carrying environmentalist. And I want clean water and clean air, and I want my trash disposed of properly. The citizens of Pulaski are probably not aware

that the Safe Drinking Water Act has cost them $1.4 million, and the Clean Water Act has cost the City of Pulaski $2.6 million. The cost of getting out of the landfill business, because it was too costly to stay in the landfill business, is now projected at $1.3 million, and that does not include the 20 to 25 years of annual cost of well monitoring that the City of Pulaski is going to have to incur.

There are other unfunded mandates that we all agree with, ADA, Drug Alcohol Testing, Infectious Disease Control, but they all put a burden on the city. I think it is interesting also to report that in 1990, we as a community in the City of Pulaski formed an Environmental Committee. Well, we went out and did comprehensive raw water testing of our raw water source to find out what contaminants would be there, if there were any above those maximum contaminant levels required by the EPA. We have limestone, a lot of limestone in Giles County. It is probably in Lawrence County. And you do get elevated levels of some natural occurring minerals, and that's basically been it. We put that information on testing on our Pulaski "Home Page." It is available on the Internet. We use that technology to communicate with people. I found out and got a copy of your bill off Internet. I found out the location of this building using the Internet this morning. It is a tool to communicate with, and I was interested in your point of bringing out this information to society.

Again, I appreciate you asking me to be here today. I can supply you with details on the dollar amount that we have spent, but it is substantial. And even while we are constructing our extension on our water treatment plant, we had to redesign plans to meet unfunded mandates. Thank you, gentlemen.

Chairman STEVENS. Thank you very much. You are both very good witnesses, and that's what we wanted to hear is information such as you brought to us today.

Have you ever thought, Mr. Ashe, as a mayor, do you have a Tennessee mayor's group as we have? We have council and State government, council and municipal governments. Do you have that here?

Mayor ASHE. Well, we have the U.S. Conference of Mayors, and obviously in Tennessee, with the Tennessee Municipal League which I will——

Senator THOMPSON. I might say Mayor Ashe was formerly the head of the National Conference of Mayors; is that right?

Chairman STEVENS. Let me ask you this question then. Have you ever thought of having that organization review the existing laws and give Congress some advice as to what ought to be repealed or amended in order to take some of these burdens off the municipalities?

Mayor ASHE. Well, to be honest, Senator Stevens, the answer is we are in the process of doing that, and frankly, this isn't the purpose of your hearing, but the U.S. Advisory Commission on Intergovernmental Relations, which unfortunately the Congress is abolishing September 1 through funding, is doing that right now, I guess, as its farewell song. I think that's a mistake to do that—to abolish them, but that's another issue. They have compiled a list of mandates and things that could be changed. I'll be blunt with you. They are having a problem getting a quorum to vote on that

because there's some people who have a different point of view who are not attending, and knowing that the Congress has unset them effective September 1, they may never get one, to be blunt about it, and so you may never get an official report. Now, the draft report is available, and this Committee could possibly call Bill Davis over at ACR and get it, and I think it is worth getting, but you may never have a formal committee meeting at which it is by the commission, ratified, because there are certain people who don't share what I suspect is your point of view that are determined that a quorum won't be present to deal with that. But that's a bipartisan group of senators, House members, mayors, county leaders, State legislators, governors, Executive Branch of the Federal Government, private citizens—I think 22, 23 members. The former Governor Winner of Mississippi is the chair of it, and it is been very bipartisan and I think very diligent in this area, but you can't force people to attend a meeting.

Chairman STEVENS. Mr. Speer, have you ever looked at the existing laws to make any recommendations as to what should be taken off of the Federal statutes and repealed?

Mayor SPEER. Yes, sir. The Tennessee Municipal League which Mayor Ashe will be president next year—by the way, he starts his term in June, and I guess it is somewhat ironic; I will be serving as his first vice president. I don't know if you are aware of that or not.

Senator THOMPSON. We expect most of these problems will be solved.

Mayor SPEER. I do. I am just going to go "Me, too." The TML does a lot of work on these issues and has made some recommendations to our elected delegations in Congress on the Safe Water Drinking Act. And yes, sir, we are quite aware of it, and we do our best to try to notify our local elected officials about these unfunded mandates, both the State and Federal, and actions that they can take.

Mayor ASHE. If I could follow up, Senator Stevens, I mean, I am not going to sit here and advocate an appeal of ADA. One, politically, it won't happen. Two, I don't favor it anyway. So I am not going to advocate something I don't favor. On the other hand, I do favor modifications both in the name of the disabled as well as able-bodied people. And I think that's going to be one of the most costly mandates down the road, and some of the fewer benefits in terms of reaching a wide range of people of any act that's been passed. Yet politically it is one of the most sensitive ones to deal with it because anyone that talks about it runs the risks of coming out as insensitive to the needs of those who are disabled, which I don't count myself in that category, and I hope I don't come across that way. If I do, I apologize to whoever might be offended. But on the other hand, to give you another minor example, we have five elevators in our City County Building in Knoxville. We have just got through the PBA which runs it, lowering the buttons on all elevators by six inches at the cost of $25,000 per elevator. Now, again, I understand if someone is in a wheelchair, the button shouldn't be so high that you couldn't reach them to push the button to get to a particular floor. On the other hand, was it necessary to do all five? Could we not have done just two, just as you don't designate

every parking slot as handicapped. You designate the ones closest to the door and have a ramp where that person can get there. Again, shouldn't a rule of reason come into play here where one or two elevators out of five would be changed, and spend the money for that, but not all five, and thereby cut your expenditure of $125,000 down to maybe $50,000? I mean, that's a minor example, perhaps in the cost of things. But at some point, it is like those $600 toilet seats that people used to talk about in the Pentagon, and they made it out as if everybody was into wasteful spending. Well, probably that isn't true. But you pick out one example that the public can understand, and they understand smaller dollars more than bigger dollars, and it will tarnish the entire law in terms of public acceptance of it. And that's the point. I think major modification, Senator Kempthorne—the Safe Drinking Water Act that you passed in the Senate—it hasn't come up in the House yet—is a giant step, a positive step in dealing with what you just asked, and hopefully the House will pass it before this year is out. But you helped in that area already.

Chairman STEVENS. Thank you. Any further questions, Senator?

Senator THOMPSON. Anyone who supports those modifications will be looking toward 30-second television commercials about them being against clean water. You understand that.

Mayor ASHE. I've been in the political system, and I understand we are in there. It is a sad commentary about where we are.

Senator THOMPSON. It is a sad commentary; it is. Are these examples you were talking about, the bus, city bus situation, for example, and the elevator, regulations as such, or are these interpretations of regulations, or are they totally discretionary with the administrator? Do you know in those instances?

Mayor ASHE. I think on the bus, it is a regulation. I can find out. On the elevators, our consultant told us that's what we needed to do. I found out about it too late to stop it, because frankly, I would have. I am a tenant—I mean, the City. We are co-tenants. It is run by an independent authority. And I mean, again we are not that well informed as local government officials, and you don't want to be held up 4 years later and someone would say, "Well, Mayor, you were told to do this, but you disregarded your own consultant's report." You can visualize yourself on the witness stand or in that deposition. "Why did you do that, Mayor? Do you think you know more than your consultant knows?" I mean, those are the type of things you are protecting yourself against in making these decisions. But, yes, had I caught it in time, I would have frankly said, "We'll do two, and not do those," and then, heck, just let somebody yell about it.

Senator THOMPSON. It seems pretty clear from the testimony we have heard and from reading people like Alice Rivlin here, that there's a clear pattern of evolving Federal/State relationship. The Federal Government came in the 1930's, and did some things that most people felt like needed to be done. And then for awhile, revenue sharing and other programs—quite a bit of money was being sent to the States and localities in one form or another. And now we have got the budget crunch on the Federal level, and we are seeing that so many of these things, No. 1, are not working. No. 2, there's no accountability, more cynicism, disenchantment with

government in general in one respect because of that. So now we are kind of trying because of administrative reasons and financial reasons, we are trying to kind of withdraw from that and move back a little bit more toward the original concept of Federalism. But I am sure it is a painful process for those at the local level who are used to living by the grant system. To what extent is that still very much a part of the life blood? You are two different size communities. How is it different from 10 years ago?

Mayor ASHE. Well, I'll cite Mayor Richard Daley from Chicago who belongs to a different party than I belong to, and he says Federal Government can take their grants and free them from the mandates, and he'd come out ahead. That's Chicago, not exactly a small city. I would say the same in Knoxville. Now, having said that, I know it ain't going to happen.

Senator THOMPSON. Well, what would keep this from happening?

Mayor ASHE. Well, the willpower of the Congress to pass it, frankly—no offense to the two gentlemen here, but my guess is you don't have——

Senator THOMPSON. In other words, you are more or less saying you are going to get the mandates anyway, so you might as well take the grants?

Mayor ASHE. Yes. I mean, the big fear that I have—and it is going to happen, is the Federal Government is going to reduce the grants because of the deficit, and I applaud you for finally doing something about it, but you are going to keep the mandates. So I am going to have less money here than I was counting on, and I am going to have to keep from jacking up my expenditures to comply with ADA, Clean Water, and the rest of it. So I am hit twice. I am losing on the one hand and having to pay in another.

Mayor SPEER. Twelve years ago, even the City of Pulaski turned down grants because we wanted to do it our way because it was cost effective. But it didn't take long before those unfunded—those mandates were put on us anyway. Okay. So I mean, now we are in the process of bringing some of our rest rooms or parks up to ADA standards with the help of a 50 percent Federal grant for that. But there was a time, I believe it was 1986, we expanded our water treatment plant using our money, not even asking for grants because we didn't want to go through the requirements of—the strings that were there. But the strings came in way on down the road. So that's one reason why we have had to spend so much money bringing them up to those standards.

Mayor ASHE. Well, to take the Cops Program, we are taking advantage of some of it, but we are not taking advantage of the full allotment, because in 3 years, that 75 percent funding disappears. Well, unless I just want to be irresponsible and just tell my—take the attitude, "Well, I am leaving office," and just stick it to my successor; the fact is, I know in 3 years we could hire about 35 to 40 officers, and we are going to hire about 20, maybe 23, because I don't want a bulge in my city budget 3 years down where I either have to raise taxes or lay off police officers. Now, which would you prefer to do? They are both equally unpopular. Now, can we use additional officers in the City of Knoxville? Sure. No question about that. But I am not going to buy into the city budget an increase that I don't know how I am going to pay for it, or it will eat up

every existing dollar that I have. And to do anything other than cops, we would have to go to a tax rate or cut back something. And you know, I think it is just a given fact that the Federal grants are going to go down some. You have to. How else are you going to balance the budget? And once you do that, which I think reasonable people understand, I balance my budget in the City of Knoxville. I've done that for 9 years, and I am sure Dan has done the same for Pulaski, and I don't need a State law to tell me to do that. But you have got to provide some relaxation or a rule of common sense in some of the mandates. Let's say the Safe Drinking Water Bill, I think passed the Senate 99 to zip. Hopefully they'll pass it in the House and do it this year, and not play politics about it and let it go over until next year.

Chairman STEVENS. We hope that too. Gentlemen, the other side of the coin that some people don't see it, is the budgetary restraints we have imposed on ourselves in Congress. We have money in the highway fund. We have money in the airport and airways fund. We can't spend the budgetary limitations because there are other monies that are being spent on these new programs that are involved in some of the mandates you are talking about. And I think that's one of the things we are looking at now as we have tried to get to the point where we must balance the Federal budget. How do we level that out? I mean, we would be better off to be able to spend the highway funds and the trust fund for the aviation, which taxpayers put into those funds to assure that they have adequate improvement in the highways and maintenance and safety in airways; and try to get out of some of this business of mandating what local governments must do, and providing some monies now under the unfunded mandate concept to carry them out. I think if we are going to get to the balanced budget, this bill we have got is part of the answer, because it says to the Federal Government, "Keep your nose out of local and State business, and just stay to your own Constitutional powers." And I hope that we can find a way to require Congress to, as Justice O'Connor said in her decision in that *Garcia v. Ashcroft,* to State categorically that if it intends to invade the powers of the State and local governments, to State categorically that it is going to do it, and what its Constitutional basis of this authority is for so doing it. And one of the things that's in this bill, of course, a judicial section that instructs courts to narrowly construe any assertion of Federal power unless it is specifically delineated in the act of Congress and is a valid assertion of Federal power under the circumstances. I think we could bring this back to a manageable situation for both States and the Federal Government from the point of view of our budget problems if we each tend to our own business. Hopefully we can get that done. I appreciate your taking the time to come. Thank you very much for your hospitality.

Senator THOMPSON. You have all been very hospitable. I appreciate your time to be here.

Mayor ASHE. We are glad to have you with us.

[Whereupon, the Committee was adjourned.]

S. 1629—THE TENTH AMENDMENT ENFORCEMENT ACT OF 1996

TUESDAY, JULY 16, 1996

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Ted Stevens, Chairman of the Committee, presiding.

Present: Senators Stevens, Glenn, and Levin.

OPENING STATEMENT OF CHAIRMAN STEVENS

Chairman STEVENS. We are going to start the hearing. Senator Levin is here. Senator Glenn is on his way.

This Tenth Amendment Enforcement Act was introduced on March 20 of this year. There are 31 Senate cosponsors of the legislation. We have had 17 governors now announce their support for this bill. It has been endorsed by the National Conference of State Legislatures and the Council of State Governments. Resolutions supporting the bill have now been passed by State legislatures, including Alaska, Florida, Alabama, New York, and Kansas.

This is the third hearing on this subject. We held hearings in Washington on March 21 and in Nashville, Tennessee, on June 3.

I would like to include my formal statement, which includes a list of Senators, Governors, and Attorneys General supporting the Tenth Amendment Enforcement Act, for the record.

[The prepared statement of Chairman Stevens follows:]

PREPARED STATEMENT OF SENATOR STEVENS

The Tenth Amendment Enforcement Act of 1996, S. 1629, was introduced on March 20, 1996. Thirty-one Senators have cosponsored this legislation.

Seventeen governors have announced their support for S. 1629, and the bill has been endorsed by the National Conference of State Legislatures and the Council of State Governments. Resolutions supporting the bill have been passed in several State legislatures, including Alaska, Florida, Alabama, New York, and Kansas.

This is the third hearing on S. 1629. The Governmental Affairs Committee held hearings in Washington on March 21 and in Nashville, Tennessee on June 3.

In 1991, when Justice Sandra Day O'Connor delivered the majority opinion of the Supreme Court in *Gregory v. Ashcroft*, we were given some very instructive language on this issue. The court stated:

> If Congress intends to alter the usual Constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute. Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States. In traditionally sensitive areas such as legislation affecting the Federal balance, the requirement of clear statement assures that the legis-

lature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

S. 1629 does three things:

(1) It focuses attention on Members of Congress on the appropriate scope of Federal power and the Constitutional sources of that power.
(2) It restricts Federal agencies from preempting State and local laws.
(3) It directs courts to interpret Federal laws and regulations narrowly against the Federal Government and broadly in favor of States.

SENATE COSPONSORS OF THE TENTH AMENDMENT ENFORCEMENT ACT

1. Spencer Abraham (R–MI)
2. Robert Bennett (R–UT)
3. Hank Brown (R–CO)
4. Dan Coats (R–IN)
5. Thad Cochran (R–MS)
6. Paul Coverdell (R–GA)
7. Larry Craig (R–ID)
8. Alfonse D'Amato (R–NY)
9. Robert Dole (R–KS)
10. Launch Faircloth (R–NC)
11. Rod Grams (R–MN)
12. Judd Gregg (R–NH)
13. Orrin Hatch (R–UT)
14. Jesse Helms (R–NC)
15. Kay Bailey Hutchison (R–TX)
16. James Inhofe (R–OK)
17. Daniel Inouye (D–HI)
18. Dirk Kempthorne (R–ID)
19. Jon Kyl (R–AZ)
20. Don Nickles (R–OK)
21. Alan Simpson (R–WY)
22. Bob Smith (R–NH)
23. Fred Thompson (R–TN)
24. Trent Lott (R–MS)
25. John Warner (R–VA)
26. John McCain (R–AZ)
27. Frank Murkowski (R–AK)
28. Craig Thomas (R–WY)
29. Richard Shelby (R–AL)
30. John Ashcroft (R–MO)
31. William Roth (R–DE)

GOVERNORS SUPPORTING THE TENTH AMENDMENT ENFORCEMENT ACT

1. Fob James (R–AL)
2. Pete Wilson (R–CA)
3. Mike Foster (R–LA)
4. William F. Weld (R–MA)
5. John Engler (R–MI)
6. Kirk Fordice (R–MS)
7. Marc Racicot (R–MT)
8. Ben Nelson (D–NE)
9. Stephen Merrill (R–NH)
10. Christine Todd Whitman (R–NJ)
11. George Pataki (R–NY)
12. George V. Voinovich (R–OH)
13. Lincoln Almond (R–RI)
14. George W. Bush (R–TX)
15. Michael O. Leavitt (R–UT)
16. George Allen (R–VA)
17. Tommy G. Thompson (R–WI)

ATTORNEYS GENERAL SUPPORTING THE TENTH AMENDMENT ENFORCEMENT ACT

1. Gale Norton (R–CO)
2. Margery S. Bronster (NP–HI)
3. Tom Miller (D–IA)
4. Betty D. Montgomery (R–OH)
5. Charles Molony Condon (R–SC)
6. James S. Gilmore III (R–VA)
7. Don Stenberg (R–NE)

Chairman STEVENS. We are pleased to have with us here today on the first panel Hon. Michael Box, who is Majority Chairman of the Alabama State Legislature. He is the President-Elect of the National Conference of State Legislatures. We also have Roger Marzulla, who is a member of the firm Akin, Gump, Strauss, Hauer, and Feld. Gentlemen, we appreciate your courtesy of being with us. We have a rather strange day going on here, but we would appreciate your testimony and we would ask you to keep it as short as possible, but we would be happy to proceed.

I think I read your name first, Mr. Box, so let me ask you to proceed first. Is that all right?

TESTIMONY OF HON. MICHAEL BOX, MAJORITY CHAIRMAN, ALABAMA STATE LEGISLATURE, PRESIDENT-ELECT, NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. BOX. Thank you, Mr. Chairman. Senator Stevens, Senator Levin, thank you very much for inviting us to participate today. I

would like to personally thank both of you for your interest in this subject and, on behalf of NCSL, show you our appreciation for the work that you have already done on this important issue.

My name is Michael Box and I am the House Majority Chairman from Alabama. In Alabama, that still means I am a Democrat. I will assure you that that is the last partisan statement that I am going to make today, because this issue is very much one that deserves bipartisan support.

NCSL would like to see this legislation move forward because we feel very strongly that the issue of preemption is worthy of debate and consideration regardless of political affiliation. We also feel that in any proposal considered, Congress should exercise great care in crafting the language used.

As I pointed out, NCSL believes that this is a bipartisan issue. Our organization itself stresses its bipartisan nature. The presidency of the organization alternates between the two major parties each year, and for any policy to be adopted, we require a three-fourths vote. Obviously, if anything within our organization becomes too closely a partisan issue, it will not become policy.

Our position before Congress is that we oppose any legislation which preempts State law in an unjustified manner and we oppose it regardless of sponsor, and this position is neither conservative nor liberal. We feel very strongly that the issue of unjustified Federal preemption of State law should not be ideological or partisan. It is a question of process, gentlemen. It is a question about which level of government most appropriately should make a public policy decision, not what the decision should be, and this is not a trivial issue.

I also pointed out that great care must be exercised in crafting the language. Attached to my testimony, Mr. Chairman, which I would like to be included as part of the record, is a draft piece of legislation prepared by the Scholars Advisory Committee to the Federalism Summit held in Cincinnati in October of 1995. This committee, I should point out, was made up of a mixed group of conservatives, liberals, and moderates. It was a very distinguished group and the draft that they prepared is worthy of your consideration. Therefore, I have attached it to my testimony.

Without going through the entire text of their draft, let me highlight a few issues that I think might be of use to the Committee. I think that some concern has been expressed by Members of this Committee, as well as others, about the point-of-order process and how it could degenerate into a partisan issue. You will note on the scholars' draft, which I have attached, that the Scholars Committee has, in fact, anticipated this objection. They noted, "The point-of-order rule applies only in the absence of a declaration of Constitutional authority, not to incorrect or questionable declarations of authority."

It would not be appropriate for the Parliamentarian or the presiding officer to determine that a declaration of authority is inadequate, given the potential for abuse, and if there are any concerns about how this language is included in proposals before the Congress, clarifying language, I think, can be added.

There are certain issues included in the scholars' draft that I would like to highlight for your further consideration. We feel very

strongly, and this is found in Section 4 of the scholars' draft, that legislation dealing with this issue should require a list of State laws that may be preempted. I think it is essential that if Congress is going to preempt and, in effect, nullify the work of a State legislature, then someone ought to take the trouble to identify the specific statutes in question, read them, and consider again whether preemption of that specific State statute is really a good idea.

We would like to recommend also to your language found in Section 4(C)(1) of the scholars' draft which suggests that a Member of Congress, in introducing a bill that proposes preemption, certify that he has examined and identified the specific laws or rules of laws in his State that would be preempted. I personally believe that Members of Congress would be much more reluctant to preempt State law if they had to look at the specific proposals in their home State that would be affected by the proposed congressional statute.

An important provision that should be included is the requirement that governors and State legislatures be notified of congressional intent to preempt. This notification would simply be a basic courtesy that would be accorded to the States, since States are coequal partners in our Federal system.

And finally, one that is probably one of the most important issues facing States deals with the State legislative appropriations authority. Section 8 of the scholars' draft would avoid preemption of State legislative appropriations authority. This is essentially the language that you have considered in the Brown amendment in sessions past.

Again, I would like to compliment Senator Stevens and Senator Levin for taking this initiative and bringing it before the Congress. I would like to again publicly thank Senator Glenn for his past support in issues of concern to the States, particularly in the mandates legislation. We are here to work with you. We feel very strongly that the State and Federal Governments are and should be coequal partners in providing the services that are needed by our mutual constituents. We would like to make our services available to you in moving this legislation along. I think it is essential that we work together both in crafting this legislation and in seeing that it is passed.

I will be glad to respond to any questions that any Member of the Committee may have, Mr. Chairman, at the appropriate time. Again, thank you for allowing us to participate today.

[The prepared statement of Mr. Box with an attachment follows:]

Testimony of

Representative Michael Box

Alabama House of Representatives

on behalf of

The National Conference of State Legislatures

before the

U.S. Senate Committee on Governmental Affairs

on S. 1629

The Tenth Amendment Enforcement Act

July 16, 1996

Good afternoon. I am Representative Mike Box, majority chairman of the Alabama House of Representatives and President-elect of the National Conference of State Legislatures (NCSL). I appear before you today on behalf of NCSL to endorse S. 1629, the 10th Amendment Enforcement Act.

I have two points that I want to emphasize. First, NCSL would like to see S. 1629 move forward on a bi-partisan basis. The bill is intended primarily to limit unjustified federal preemption of state law: that is neither a Republican issue nor a Democratic issue. It is neither a liberal issue nor a conservative one. It is simply a matter of good government and a matter of showing an appropriate respect for our constitutional system of federalism. Second, in marking up S. 1629, NCSL would urge great care in crafting legislative language. A statute that is too loosely drawn might simply result in the addition of boiler plate language on preemption and constitutional authority to bills pending in Congress. In this case, it would be less the Tenth Amendment Enforcement Act than the "Federalism Footnote Act." On the other hand, an inartfully drafted statute, particularly in the section dealing with "point-of-order" rules, could lead to unnecessary delays in the Congressional process, and abuse of the process for purposes of partisan tactical maneuvering.

Returning to my first point, NCSL believes it is vitally important to pass legislation that ensures a more thoughtful Congressional process when issues of state law preemption are involved. If properly drafted, such legislation would not provide an advantage to one party or the other or one point of view or another. As the incoming President of NCSL, an organization that closely tracks preemption issues, I can tell you that there is no partisan or ideological slant to what we propose.

NCSL opposes any bill, in which preemption of state law is unjustified, regardless of sponsor. Our position is neither conservative nor liberal.

The issue of unjustified federal preemption of state law is not ideological or partisan. It is a question of process. It is a question about which level of government most appropriately should make a public policy decision, not what the decision should be. And, it is not a trivial issue.

Every year, and 1996 is no exception, Congress considers bills, federal agencies consider rules, and the federal courts render decisions that could result in the preemption of state statutory or common law. Adverse decisions may result not only in nullifying state legislative acts or court decisions, but also may result in narrowing the range of issues that state legislatures may consider in the future. The threat is the steady, incremental, year-by-year erosion of the jurisdiction of state legislatures.

Interest groups of every stripe that are unsuccessful in pursuing their agendas at the state level increasingly are tempted to "forum shop" and come to Washington, D.C. seeking reversal of state legislative action. Federal preemption frequently results in undoing the work of sponsors of state legislation who may have labored for months or years to pass a bill. But perhaps the most insidious consequence of preemption from the state perspective is its impact in the future. Unless a federal statute is amended or a court decision reversed, state jurisdiction over an area of public policy is ceded for the indefinite future to the federal government. It is particularly harmful when federal action results in "field" preemption, which may bar future state legislative action even when there is no direct conflict with federal law. This may happen when state

standards are simply more stringent than or supplementary to federal standards or even when state law merely touches tangentially on the same subject as federal legislation.

Again, these are issues of process, not issues of ideology or party. This is underscored by the fact that both Senator Stevens and Senator Levin have introduced bills addressing the problem of preemption. NCSL applauds both your efforts, and we have some ideas of our own that the committee may want to consider as it moves to mark-up.

As I noted earlier, great care must be exercised in crafting legislation in this area. I would like at this time to submit for the record draft legislation, similar to Senator Stevens' and Senator Levin's bills, that was prepared by the scholars advisory committee to the Federalism Summit held in Cincinnati in October of 1995. The scholars committee, I might note, was composed of a mixed group of conservatives, liberals, and moderates. This was a very distinguished group. The draft that they prepared is worthy of careful study.

Without running through the whole text of their draft let me highlight a couple of issues that I know to be of concern to the committee and then highlight some features of the scholars' draft that you may want to consider including in your legislation at mark-up.

First, I know that concern has been expressed that the point-of-order process could be used for partisan purposes by the parliamentarian or presiding officer. Our scholars committee anticipated this objection, and noted in their section-by-section analysis of their draft that: "The point-of-order rule applies only in the absence of a declaration of constitutional authority, not to

incorrect or questionable declarations of constitutional authority - although such questionable declarations would likely trigger debate on the floors of the House and Senate." In other words, a point-of-order procedure is important so that issues of constitutional authority may be aired in debate. It would not be appropriate for the parliamentarian or the presiding officer to determine that a declaration of authority is inadequate, given the potential for abuse. And, clarifying language to that effect, I believe, can be added to any bill that is marked-up.

Second, I understand that questions have been raised about the supermajority required to waive the point-of-order in Senator Stevens' bill. I would note only that our scholars also favored a supermajority rule, but recognized that Congress can always pass a statute by a simple majority in disregard of such a requirement, and there would be no judicial remedy.

Now, let me note some features of the scholars draft that you might want to include when marking-up legislation. Section 4 of the scholars' draft provides that committee reports ought to include " a list of the state laws that may be preempted," with the proviso that "nothing in the report or statement shall expand or be construed to expand the scope of preemption that is expressly and clearly stated in the statute." Such a provision, I think, would be very valuable. If Congress is going to preempt and in effect nullify the work of a state legislature, then somebody ought to take the trouble to identify the statutes in question, read them, and consider again whether preemption is really a good idea.

Also at section 4 (c) (1) of the scholars' draft it is proposed that when a member of Congress introduces a bill, that member must certify that he or she has examined and identified specific

laws or rules of law in their state that would be preempted. I think members of Congress would be much more reluctant to preempt if they had to look at the specific sections of their home state's code that they would be striking from the books.

Section 4 (c) (2) of the scholars' draft requiring congressional committees to formally notify governors and state legislatures of their intent to preempt also would be a welcome addition to legislation. Such a notification would appear to be simply a basic courtesy accorded to states as co-equal partners in the federal system.

Finally, I would draw your attention to section 8 of the scholars draft, which would seek to avoid preemption of state legislative appropriations authority, a very important issue particularly in the context of federal block grant legislation.

In conclusion, I again compliment Senator Stevens and Senator Levin for introducing their bills and I compliment the committee and its chairman for holding hearings on this very important topic. I appear today as a state legislator and an officer of NCSL with an obvious interest in preserving the institutional role and jurisdiction of state legislatures. But, the issue of preemption is not ultimately a petty question of turf. The defense of state legislative jurisdiction is really a defense of what the late Justice Hugo Black referred to as "the dreams and ideals of our federalism."

The ideals at stake here were articulated by Justice Sandra Day O'Connor in *Gregory v. Ashcroft*. They include a decentralized government that responds to a "heterogeneous society," increased

opportunity for democratic participation, a greater capacity for "innovation and experimentation in government" and most important of all "a check on abuses of governmental power."

Mr. Chairman, members of the committee, thank you for this opportunity to testify.

REPORT OF THE
SCHOLARS ADVISORY COMMITTEE ON FEDERALISM

for the

FEDERALISM SUMMIT

Cincinnati, Ohio
October 22-24, 1995

Scholars Advisory Committee on Federalism

John Kincaid, Committee Chair
Robert B. & Helen S. Meyner Center
for the Study of State and Local Government
Lafayette College
Easton, Pennsylvania

Stewart A. Baker
Steptoe & Johnson
Washington, DC

Charles J. Cooper
Shaw, Pittman, Potts & Trowbridge
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Daniel J. Elazar
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Temple University
Philadelphia, Pennsylvania

Barry Friedman
School of Law
Vanderbilt University
Nashville, Tennessee

A. E. Dick Howard
School of Law
University of Virginia
Charlottesville, Virginia

Deborah Jones Merritt
College of Law
The Ohio State University
Columbus, Ohio

Charles Rothfeld
Mayer, Brown & Platt
Washington, DC

Restoring Balance Through A Federalism Statute

To help restore balance in the federal system, states could seek congressional enactment of a "Federalism Act." A recent precedent is the Unfunded Mandates Reform Act of 1995--an historic bipartisan achievement of state and local governments and their citizens building bipartisan support in the Congress for reform. Although it is too early to assess the success of the Unfunded Mandates Reform Act, a statutory approach to further reform perhaps deserves an opportunity to succeed before states seek to amend the U.S. Constitution.

Could a Federalism Act enhance the political safeguards of federalism and give states a more effective voice in congressional deliberations?

Key reasons for considering a Federalism Act are that (1) the Congress rarely considers the constitutional limits on its powers and (2) the federal courts have been reluctant to enforce those limits. Instead, the Congress tends to assume a general police power that enables it to engage any issue, no matter how local. The Congress has also neglected to consider prudential limits on its powers; even when the Congress has the constitutional authority to act, state governments may be better suited to legislate on certain matters. A key policymaking question in our federal system is not only whether government should act on a particular matter but, equally important, which government--federal or state--should act in that matter. These problems of federal overreach are further compounded by the Congress's tendencies to act without considering the nature and number of state laws its actions will preempt (i.e., displace) and to tolerate further preemptions of state laws by federal administrative agencies, which are not elected by the people.

A Federalism Act could potentially respond to these problems by:

1. requiring the Congress to identify the constitutional sources of its power to legislate on specific matters;

2. requiring the Congress to justify its exercise of powers in relation to the reserved powers of the states under the U.S. Constitution;

3. requiring the Congress to consider prudential limits on its powers, such as whether legislative objectives could be better achieved through state law;

4. requiring the Congress to identify during the legislative process state laws that might be preempted by a proposed federal statute or regulation;

5. requiring the Congress to notify state officials of potential preemptions of state law contained in bills and resolutions;

6. limiting the power of executive departments and independent agencies to preempt state law without express congressional authorization;

7. permitting greater state participation in federal rule-making;

8. directing the courts to construe federal statutes in a manner that avoids both unintended preemptions and unnecessary intrusions upon state powers; and

9. protecting state laws and procedures in expenditures of federal funds.

Each of these objectives could be pursued in a separate statute, but a single Federalism Act encompassing all of these points would signal a clear congressional commitment to overall reform. Such a statute could enhance debate in the Congress and the media about the appropriate constitutional scope of federal power. Legislators and voters would become accustomed to debating whether state government or the federal government is constitutionally or prudentially best suited to address various policy issues, rather than simply whether those issues should be addressed by government.

A Federalism Act might also highlight for citizens the values and importance of state and local governments. Expansions of federal power in recent decades have led many citizens to believe that the federal government is the most important or most responsive government in their lives. For example, passage of the Gun-Free School Zones Act of 1990 created a widespread public impression that only the federal government was able and willing to ban guns from school grounds. In fact, however, some 40 states had already enacted similar laws to protect school-children from gun violence. Furthermore, the federal government lacks the capacity to enforce all of its laws; consequently, certain acts are of little more than symbolic value intended to create the appearance of federal resolve, while other acts frustrate state and local efforts to actually solve real problems.

Some people might question whether a Federalism Act is necessary in light of the U.S. Supreme Court's renewed attention to federalism issues in such cases as *Gregory* v. *Ashcroft*, 111 S.Ct. 2395 (1991), *New York* v. *United States*, 505 U.S. 144 (1992), and *United States* v. *Alfonso Lopez, Jr.*, 115 S.Ct. 1624 (1995). In *Lopez*, for example, the Supreme Court struck down the Gun-Free School Zones Act as exceeding the scope of the Congress's commerce power. However, the Supreme Court is likely to construe the 5-4 *Lopez* decision quite narrowly. A Federalism Act, moreover, could reflect the Court's recent concern about the lack of congressional attention to federalism and carry that concern forward by encouraging the Congress to take a more responsible and responsive role in maintaining an appropriate constitutional balance of state and federal powers.

Could requiring the Congress by statute to identify the constitutional sources of its authority, consider prudential limits on its exercise of power, and identify state laws that might be preempted by proposed federal action actually protect the reserved powers of the states and the people?

The effectiveness of such statutory requirements cannot be known for certain. Potential strengths and weaknesses of such statutory rules are as follows:

Possible Strengths

- Congressional debate on federalism could be enhanced, and the attention of members of Congress and their staffs could be focused more effectively on the appropriate scope of federal power and the constitutional sources of that power.

- If point-of-order rules were included in a Federalism Act, they might actually limit some federal legislation for lack of clear constitutional authority. At a minimum, such rules would require members of Congress and, indirectly, their staffs and lobbyists to consider their constitutional authority and the prudent or

imprudent effects of their proposed legislation on state and local governments and taxpayers.

- Respect for federalism might be enhanced in Washington, D.C., thereby promoting a healthier balance of state-federal power over the long run, especially in light of the U.S. Supreme Court's difficulty in articulating workable standards in this area and the Court's tendency to police excessive congressional and executive action only at the extreme margin.

- Statutory provisions could reflect and reinforce language in recent U.S. Supreme Court opinions noting the importance of congressional findings or "clear statements" of intent to preempt state law, as well as language suggesting that the Congress has a constitutional duty to consider limits on its authority.

- Such provisions in a Federalism Act would help members of Congress who have a keen interest in federalism and the federal-state balance of power to keep federalism issues constantly before the Congress.

- Such provisions would help state and local governments and their citizens to voice their concerns and participate more effectively in congressional deliberations on state-federal relations.

- Debates on federalism provoked by a statute might attract media and public attention and perhaps refocus that attention on which government should legislate on a particular issue rather than simply on whether an issue is appropriate for government action.

- A statute should be relatively uncontroversial and would be easier to enact than an amendment to the U.S. Constitution. The Unfunded Mandates Reform Act of 1995 provides a model for this statute.

Possible Weaknesses

- Statutory requirements of the above nature would not create judicially enforceable rights, and the Congress would be free to disregard such statutory requirements in future sessions.

- A statute requiring a congressional declaration of its constitutional authority to enact a particular piece of legislation might simply produce boilerplate language on constitutional authority, thus making a federalism statute little more than a "Federalism Footnote Act."

- Such a statutory requirement could, however, further encourage the Congress to continue adopting broad constructions of its powers. Such constructions might lead the courts to embrace similarly broad rationales for federal power. For example, the Congress and the courts might conclude that the Congress has the power to regulate private conduct under Section 5 of the Fourteenth Amendment--an issue the U.S. Supreme Court has avoided resolving for many years.

- Enactment of a federalism statute might reinforce the belief expressed by the Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985) that the Congress's political process adequately protects state powers and interests. The Court has turned slightly away from *Garcia* in recent years (e.g., *United States* v. *Alfonso Lopez, Jr.*, 1995), but a federalism statute supported by the states might encourage a return to *Garcia*'s reasoning.

- Point-of-order rules could lead to delays, tactical maneuvering, and paralysis by analysis in the Congress.

- If members of Congress were to use a federalism statute too often as a ploy to defeat the substantive merits of bills rather than as a sincere means to discern the proper constitutional bases of federal power, the public might become impatient with such ploys and, thereby, develop a distaste for debates on federalism and perceive efforts to protect state and local government interests as merely obstructionist.

- It may be impossible for the Congress to identify all state laws that might be preempted by federal action; hence, congressional committees might simply conduct *pro forma* investigations to satisfy statutory requirements.

Could statutory provisions limiting the power of executive departments and independent agencies to preempt state law effectively protect state and local powers?

Possible Strengths

- Given that some of the most far-reaching preemptions of state law come from executive departments and independent agencies, and given that such agencies must act pursuant to law, statutory limits set by the Congress could restrict federal agency preemptions of state law to cases in which a federal statute expressly authorizes the issuance of preemptive regulations or in which the exercise of state authority directly conflicts with the exercise of federal authority.

- Federal agency rulemakers are not popularly elected; so it is particularly appropriate for the Congress to limit and specify their authority to preempt state law and local ordinances.

- This potential statutory provision would be judicially enforceable. It would authorize courts to strike down federal agency regulations that preempt state law in the absence of express congressional authorization or a clear statutory need for the preemption.

- This potential statutory provision would still allow federal agencies to further the needs of federal law by allowing agencies to preempt state laws when directly authorized to do so by the Congress or when there is a direct conflict between the state and federal laws.

- Enacting this provision, like any statutory proposal, would be easier to accomplish than a constitutional amendment.

Possible Weaknesses

- Executive departments and independent agencies would still retain broad authority to preempt state law whenever the Congress grants that authority or enacts a law that directly conflicts with state laws.

- Future Congresses might eviscerate such statutory rules by including boilerplate language in every statute simply authorizing administrative and regulatory agencies to preempt state law, especially in light of unanticipated conflicts between state and federal law.

- The language of a general statutory provision of this nature would be necessarily broad. Courts could interpret the language in a manner that would continue to allow widespread agency preemption of state law. Courts, for example, might generously interpret when state laws "directly" conflict with federal laws.

Could a statutory provision directing courts to construe federal statutes narrowly be an effective guide for federal courts to limit preemption of state powers and avoid unnecessary intrusions upon state authority?

Possible Strengths

- This type of statutory provision would be judicially enforceable. It would direct, though probably could not require, the courts to interpret federal statutes and administrative rules in ways that preserve state authority whenever possible.

- Such a statutory provision would reflect and reinforce a recent trend on the U.S. Supreme Court to construe federal statutes more narrowly and in a manner that reduces undue federal interference with state law.

- Such a provision, moreover, could apply only to statutes enacted, or rules adopted, after the effective date of the provision's enactment. This prospective approach would avoid unsettling expectations in many areas, such as the relationship between state and federal securities laws, that could spawn widespread litigation or have damaging effects on existing contracts and other standing arrangements.

- Another approach would be to require the inclusion of such a rule of construction in every future statute and to allow a point of order to lie against any bill or resolution not containing such a rule of construction. The point of order would not be judicially enforceable, but the rule of construction included in future statutes would be judicially enforceable.

Possible Weaknesses

- The Congress would still retain broad authority to preempt state law, and to legislate in areas of traditional state concern, as long as it stated its intentions explicitly. This could be done with boilerplate language.

- The prospective approach of this type of statutory provision would not overturn broad judicial constructions of existing federal laws and regulations that serve to preempt state laws or regulate in areas of traditional state concern.

- This type of statutory proposal might be more controversial than other statutory proposals because it would create a judicially enforceable rule rather than a point-of-order rule effective only within Congress.

- However, it is not clear whether such a general statutory rule of construction directing the courts to construe all other future federal laws narrowly in order to preserve state powers would be regarded as binding on future Congresses, be taken seriously by the courts, or be any more effective than the Tenth Amendment's existing rule of construction. Like the Tenth Amendment, the U.S. Supreme Court might interpret such a statutory rule of construction as a "mere truism."

In light of these considerations, what follows is an initial discussion draft of a possible "Federalism Act" that might be proposed for enactment by the Congress. The draft is derived from considerations of the Scholars Advisory Committee on Federalism, from a draft proposal developed by U.S. Senators Hank Brown of Colorado and Spencer Abraham of Michigan, and from policy positions developed previously by the National Conference of State Legislatures and the U.S. Advisory Commission on Intergovernmental Relations. The language is presented for purposes of discussion and debate. Following the draft language of the potential bill is a section-by-section analysis of the text.

7

A POSSIBLE FEDERALISM ACT

To ensure the liberties of the people by promoting federalism and protecting the reserved powers of the States, 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 1995".

SEC. 2. FINDINGS.

The Congress finds that—

(1) The people of the States created the Federal Government when they delegated to it those enumerated powers relating to matters beyond the competence of the individual States. All other sovereign powers, except those expressly prohibited the States by the United States Constitution, are reserved to the States or to the People.

(2) Federalism is rooted in the knowledge that our political liberties are best assured by respect for the Constitution's enumeration of limited powers of the Federal Government and reservation of powers to the States and to the People.

(3) Article I and the Tenth Amendment to the Constitution confirm that the Federal Government has limited, delegated powers; it does not possess a general police power. Members of Congress, like members of all other branches of the Federal and State Governments, have a duty to uphold the Constitution and should, therefore, be obligated to identify the constitutional source(s) of their authority to act on any particular matter and to consider carefully whether their acts exceed their constitutional authority.

(4) Acts of the Federal Government, whether legislative, executive, or judicial, that exceed the enumerated powers of that Government under the Constitution are without constitutional authority and violate the principle of federalism established by the Framers.

(5) The People of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(6) In most areas of government concern, the States possess the constitutional authority, the resources, and the competence to discern the sentiments of the People and to govern accordingly.

(7) Our constitutional system encourages a healthy diversity in the public policies adopted by the People of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(8) Policies of the Federal Government should recognize the responsibility of and should encourage opportunities for individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

SEC. 3. DECLARATION OF CONSTITUTIONAL AUTHORITY.

(a) IN GENERAL.—Chapter 2 of title 1, United States Code, is amended by inserting after section 102 the following new section:

"§102a. Constitutional authority clause

"(a) IN GENERAL.—A constitutional authority clause shall follow the enacting clause of any Act of Congress or the resolving

clause of any joint resolution. The constitutional authority clause shall be in the following form (with appropriate modifications and appropriate matter inserted in the blanks): 'This Act (or resolution) is enacted pursuant to the power(s) granted to the Congress under Article(s) _____ section(s)_____, clause(s) _____ of the United States Constitution.'.

"(b) SIMILAR CLAUSE.—A similar clause shall precede the first title, section, subsection, or paragraph, and each following title, section, subsection, or paragraph to the extent the latter title, section, subsection, or paragraph relies on a different article, section, or clause of the Constitution from the one pursuant to which the first title, section, subsection, or paragraph is enacted.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 2 of title 1, United States Code, is amended by inserting after the item relating to section 102 the following:

"§102a. Constitutional authority clause.".

SEC. 4. COMMITTEE REPORTS.

(a) IN GENERAL.—When a committee of the Senate or the House of Representatives reports a bill or joint resolution, the report of the committee accompanying the bill or joint resolution shall contain the information described in subsection (b) of this section. In the absence of a committee report, the committee shall report to the Senate and the House of Representatives a statement containing the information described in subsection (b) of this section.

(b) REPORTS ON CONGRESS CONSTITUTIONAL AUTHORITY.—Each report described in subsection (a) shall contain—

(1) an identification of each article, section, and clause or amendment of the United States Constitution which provides the

Congress with the authority to legislate on the matter or regulate activity as prescribed by each title, section, subsection, or paragraph of the bill or joint resolution;

(2) an explicit statement on the extent to which the bill or joint resolution preempts any State or local law, and, if so, an explanation of the reasons for such preemption;

(A) Among the factors to be considered in explaining the facts and reasons for preemption are:

(i) The extent to which the exercise of authority by individual States has produced widespread and serious conflicts imposing a severe burden on national economic activity or other national goals;

(ii) The extent to which variations among State laws impose a substantial burden on interstate commerce;

(iii) The extent to which eliminating differences among State laws is not merely desirable, but necessary and essential to achieve a compelling national objective; and

(iv) A determination that other avenues short of preemption are unworkable and that preemption is the only reasonable means of addressing the need for uniformity.

(B) For the purposes of this subsection, "preempt" means:

(i) to mandate the substitution of Federal standards or procedures for State or local government

standards or procedures;

(ii) to require the creation, elimination, or alteration of any program, service, or function of State or local governments; or

(iii) to condition the receipt of Federal funds by State or local governments on the adoption of uniform implementation standards or procedures.

(C) So that each member of Congress is informed of the extent of preemption of their State laws, the report or statement shall include a list of State laws that may be preempted; however, nothing in the report or statement shall expand or be construed to expand the scope of preemption that is expressly and clearly stated in the statute.

(3) a list of factual findings that establish a substantial nexus between the regulatory effect of the bill or joint resolution and the constitutional authority to legislate invoked by the Congress;

(4) an analysis of the extent to which the bill or joint resolution legislates in an area of traditional State authority, and the extent to which State authority will be maintained if the bill or joint resolution is enacted by the Congress;

(5) if article I, section 8, clause 1 is identified under paragraph (1), a statement of reasons as to why any conditions upon spending grants imposed by the bill or joint resolution are necessary to specify the manner in which the funds are expended;

(6) an estimate of the financial cost, if any, to State or local governments of the preemptions contained in the bill, joint resolution, or amendment; and

(7) a discussion of possible, though not exclusive,

alternatives to, or less intrusive forms of, preemption, regulation, or conditions of grants that might be employed to achieve the goals of the bill, joint resolution, or amendment.

(c) IDENTIFICATION AND NOTIFICATION.–

(1) When a member of Congress introduces or cosponsors a bill, joint resolution, or amendment that would preempt a law or rule of law of the State they represent in Congress, that member must certify that they have examined and identified specific laws or rules of law of their State that would be preempted by the bill, joint resolution, or amendment. Such certifications by the primary sponsor and cosponsors must be completed before the bill is referred to committee.

(2) When a committee of authorization of the Senate or the House of Representatives reports a bill, joint resolution, or amendment of public character that is intended to preempt State law, a notice of intent must be forwarded to the Governor of each State and the presiding officer of each chamber of the Legislature of each State setting forth the extent and purpose of the preemption. State officers who have received the notice of intent to preempt shall have 30 days to comment on the proposed legislation. No bill, joint resolution, or amendment of public character may be referred to the floor for a vote before the 30 days have elapsed.

(3) Upon the close of each session of Congress, the Congressional Research Service shall prepare a cumulative report on the extent of Federal preemption of State or local government powers. The report shall contain a cumulative list of Federal statutes preempting, in whole or in part, State or local powers; a summary of legislation enacted during the previous session preempting, in whole

or in part, State or local government powers; an overview of Federal court rulings on preemption issued during the previous session of the Congress; and other information the Director of the Congressional Research Service deems appropriate. This report shall be made available to each member of Congress, each Governor, the presiding officer of each chamber of the Legislature of each State, and to the People through the *Congressional Record*.

SEC. 5. POINT OF ORDER.

(a) IN GENERAL.—

(1) INFORMATION REQUIRED.—It shall not be in order in the Senate or the House of Representatives to consider any bill, joint resolution, or amendment that does not include the information required by section 3 or section 4 and is not accompanied by a report or statement containing the information required by section 4.

(2) SUPERMAJORITY REQUIRED.—The requirements of this subsection may be waived or suspended in the Senate or the House of Representatives only by the affirmative vote of three-fifths of the Members duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate or of the House of Representatives duly chosen and sworn shall be required in the Senate or the House of Representatives to sustain an appeal of the ruling of the chair on a point of order raised under this subsection.

(b) RULE MAKING.—This section is enacted—

(1) as an exercise of the rule-making power of the Senate and of the House of Representatives, and, as such, it is deemed a part of the rules of the Senate and the House of Representatives, but applicable only with respect to the matters described in sections 3 and 4 and supersede other rules of the Senate or the House of

Representatives only to the extent that such sections are inconsistent with such rules; and

(2) with full recognition of the constitutional right of the Senate or of the House of Representatives to change such rules at any time, in the same manner as in the case of any rule of the Senate or the House of Representatives.

SEC. 6. EXECUTIVE PREEMPTION OF STATE LAW.

(a) IN GENERAL.—Chapter 5 of title 5, United States Code, is amended by inserting after section 559 the following new section:

"§ 560. Preemption of State Law

"(a) No executive department or agency or independent agency shall construe any authorization in a statute for the issuance of regulations as authorizing preemption of State law or local ordinance by rule-making or other agency action unless—

"(1) the statute expressly authorizes issuance of preemptive regulations; or

"(2) the executive department or agency or independent agency concludes that the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute, such that the State statutes and the Federal rule promulgated under the Federal statute cannot be reconciled or consistently stand together.

"(b) Any regulatory preemption of State law shall be narrowly tailored to achieve the objectives of the statute pursuant to which the regulations are promulgated and shall explicitly describe the scope of preemption.

"(c) When an executive branch department or agency or independent agency proposes to act through rule-making or other

agency action to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation by duly elected State and local government officials or their designated representatives in the proceedings without regard to the Federal Advisory Committee Act.

"(1)The notice of proposed rule-making must be forwarded to the Governor, the Attorney General, and the presiding officer of each chamber of the Legislature of each State setting forth the extent and purpose of the preemption. In the table of contents of each *Federal Register*, there shall be a separate list of preemptive regulations contained within that *Register*.

"(d) Unless a final executive department or agency or independent agency rule or regulation contains an explicit provision declaring the Federal government's intent to preempt State or local government powers and an explicit description of the extent of that preemption, the rule or regulation shall not be construed to preempt any State or local government law, ordinance, or regulation.

"(e) Each executive department or agency or independent agency shall publish in the *Federal Register* a plan for periodic review of the rules and regulations issued by the department or agency that preempt, in whole or in part, State or local government powers. Such plan may be amended by the department or agency at any time by publishing the revision in the *Federal Register*.

"(1) The purpose of this review shall be to determine whether such rules are to continue without change, consistent with the stated objectives of the applicable statutes, or be altered or repealed to minimize the effect of the

rules on State or local government powers.

"(2) The plan shall provide for the review of all such department or agency rules and regulations in force on January 1, 1997. It also shall provide for the periodic review of any rules adopted after that date, within ten years of the date of publication of such rules and regulations as final rules.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by adding after the item for section 559 the following:

"§560. Preemption of State Law.".

[Alternate] SEC. 7. CONSTRUCTION OF FEDERAL ENACTMENTS.

(a) No statute, or rule promulgated under such statute, enacted after the date of enactment of this Federalism Act shall be construed to preempt, in whole or in part, any State or local government law, ordinance, or regulation unless the statute, or rule promulgated under such statute, contains an explicit statement of preemption or unless there is a direct conflict between such statute and a State or local government law, ordinance, or regulation, such that the two cannot be reconciled or consistently stand together.

(b) Notwithstanding any other provisions of law, any ambiguities in this Act, or in any other law of the United States, shall be construed in favor of preserving the authority of the States and the People.

[Alternate] Sec. 7. POINT OF ORDER.

(a) IN GENERAL.--

(1) INFORMATION REQUIRED.--It shall not be in order in the Senate or the House of Representatives to consider any bill, joint

resolution, or amendment that does not include the following Rules of Construction:

(A) Notwithstanding any other provision of law, any ambiguities in this Act shall be construed in favor of preserving the authority of the States and the people.

(B) Notwithstanding any other provision of law, neither this statute, nor any rule promulgated under said statute, shall be construed to preempt, in whole or in part, any State or local government law, ordinance, or regulation beyond the explicit statement of intent to preempt contained in this statute, or unless there is a direct conflict between such statute and a State or local government law, ordinance, or regulation such that the two cannot be reconciled or consistently stand together.

(2) SUPERMAJORITY REQUIRED.--The requirements of this subsection may be waived or suspended in the Senate or the House of Representatives only by the affirmative vote of three-fifths of the Members duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate or of the House of Representatives duly chosen and sworn shall be required in the Senate or the House of Representatives to sustain an appeal of the ruling of the chair on a point of order raised under this subsection.

(b) RULE MAKING.—This section is enacted—

(1) as an exercise of the rule-making power of the Senate and of the House of Representatives, and, as such, it is deemed a part of the rules of the Senate and the House of Representatives, but applicable only with respect to the matters described in this section and supersede other rules of the Senate or the House of

Representatives only to the extent that such section is inconsistent with such rules; and

(2) with full recognition of the constitutional right of the Senate or the House of Representatives to change such rules at any time, in the same manner as in the case of any rule of the Senate or the House of Representatives.

Sec. 8. EXPENDITURE OF FEDERAL FUNDS IN ACCORDANCE WITH LAWS AND PROCEDURES APPLICABLE TO EXPENDITURE OF STATE FUNDS.

Notwithstanding any other provision of law, any funds received by a State after the date of enactment of this Federalism Act shall be expended only in accordance with the laws and procedures applicable to expenditures of the State's own revenues, including appropriation by the State legislature, consistent with the terms and conditions required under such provisions of law.

Section-by-Section Analysis of Possible Federalism Act

Section 2. Findings

The suggested findings are intended to focus the bill on the constitutional balance of state-federal power, especially in light of the Tenth Amendment, and to highlight the idea that the liberties of the people lie in a certain competitive tension as well as cooperative partnership between the federal government and the states. The findings highlight the limited, delegated nature of federal power; the reserved powers of the states; and the importance of allowing the states to exercise their constitutional responsibilities on behalf of the people.

Section 3. Congressional Declaration of Constitutional Authority

This section would require the Congress to investigate, identify, and declare the constitutional bases of its authority to enact any particular statute. This is a matter of no little significance, given the Congress's general inattention to constitutional matters of federalism in recent decades.

One concern, though, is whether the required declarations of constitutional authority would simply become *pro forma* boilerplate statements needed to avoid a point-of-order challenge. If a majority of either house of the Congress is intent on passing a bill, boilerplate language will be accepted as compliance with this proposed Federalism Act. The point-of-order rule applies only in the absence of a declaration of constitutional authority, not to incorrect or questionable declarations of constitutional authority--although such questionable declarations would likely trigger debate on the floors of the House and Senate.

We assume that unless the Congress directs the courts to the contrary (which the above draft bill does not do), the courts will be free to uphold a federal statute on any basis. Even if the Congress attempted to direct the courts to the contrary, the courts might refuse to be bound by the Congress's direction. However, the courts might very well uphold statutes on grounds not identified by the Congress. More likely, though, so long as the Congress does not attempt to direct the courts, the courts will be fairly deferential to congressional identifications of its constitutional authority, and will be reluctant to uphold statutes on grounds not identified by the Congress.

A deeper concern for state and local governments is whether the proposed statute would lead to expansive constructions of federal power both in the Congress and in the courts. Although the statute admonishes the Congress to recognize its limited powers, "limits" lie in the eye of the beholder, and congressional perceptions of such limits may be much more expansive than state or public perceptions of those limits. Federal statutes, moreover, ordinarily come to the courts with a presumption of constitutionality, and if the elected representatives of the people in Congress can be said to have investigated, interpreted, and declared under the Federalism Act what they regard as their constitutional authority for any particular enactment, the courts would be pressed to uphold the Congress's determination. If congressional declarations of authority become boilerplate, it might be all that much easier for the courts to uphold broad exercises of congressional power. Of course, no one knows for sure how the dynamic between the Congress and the Supreme Court might develop pursuant to this proposed statute; hence, we cannot be certain of the outcome of the Federalism Act's required declaration of constitutional authority.

Section 4. Committee Reports on Constitutional Authority

This section is intended to ensure adequate congressional consideration of its own constitutional powers and those of the states with respect to bills or joint resolutions that would preempt state or local government powers; assert congressional powers under the commerce clause or other sources; or add conditions to grants-in-aid for state and local governments. These matters are likely to become even more challenging for the maintenance of state powers and for an appropriate balance of state-federal power as the United States fully implements the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA).

Given that many bills have no committee report, the proposed statute (Sec. 4(a)) would ensure at least a committee statement of intergovernmental impact analysis as required under Sec. 4(b).

Sec. 4(b)(2) reiterates Title I, Sec. 423(e) of the Unfunded Mandates Reform Act of 1995, which states:

> When a committee of authorization of the Senate or the House of Representatives reports a bill or joint resolution of public character, the committee report accompanying the bill or joint resolution shall contain, if relevant to the bill or joint resolution, an explicit statement on the extent to which the bill or joint resolution is intended to preempt any State, local, or tribal law, and, if so, an explanation of the effect of such preemption.

Particular intergovernmental factors for congressional consideration of preemption are included in Sec. 4(b)(2)(A), along with a definition of preemption (Sec. 4(b)(2)(B) and a requirement that committees identify state laws that might be preempted by proposed legislation (Sec. 4(b)(2)(C). These provisions are intended to focus the attention of members of Congress and their staffs on major state concerns about congressional perceptions of the need for preemption. Requiring the Congress to consider these particulars may be the best way for proponents of federalism to give the rest of the Federalism Act more teeth and prevent committees from making merely general, *pro forma* inquiries into federal-state issues embedded in proposed legislation. The Congress, moreover, is free to adopt guidelines or standards on these matters that are narrower than the ones imposed by the U.S. Supreme Court.

A possible disadvantage of including these particulars is that they could make the proposed Federalism Act seem more complicated than necessary and tedious for future Congresses, and thereby prevent its enactment. Also, while the particulars require the Congress to consider certain specific factors, this consideration does not eliminate the potential for boilerplate language.

Sec. 4(b)(3) endeavors to require congressional committees to demonstrate a "substantial nexus" between proposed legislation and its constitutional authority. The draft bill prepared by Senators Brown and Abraham limits this language to the Congress's commerce power, but it seems advisable to broaden the language to all constitutional provisions that might be invoked by the Congress.

Sec. 4(b)(4) requires an analysis not only of how a proposed bill or resolution would legislate in an area of traditional state authority but also of how the proposed legislation will

maintain some state authority. The intent here is to ensure consideration of ways to maintain traditional state authority, even if there is a need for the Congress to assert federal authority.

Sec. 4(b)(5) requires an analysis and statement of reasons why any conditions attached to a grant-in-aid program "are necessary to specify the manner in which the funds are expended." Alternative language might read: "are directly and substantially related to the manner in which or purposes for which the funds are to be expended." It is difficult to frame general language that would require the Congress to limit conditions of aid to matters that are genuinely germane to the substantive purposes of grants-in-aid. It is, therefore, equally difficult to predict which statutory formulation of language would be most effective.

Sec. 4(b)(6) follows on the model of the Unfunded Mandates Reform Act of 1995, but in a broader fashion, to require the Congress to consider the financial cost to state and local governments that might result from any preemptive legislation. Critics may charge that the Congress should be required to consider the benefits of preemption as well, but we assume that such benefits will, as a matter of course, be fully articulated by proponents of preemptive legislation. Advocates of bills ordinarily overplay their benefits for the nation and underplay their costs to state and local governments; hence, there should be no dearth of debate on benefits as well as costs.

One possible weakness of this section is that it does not spell out the nature of the expected cost estimates in the detail provided in the Unfunded Mandates Reform Act of 1995. In another respect, however, this section is broader than the Unfunded Mandates Reform Act because it would require a cost estimate on all proposed legislation having a preemptive effect, including categories of legislation exempted under the Unfunded Mandates Reform Act.

Sec. 4(b)(7) follows the current trend expressed both in the Congress and the executive branch's reinventing government program of allowing state and local governments more flexibility in implementing or adjusting to federal laws and of focusing policy legislation more on performance objectives than procedural details.

Sec. 4(c) is intended to ensure that members of Congress and leading state officials are fully informed about the impacts on their states of proposed federal preemptions.

Sec. 4(c)(1), requiring bill sponsors and cosponsors to become aware of and examine laws in their home states that would be preempted by proposed legislation, should encourage members of Congress to pay much more attention to preemption issues and may also strengthen somewhat the ties between members of Congress and their state legislature.

Sec. 4(c)(2) is intended to ensure that governors and state legislatures are adequately informed about bills in Congress that are intended to preempt state powers. This would appear to be a basic courtesy due the states as co-equal partners in the federal system. This provision should prevent eleventh-hour enactments of preemptions and help members of Congress to identify and assess the potential impacts of proposed preemptions on their home states.

Sec. 4(c)(3) is intended to remedy a deficiency in accounting for the balance of federal-state power by alerting the Congress, the states, and the people to the cumulative load of federal preemptions over time. Encouraging the Congress to be attentive to the constitutional limits of its powers requires, among other things, knowledge of where those limits lie at any particular point in

time. Although the federal government disseminates information about many aspects, especially fiscal aspects, of intergovernmental relations, no systematic data are provided on federal preemptions of state powers, even though the nature and extent of preemption are equally and perhaps even more critical for the maintenance of an appropriate balance of state-federal power as grants-in-aid, conditions attached to aid, and other more documented federal actions.

A major drawback of all the provisions suggested for Section 4 may be a perception that the statute is cumbersome and would require too much busy-work from congressional staff. Such a perception might impede enactment of the Federalism Act. At the same time, however, there is a need to educate and focus the attention of members of Congress and their staffs on these matters. All of the proposed revisions, moreover, reflect concerns that have been expressed by various state and local officials in recent years.

Finally, it should be noted that officials of tribal governments have many of the same concerns. We have not incorporated tribal governments in the above statute because of their distinctive place in federal law. Appropriate relief for tribal governments might require different statutory approaches than those for state and local governments.

Section 5. Point of Order on Constitutional Authority Declaration

The point of order adds considerable strength to the proposed bill's fundamental requirement that members of Congress pay attention to their constitutional authority to act on any particular matter.

Sec. 5(a)(1) applies both to a proposed bill and to the committee report or other findings.

The super-majority requirement in Sec. 5(a)(2) gives the Federalism Act real teeth; however, in light of the unwillingness of the Congress to include a super-majority rule in the point of order incorporated in the Unfunded Mandates Reform Act of 1995, the prospects for a super-majority rule being included in the Federalism Act may not be bright. But given that the rule itself could be overturned by a simple majority vote of the House or the Senate, the three-fifths super-majority rule is wholly reasonable. We believe, however, that regardless of the super-majority question, the Congress can always pass a statute by a simple majority in disregard of this statute, and there would be no judicial remedy.

Section 6. Executive Preemption of State Law

This section is intended to ensure that preemptive rule-making by executive departments and agencies, as well as independent agencies, does not exceed the intended preemption explicitly stated in federal statutes or exceed preemptions needed to resolve clear and unavoidable conflicts between federal and state law.

Sec. 6, §560(a) is intended to establish standards for executive preemptions of state law in light of the inherent difficulty of articulating a clear and definitive standard for such preemption. The language is admittedly vague, but may be the best that can be achieved under the circumstances and without an unduly cumbersome list of criteria.

The proposed provision in (b) is intended to alert federal regulators as well as state and local officials of the intended scope of any regulatory preemption and also to prevent creeping preemption through gradually expanding bureaucratic interpretations of rules and regulations. It may sometimes be difficult to describe the intended scope of preemption precisely, but executive departments and independent agencies should make good-faith efforts to do so.

The provision in (c) is intended to ensure a state and local voice in rule-making and to guard against a common misuse by federal agencies of the Federal Advisory Committee Act as a device to frustrate state and local participation in rule-making. The provision in (c)(1), moreover, is intended to ensure that notices of proposed rule-making are sent to the appropriate state officials and to prevent departments and agencies from circumventing state participation and notification on the ground that they cannot identify the state officials with whom they should work during the rule-making process.

This provision, however, does not resolve one problem frequently faced by federal agencies, namely, who speaks authoritatively for a state? If the governor, attorney general (who is elected independently in most states), and the legislative leaders disagree on a proposed federal rule, the federal agency is left to choose its preferred state response.

Paragraph (d) is intended to protect state and local governments from implied regulatory preemptions.

Paragraph (e) complements Sec. 4(c)(3) by requiring periodic department or agency review of preemptive rules and regulations. Without such review, rules and regulations can become immortal and obstructive of progress in a dynamic, democratic society. Given that the proposed Federalism Act would not apply retroactively to current agency constructions of current statutes, this review process would at least enable agencies to reconsider long-standing rules and regulations in light not only of their continuing utility but also of the objectives of the Federalism Act.

Section 7. Construction of Federal Enactments [Alternate 1]

This section is intended to ensure construction of all future federal statutes in favor of preserving the authority of the states and the people to the greatest extent possible consistent with the U.S. Constitution.

Paragraph (a) in Section 7 is intended to clarify and strengthen the Federalism Act's basic objective of restricting preemption to explicitly and clearly stated congressional intentions to preempt state powers and, otherwise, to direct and unavoidable conflict between a federal statute and a state or local law.

Paragraph (b) is intended to ensure that ambiguities in federal laws are construed by the courts and federal agencies in favor of preserving, to the extent possible, the authority of the states and the people under any given federal statute.

Section 7. Point of Order on Rule of Construction [Alternate 2]

This proposed point of order, which is an alternative approach, is intended to accomplish

for explicit preemption the same type of objective as that provided by Section 5's point of order for congressional declarations of its constitutional authority.

This section is weaker than Section 7 [Alternate 1] insofar as the point of order would apply only to future federal statutes rather than to all federal statutes, current and future, covered by Section 7's [Alternate 1] paragraph (b) rule of construction. However, in the absence of a point of order, it might be much easier for the Congress to ignore Section 7's [Alternate 1] rules of construction in future statutes just as the absence of a point of order would make it much easier for the Congress to ignore Section 5's requirement of a declaration of constitutional authority. Furthermore, Section 7's [Alternate 2] point of order would apply to amendments to current statutes.

In another respect, Section 7's [Alternate 2] point of order is stronger than Section 5's point of order. The Section 5 point of order would apply to the requirement that all future congressional acts contain a declaration of constitutional authority, which could simply take the form of boilerplate language. The Section 7 point of order, however, would apply to the requirement that all future congressional acts consistently contain the rules of construction set forth in Section 7.

Section 7 [Alternate 1] is judicially enforceable, whereas Section 7's [Alternate 2] point of order is purely a restraint on the Congress. However, Section 7 [Alternate 1] could be ignored by the Congress, or any future statute could easily be exempted from the Section 7 [Alternate 1] rules. No point of order would lie against these ploys if Section 7 [Alternate 2] is not included in the Federalism Act. In addition, while Section 7's point of order, like Section 5's point of order, would not be judicially enforceable, the rules of construction required to be included in future statutes would be judicially enforceable. The Section 7 [Alternate 2] point of order would require floor debate on the Congress's preemption intentions and the scope of intended preemption.

Section 8. Expenditures of Federal Funds in Accordance with Laws and Procedures Applicable to Expenditures of State Funds

This section contains language recently negotiated between state officials and members of Congress for inclusion in proposed welfare legislation. This provision could apply to all federal funds received by the states and, therefore, is included within this potential Federalism Act. This provision addresses a major concern of the states, but the provision is too new to make an assessment of its effectiveness.

Conclusion

A Federalism Act would not be a panacea for what many state and local officials regard as a serious imbalance in the federal system; however, such a statute is worthy of consideration as an important step toward reform. The possible bill outlined above is an initial draft presented for purposes of discussion and debate. It does not reflect a final consensus on substance or language of the Scholars Advisory Committee on Federalism.

Chairman STEVENS. Thank you very much, Mr. Box.

Senator Glenn is here, and I neglected to ask Senator Levin if he had an opening statement. I apologize, Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Mr. Chairman. I do have a brief opening statement.

What we are embarked upon here in this hearing today is a very important discussion. There is a lot of discussion about the Tenth Amendment in the abstract, but when it comes to specific legislation, some of the same legislators who have focused on the Tenth Amendment as not preempting States from acting introduced legislation which has exactly the effect of knocking States out of the box in some very critical areas. We have that happening here all the time.

We saw it with tort liability. Some of the strongest supporters of the Tenth Amendment would preclude States from doing certain things in the area of tort liability without even recognizing the inconsistency. The same thing is true of a bill which was recently introduced by many of the supporters of some of this Tenth Amendment legislation that have to do with States not being allowed to become involved in areas of the parents' relationship with children.

It seems to me that it is critically necessary that we get down to specifics and not abstractions, and that is why I am glad that you and your organization has focused on some of the language in one of the bills, at least, that is pending before us. The language problems, the specifics, it seems to me, are critical, including that point-of-order provision, which has lots of problems with it in my book.

You have also focused in your testimony on a bill I introduced which, when it comes time to ask questions, I would do so for the record. This is not the moment, because we are right in the middle of the testimony, and I am not able to stay. I will be asking questions of both of you for the record relative to the preemption bill that I have introduced which would preclude preemption unless there is a specific statement in the bill which indicates an intention on the part of Congress to preempt or there is a direct conflict between State law and Federal legislation.

So there are a number of different approaches to this, and I think that your effort on the part of State legislatures would be very helpful because it focuses on some of the specific language. In the draft that you have attached to your testimony from this panel of experts, there are some significant differences between what is in the bills before us and that draft. I think it is going to take some time for us to analyze the differences in the approach that you are recommending and in the approach that is in the bills before us, and that is true with both Senator Stevens' bill and with my bill, the substance of which is incorporated in one section in Senator Stevens' bill.

But basically, I just want to acknowledge the presence of our witnesses, both panels. I thank the Chairman for holding these hearings. It is a very important subject which many of us have been deeply involved in for a long time. I want to thank our witnesses today for coming forward and offering their assistance to us as we

try to focus on specifics so we can get away from some of the ringing declarations and the theories, which take us only so far.

Thank you, Mr. Chairman.

Chairman STEVENS. Senator Glenn?

OPENING STATEMENT OF SENATOR GLENN

Senator GLENN. Thank you, Mr. Chairman.

Just briefly, I am sorry I could not get here on time, but I am concerned about some of these same things as Senator Levin mentioned. I am glad we are having this hearing to flesh out some of the pros and cons of this Tenth Amendment Enforcement Act.

Federalism issues have risen to the forefront in this Congress. We began the year by enacting S. 1, the Unfunded Mandates Act, and that is legislation I was proud to coauthor with my colleague, Senator Kempthorne. I have supported efforts to pass comprehensive regulatory reform. I will not go into details on that. I think most everybody is aware of our efforts in that area.

We have passed proposals in the Senate to devolve some Federal responsibilities to the States in welfare, job training, drinking water, health care, and several other areas. I have supported a number of those but thought we had to do them with a balance, an appropriate balance of Federal responsibility and funding, while turning some of the execution of these things over to the States.

One of the basic concepts behind the Chairman's bill is that Congress should have more information about the impact of legislation on State and local laws. I certainly support that concept very much, although I have other reservations about the bill. The notion that Congress should have more information about the impact of its actions on State and local law is something that we built into S. 1, the Unfunded Mandates Act. When we get to questions here in a little while, I may have some questions on that.

Section 423(e) of that Act requires Committee reports to state specifically whether a piece of legislation is intended to preempt any State, local, or tribal law, and if so, explain the effect of that preemption. We do not really have any track record with S. 1 yet because it has just been in effect since the start of this year, so it is premature to reach any final judgment about how well it is working and whether we need to beef it up any more or not, but we wrote that into S. 1 very specifically to cover some of the concerns that are expressed by the Chairman in this legislation.

I am troubled by another aspect of the bill. Its purpose and findings suggest that the Federal Government has improperly, illegally, or even unconstitutionally taken over State areas of responsibility. I challenge that premise.

Advances in the economy, international trade, civil rights, public health and safety, environmental protection—there is a long list of national problems that have been addressed precisely because the Federal Government was able to do what the States either would not, should not, or could not do, yet this bill sets up a process enforced by supermajority points of order and judicial review that will make it much more difficult, perhaps even impossible, for the Federal Government to address national problems that cannot be solved just on a State-by-State basis. A lot of our environmental

laws, for instance, things blow and flow across State lines. I will not go into any details on it right now.

I agree that Congress has over-legislated, and that Federal agencies have often over-regulated. So we do need unfunded mandates legislation and regulatory reform and devolution of authority in some cases and greater grant flexibility as proposed in the national performance review. These reforms will help repair some of the intergovernmental partnership.

I think we can accomplish these objectives and I am glad we are having the hearing so we can hear both sides of this. I think we have had a balance through our 200 years of history. In my opinion, I think it has served this country pretty well. We have gone too far on one occasion or another, but we seem to correct back. I look forward to having the hearing today.

The Justice Department was, as I understand it, invited to testify today, but scheduling problems made appearance by the appropriate officials impossible. I would ask unanimous consent, Mr. Chairman, that the hearing record be held open for the filing of a written statement, which should be submitted within the next week.

Chairman STEVENS. I am going to object to them coming with a statement from the administration and not being subject to questions, Senator. I do not think that the administration ought to be able to file a statement of policy here and not be subject to questions. It is another thing for a witness who does not have the responsibility of enforcing the laws. I would be happy to have their statement, but I think they should appear. I think we ought to be able to have a chance to question the position taken by the administration. I hope you will understand.

Our next witness is Mr. Marzulla.

TESTIMONY OF ROGER MARZULLA, ESQ., AKIN, GUMP, STRAUSS, HAUER, AND FELD

Mr. MARZULLA. Thank you, Mr. Chairman and Senators Glenn and Levin. I am pleased today to have the opportunity to testify in support of S. 1629, the Tenth Amendment Enforcement Act of 1996.

I do not come on behalf of any organization nor any clients nor any law firm but rather as a lawyer with 24 years' experience in interpreting State and Federal statutes, both on behalf of the Federal Government, with which I was an official for about 6 years, and on behalf of private clients.

As this Committee knows, ours is a government of limited powers. The Founding Fathers wisely decided to divide power at the Federal level among three branches, the Executive, the Judicial, and the Legislative, and likewise to divide power between the Federal Government, on the one hand, and the State Government on the other hand, allocating those authorities which could best be handled at the Federal level to the Federal Government and allocating those matters of primarily local concern to local governments.

To pass legislation in Congress without referring to the specific authorities granted to Congress under the Constitution is like building a house without referring to the blueprints. You are likely

to end up with a structure that is rickety and haphazard and likely to collapse for lack of Constitutional support.

Our Federal courts, before deciding any case, routinely examine the source of their jurisdiction, statutory and Constitutional. Our regulatory agencies, when they promulgate regulations, routinely examine the source of their statutory authority, the limitations upon that authority, and the manner in which the regulation can be promulgated consistent with those authorities.

Congress alone routinely fails to examine the source and limitations upon its legislative authority when it passes statutes. I would respectfully suggest that Congress could learn a lesson from the other two branches of the Federal Government.

Take, for example, the case of Bob and Mary McMackin, who moved into a house a couple of years ago in the Pocono Mountains of Pennsylvania, a house which was part of a development which had been appropriately permitted and constructed. It was part of a local municipality.

Four years later, Mr. McMackin went to the mailbox and found a letter from the U.S. Army Corps of Engineers indicating that he was required within 10 days to remove the entire lateral support for the house, that is, to destroy the house, on the ground that it had been constructed on land over which the Corps of Engineers asserted wetlands jurisdiction, a jurisdiction, I might add, which is often justified on the grounds not that it is water, not that it is a marsh or a bog, but on the grounds that perfectly dry land might, nevertheless, serve as a place where migratory birds could land.

Or take, for example, the current litigation over the San Bernardino County Hospital in California, where the hospital is being blocked from the construction of a badly needed emergency room entrance on the ground that there is a colony of "flower-loving" flies, an endangered species, in the path of that entrance. The Federal Government is defending this overriding of county health and safety requirements and the authorization to build on the ground that in 1992, five of those flies were mailed from Texas to New York, constituting an "interstate-commerce" basis on which Congress may control the construction of that hospital emergency room.

Or finally, take, for example, a regulation promulgated by the Environmental Protection Agency on May 8 under the Safe Drinking Water Act, requiring that any State seeking to exercise its delegated power to permit under that statute would also be required to pass legislation opening its State courts to certain litigants prescribed by EPA.

Did Congress intend these results in the case of the McMackins, in the case of the San Bernardino County Hospital, in the case of this regulation requiring State legislatures to pass certain legislation? We do not know because the Clean Water Act, the Endangered Species Act, and many other statutes are entirely silent upon the Constitutional authority which Congress intended to exercise in passing that legislation.

I suggest to you that the passage of this bill will improve legislation and discourage litigation for four reasons. First, it is going to avoid tying up badly needed new Federal programs in years of litigation by addressing and justifying at the outset the Constitutional

basis for the statute itself. As this Committee knows, important provisions of the Superfund law, of the Safe Drinking Water Act, have recently been invalidated by State courts after years and years of litigation and of application of those programs, requiring that they now be repaired.

Second, passage of this statute will help clarify the intent of Congress in the passage of these statutes. Let us know whether the migratory bird rationale, a rationale that, of course, would apply to front yards and roofs, as well, since migratory birds land almost everywhere, is or is not the kind of exercise of commerce power jurisdiction that Congress had in mind.

Third, it will avoid the invalidation of part or all of statutes passed by Congress. It will ensure that the programs will be tailored so as to fit within the Constitutional limitations of the legislative authority and thus to work well without having portions of them invalidated.

And finally, of course, it will dramatically improve the relationship between State and Federal Governments, that very relationship which was established by the Founding Fathers under the Constitution precisely for the purpose of dividing power among several entities to avoid excessive concentrations of that power in one governmental body, and thus to protect our precious American liberties.

I suggest to you that this bill is entirely consistent with and, in fact, will require that Congress, when it constructs new legislation, reference the blueprint of the Constitution and that it will have dramatically beneficial effects in connection with all Federal programs. Thank you, Mr. Chairman.

[The prepared statement of Mr. Marzulla with attachments follow:]

Testimony of Roger J. Marzulla
Before the Senate Committee on Governmental Affairs
July 16, 1996

Mr. Chairman and Members of the Committee:

Thank you for your invitation to testify today on S.1629, the Tenth Amendment Enforcement Act of 1996. Passage of this Act will make an across-the-board improvement in the quality of the legislation produced by Congress. Since ours is a government of limited powers specifically granted by the people to the government, authorization for enactment of any statute must be found in the Constitution itself. To enact a statute without considering the nature and extent of your constitutional legislative authority is like building a house without consulting the blueprint; the resulting law is likely to be rickety and haphazard and, in some cases, will collapse for lack of constitutional support.

I am a lawyer with 24 years experience interpreting statutes both as a federal official and on behalf of my private clients. My expertise is primarily in the field of environmental and natural resources law. Today I am testifying not on behalf of my law firm or any client, but rather as an attorney with substantial experience advising both federal agencies and private companies on the meaning and constitutionality of federal laws. I can tell you from my long experience in this field that an explicit statement by Congress of its constitutional authority to enact a given statute would significantly improve the functioning of many federal programs by dramatically reducing costly and

disruptive litigation regarding the constitutionality of statutes and regulations.

Before considering the merits of a case, federal courts examine the source of their jurisdiction and explicitly state the statutory or constitutional source of their judicial authority. Similarly, executive branch agencies, when promulgating a regulation, describe in detail the statutory and constitutional authorities authorizing the regulation. Congress alone among the three branches of the federal government has generally failed to state - and many times even consider - the constitutional authority under which it enacts various laws. I respectfully suggest that Congress could learn a valuable lesson from the other two branches of the federal government; examining your constitutional authority before exercising governmental power produces better legislation and less litigation.

I know that critics of this bill assert that adding the requirement of an explicit statement of constitutional authority will unnecessarily delay and complicate the legislative process. To those critics I submit that the result - avoiding unconstitutional government incursions upon our precious American liberties - is worth it. Moreover, by consulting the blueprint of the Constitution before constructing a statutory scheme, Congress will produce better legislation in four significant ways:

- First, Congress will avoid having important legislation tied-up in litigation to determine a law's constitutionality.
- Second, Congress will avoid invalidation of part or all of a statute for lack of constitutional authority, a process that often consumes many years and millions of dollars.
- Third, Congress will be able to clarify its purpose in passing the legislation by stating the field within which it intended to legislate (e.g., national defense, appropriations, interstate commerce).
- Fourth, Congress will improve relations with the 50 sovereign states, which, under our constitutional blueprint, possess governmental powers that they alone (and not the federal government) may exercise.

I. The Tenth Amendment: Protecting Individual Liberties by Limiting the Power of the Federal Government

The Constitution establishes the principle of vertical division of powers between the states and the federal government. Just as the different branches of government are limited by the separation of powers, so is the federal government constrained by state sovereignty. In essay No. 45 of The Federalist, James Madison wrote that:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which

> in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State.

Thus, in ascertaining whether Congress possesses constitutional authority to enact particular legislation, it is not enough merely to identify an enumerated power in the Constitution; rather, Congress must look to the structure of the entire Constitution to determine the constitutionality of pending legislation. The United States Supreme Court explained this requirement in its 1992 decision New York v. United States, stating that:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress . . . . [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 2418 (1992).

The Court noted that a corollary of the existence of this division of powers is the absolute constitutional command that "neither government [federal or state] may destroy the other nor curtail in any substantial manner the exercise of its powers." Id. at 2421. The principle of dual sovereignty under our constitutional system is structural and inviolate; neither officials of the state nor of the federal government may alter

this constitutional structure in any manner short of amending the Constitution. As the Court succinctly stated in the New York decision, "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." New York, 112 S. Ct. at 2432. Just as Congress cannot surrender its powers to the executive branch, core state powers cannot be transferred to the federal government, for "[t]he constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." Id.

The vertical separation of powers between federal and state governments is indestructible because it exists, in the end, for the protection of individuals. The Constitution prevents the accumulation of power in a single, national government in order to protect individual liberty. Again, the Supreme Court has explained:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

New York, 505 U.S. 144, 167, 112 S. Ct. 2408, 2431.

While it may be tempting to sacrifice constitutional means for desirable ends, the Supreme Court warns us against such expediencies:

> The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 112 S. Ct. at 2434.

Observing the Tenth Amendment's limitation on Congressional authority is crucial for maintaining the integrity of our nation, for as the Supreme Court recently admonished in the 1991 decision Gregory v. Ashcroft, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Gregory v. Ashcroft, 501 U.S. 452, 2395, (1991).

II. Wetlands Regulation: Desert Land, Beaver Coats, Muskrat Meat And Retirement Homes.

The Clean Water Act, adopted by Congress in 1972, forbids the discharge of a pollutant into navigable waters without a permit. Although the Clean Water Act is silent on the point, Congress clearly had the authority to regulate pollution of navigable interstate waterways under its power to "regulate commerce among the several states" found in Article I, Section 8 of the Constitution. By failing to analyze its constitutional authority to pass the statute, however, Congress has failed to give the regulatory agencies and the public any clue as to the

scope and extent of the statute's reach. Thus, the Corps of Engineers and EPA have defined tens of millions of acres of dry land as "wetland" and classified such wetland as "navigable waters". By this regulatory sleight of hand, the homes and farms of millions of Americans have been transformed into "navigable waters" despite their complete lack of connection to interstate commerce.

Take, for example, the story of Bob and Mary McMackin, an elderly couple who purchased a modest retirement home in the Pocono Mountains of Pennsylvania in 1988. Mr. McMackin, a former engineer, carefully checked to see that their new home had all of the necessary permits and approvals. After four years of happily living in this retirement home, Mr. McMackin went to the mailbox one day and found a letter from the U.S. Army Corps of Engineers demanding that he remove all of the soil from his yard - destroying the lateral support for the house itself - because the government had decided that his property was once a wetland. According to the letter, if he failed within ten days to destroy his home, as the Corps demanded, he would be subject to civil penalties of up to $25,000 per day or criminal penalties of up to $50,000 per day and a year in federal prison. The Corps did not care whether Mr. McMackin's house had anything to do with the navigability of waterways or interstate commerce.

Consider also the Double Diamond Ranch, located on an interstate freeway immediately south of the rapidly-growing City of Reno, Nevada, which gets only seven inches of rain per year

and has no rivers or other water bodies located on it. In 1988, after two years of study, the Corps of Engineers declared in a Final Wetlands Determination that (with a minor exception) the ranch was not a wetland. On the basis of this Determination, Don Norman and Roger Norman (father and son) purchased the ranch for $20 million with the intent to develop an integrated commercial and residential project. Soon afterwards, however, on the basis of a new wetlands "manual", the Corps changed its mind and halted all development on the property for more than six years. The Normans were forced to sell off everything they owned to keep the project going, narrowly escaping complete financial disaster. The Corps has no interest in ascertaining whether this ranch, located in the middle of the Nevada Desert, constitutes "navigable waters" or has any connection with interstate commerce.

Still more alarming is the fate of James Wilson, President of the Interstate General Corporation. Mr. Wilson spent 18 years of his life building a model community in St. Charles, Maryland that now houses 30,000 people. The community was constructed in partnership with the U.S. Department of Housing and Urban Development, and the U.S. Army Corps of Engineers wrote a letter in 1977 stating that the property contained no jurisdictional wetlands. In February 1996, Mr. Wilson was convicted and sentenced to 21 months in federal prison for disturbing land that the Corps now asserts to have been wetland.

To prove a connection with interstate commerce at Mr. Wilson's trial, the Assistant U.S. Attorney qualified a government official as a "fur-bearing" expert. This official testified that about 300 beavers per year are trapped in Charles County, Maryland (although not on the property in question) and that beaver coats are normally not made within Maryland. He also discussed the market for muskrat and raccoon meat on Maryland's Eastern Shore. Significantly, however, the prosecutor never presented any evidence that the Clean Water Act was intended to protect interstate commerce in beaver coats or muskrat meat.

In fact, the Corps of Engineers routinely asserts jurisdiction over private property that it designates as "isolated wetland" - i.e., lands not having any connection to interstate navigable waters - by asserting that migratory birds might wish to land on this property. Of course, since migratory birds might land on anyone's roof, front yard, or swimming pool, this rationale essentially brings all private property within the jurisdiction of the Corps of Engineers. But the Corps offers no support for a claim that Congress enacted the Clear Water Act to protect migratory birds on isolated private lands.

Congress may or may not have intended to include private residences, desert land, beaver coats, muskrat meat, or migratory birds within the purview of the Clean Water Act. Since the statute contains no statement of the constitutional authority that Congress sought to exercise in adopting it, however, both the regulatory agencies and the citizens of the United States are

doomed to speculate - and litigate - whether that constitutional authority exists in each particular case. Wouldn't it be tragic if people like Jim Wilson went to prison or Bob and Mary McMackin lost their retirement home when Congress had no intention to impose such punishment?

III. The Endangered Species Act: Which Wins - Flies or Hospitals, Fish or Farmers?

The Endangered Species Act, passed in 1973, seeks to protect species of plants and animals from extinction. The statute does not explicitly state the source of its constitutional authority, although both the commerce and treaty powers (Article I, Section 8) are implied. Most of the species covered by the act, however, have no commercial value and are not protected by international treaties. Predictably, much litigation and uncertainty has been generated as a result of Congress' failure to state under what constitutional power the statute was adopted.

Take, for example, the County of San Bernardino, California, which needs to build an ambulance entrance to its new emergency room over land that is occupied by the "flower loving fly", an endangered species that does not travel between states. Speculating that the Endangered Species Act is predicated on Congress' interstate commerce power, the Justice Department has introduced evidence that five of these "flower loving flies" were once sold by an insect supply house in Texas to a collector in New York. The government is unable to produce any evidence,

however, that the statute was adopted to regulate what appears to be the only known sale of such flies, or why that sale can block the construction of a badly needed ambulance entrance to the San Bernardino County Hospital.

This Fall the Supreme Court will hear argument in Bennett v. Plenert. The Court of Appeal's decision held that farmers whose interest is "commercial" cannot challenge a government order prohibiting them from withdrawing irrigation water from a pond which contains the short-nosed sucker, an endangered species. If the Endangered Species Act is based upon Congress' commerce power, then commercial interests, such as farming, are within the zone of interest of the statute. If the government's argument is upheld, however, the Supreme Court will adopt the interpretation that the Endangered Species Act is intended to protect only non-commercial interests - i.e., interests that are not within the constitutional power of the Commerce Clause.

The State of Texas has been especially hard hit by the Endangered Species Act. The United States Fish and Wildlife Service has listed as endangered or threatened 42 species whose habitat is at least in part within Texas. It has already proposed listing another four species found in Texas. The Fish and Wildlife Service has many more listings under consideration. It has identified another 155 species found in Texas for which it has information indicating that a proposal to list is "possibly appropriate."

In his brief before the United States Supreme Court last year, the Attorney General of Texas argued that such an expansive interpretation of the statute - unlimited by any reference to Congress' constitutional authority to legislate - violates the regulatory authority of the State. The Attorney General of Texas stated:

> The Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution protect the self-governing rights and sovereignty of states. These rights ultimately devolve to the citizens of the state in order to protect them from overreaching by the federal government. Pursuant to their self-governing rights, Texas and its citizens have established a legal framework defining property rights and the powers of state and local governments to regulate and manage resources. The ESA's language and legislative history do not indicate that Congress intended to interfere (to the extent sought by FWS) with states' land use planning and water rights.
>
> The FWS "harm" regulation intrudes into two deeply-rooted areas reserved to the states and protected by the Constitution: the control, allocation, and use of water resources and land use management (including protection of private property). FWS's over expansive interpretation of the word "harm" results in a *de facto* comprehensive resource management scheme in Texas that is extensive, undefined, unpredictable, and expensive. As a result, landowners use their land at the risk of civil and criminal sanctions.
>
> Using the over expansive "harm" regulation, the FWS has not only run roughshod over long-established Texas water law and property law, it has seized control over land use planning throughout large sections of the state from Texas and its local governments. (More extensive excerpts from the briefs of Texas, Colorado and Arizona are attached as Exhibits A and B.)

IV. Public Lands: Does The Federal Government Rule The West?

In the twelve western states (including Alaska) the federal government owns more than half the land. In Nevada, for example, the federal government holds title to 87 percent of the land. Article IV of the Constitution gives Congress the power to "dispose of and make all needful rules and regulations" regarding the public lands. Federal government lawyers have argued that, in the guise of the power to "dispose of" the public lands, Congress may forbid ranchers from running wild horses off their properties (because the horses are also found on public land), regulate recreational developments (because they are adjacent to public lands), appropriate private water rights in streams crossing public lands, and even regulate automobiles and industries in distant cities (because air pollution eventually reaches public land). In each instance the courts and the litigants, including federal government lawyers, can only guess at the constitutional authority Congress sought to exercise, since the statutes in question give no hint that Congress has analyzed its constitutional power to pass them.

Many western counties, which may be 80 or 90 percent public land, find it impossible to provide ordinary services to their citizens because federal ownership overshadows local decisions regarding land use, road construction and maintenance, economic development, and the provision of water, power, and other basic services to residents. More often than not officials of federal land management agencies such as the Forest Service and Bureau of

Land Management simply assume that, as the majority landowner in the county, they - and not elected local government officials - are entitled to decide matters traditionally entrusted to local government. Neither local government officials nor federal agents can ascertain whether Congress intended to give federal officials such broad authority over local affairs because Congress has failed to state in this broad array of statutes both the constitutional basis and extent of federal power over public lands.

Indeed, uncertainty over the nature and extent of federal authority to intervene in state and local affairs is the primary source of western resentment of federal agencies. Congressional attention to the nature and extent of its legislative power would help clarify the authority of these agencies and avoid much unnecessary conflict in the West. Absent such direction, however, those federal agencies are left to simply do what they think best, which sometimes is the wrong thing.

V. Federal Environmental Regulation Of State And Local Government: The Super Unfunded Mandate

In enacting environmental statutes, Congress often forgets that states are sovereign governments, too. The Tenth Amendment to the U.S. Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." All too often, however, Congress has imposed procedural and substantive requirements on state and local governments

without any consideration of whether Congress possesses such a power, let alone whether those requirements make sense.

In an editorial published on December 1, 1994, Greg Lashutka, Mayor of Columbus, Ohio, likens such federal mandates to having "your Uncle Sam take you to lunch, order your food, and then hand you the check". He reports that between 1991 and 2000, Columbus expects to spend $1.6 billion on 14 major federal environmental mandates. Each Columbus family's share will be $850 per year to comply with these federal requirements. (A copy of this editorial is attached as Exhibit C).

Even in the face of EPA's commitment to devolution of federal programs to state and local governments, the Justice Department recently testified in opposition to a House Bill that would effectively prohibit federal "overfiling" of environmental enforcement cases where a regulated entity reasonably relied upon the instructions of state environmental officials to comply with environmental laws. Asserting that state officials tend to "race to the bottom" in applying environmental protections, the Justice Department seems to assume that only the federal government can be trusted with protection of the environment. Such a Washington-centered view of the world ignores the fact that it is state and local environmental officials, not EPA bureaucrats in Washington, who live, work, and raise their families in the communities that EPA seeks to regulate by command and control from Washington, D.C.

In rules recently promulgated under the Clean Air Act and Clean Water Act, for example, EPA has required that state legislatures pass laws providing broad standing in state courts for challenges to state air and water permits issued under programs delegated by the federal government to states under the Clean Air Act and Clean Water Act. Had Congress analyzed the Tenth Amendment implications of those statutes, it undoubtedly would have concluded that EPA has no authority to write legislation and order state legislatures to pass it. Absent that constitutional analysis, however, both EPA and the states are left to speculate and litigate over the question of whether or not Congress intended to respect the sovereignty of state legislatures.

Conclusion:

The power of Congress to legislate was limited by the framers of the Constitution to protect Americans against the evils of a government possessing absolute authority over the individual. When Congress ignores the constitutional limits upon its authority - even in a good cause such as environmental protection - it violates its solemn obligation to act only within constitutional limits. Passage of S.1629 will ensure that, each time Congress legislates, it pauses to tailor that legislation so that the statute does not violate our precious American freedoms. In short, S.1629 will ensure that the legislation Congress passes

is not only good - but constitutional as well. Accordingly, I strongly urge passage of this bill.

I would be pleased to answer any questions you may have.

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INTERESTS OF AMICUS CURIAE STATE OF TEXAS

This brief is submitted by *amicus curiae* State of Texas ("Texas") on behalf of the state, its local governments, and the private groups that have endorsed this brief.[1] It is also submitted by Texas in its capacity as *parens patriae* in order to protect the self-governing and private property rights of Texas citizens. Texas and the members of the private groups endorsing this brief are affected by the *de facto* comprehensive resource management scheme contrived by the Petitioners on the basis of their overexpansive interpretation of the term "harm" (and therefore "take") as contained in the Endangered Species Act ("ESA").[2] This scheme will convert substantial amounts of private property and state property into *de facto* "federal wildlife preserves," the onus of which may be avoided only by securing an ESA § 10(a) "incidental take" permit.

Texas and its political subdivisions seek to vindicate and protect fundamental, historical attributes of state sovereignty and self-government, including their police power to make and enforce laws to protect their citizens' health, safety, and property against the intrusion of the United States Fish and Wildlife Service ("FWS").[3]

SUMMARY OF ARGUMENT

I. Deference to FWS's "harm" regulation pursuant to the step 2 analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) is inappropriate because the challenged agency regulation intrudes into areas of constitutionally-protected state authority without a plain statement from Congress. The intrusion results in derogation of Texas' and its citizens' self-governing and property rights.

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[1] The list of the private groups who have endorsed this brief is included in the Appendix at 1a.

[2] 16 U.S.C. §§ 1531-1544.

[3] Because Petitioner Secretary of the Interior has delegated his ESA authority to the FWS, Texas will refer to Petitioners collectively as "Petitioners" or "FWS."

When Congress desires to intrude into areas of state sovereignty or authority, it must do so plainly, with unmistakably clear language in the text of a statute. Agency regulations which intrude on a state's and its citizens' self-governing and property rights must be measured against that stringent standard. Any less stringent standard (such as the application of the step two analysis of *Chevron*) would allow Congress and federal agencies to circumvent the protections afforded the states by the "plain statement rule." Furthermore, it is a fundamental principle of statutory construction that constitutional questions should be avoided when possible.

The Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution protect the self-governing rights and sovereignty of states. These rights ultimately devolve to the citizens of the state in order to protect them from overreaching by the federal government. Pursuant to their self-governing rights, Texas and its citizens have established a legal framework defining property rights and the powers of state and local governments to regulate and manage resources. The ESA's language and legislative history do not indicate that Congress intended to interfere (to the extent sought by FWS) with states' land use planning and water rights.

The FWS "harm" regulation intrudes into two deeply-rooted areas reserved to the states and protected by the Constitution: the control, allocation, and use of water resources and land use management (including protection of private property). FWS's overexpansive interpretation of the word "harm" results in a *de facto* comprehensive resource management scheme in Texas that is extensive, undefined, unpredictable, and expensive. As a result, landowners use their land at the risk of civil and criminal sanctions.

Using the overexpansive "harm" regulation, the FWS has not only run roughshod over long-established Texas water law and property law, it has seized control over land use planning throughout large sections of the state from Texas and its local governments.

Conclusion

FWS's definition of "harm" is *ultra vires* because it fails the step one analysis of *Chevron*. It is furthermore *ultra vires* because Congress did not plainly state that FWS was authorized to infringe upon important areas of state governmental and sovereignty rights and because the interpretation needlessly raises constitutional issues by infringing on the rights and powers of Texas and its citizens protected and reserved by the Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution. The Court of Appeals' decision should be affirmed.

ARGUMENT

The Endangered Species Act ("ESA")[4] makes it unlawful for any person to "take" an endangered species. 16 U.S.C. § 1538(a)(1). A "take" is defined by statute to include "harm." There is no statutory definition of "harm." By regulation, however, FWS has defined "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (1994).

On the basis of this overexpansive interpretation of "harm," FWS has contrived a *de facto* comprehensive resource management scheme in Texas that prevents Texas and its landowners from using their land, property, and resources in ordinary, customary ways (such as building homes and pumping groundwater) in accordance with state and local law.

As a result of the FWS's "harm" regulation, Danny McFadin, a Uvalde County farmer, must decide either to stop pumping Edwards Aquifer water necessary to irrigate his crops or to continue to pump the water and risk fines and jail for "takes" of endangered species. Remarkably, the endangered species at issue are not on his land. Rather, the protected species live in springs

[4] 16 U.S.C. § 1531 *et seq.*

over 100 miles away. Hundreds of other farmers and dozens of cities in Central Texas face the same dilemma. San Antonio, for example, pumps all of its water from the Edwards Aquifer. San Antonio is now challenged with ensuring the long term delivery of water to its residents for residential, business, economic development, and other essential uses.

A federal district court adopting the FWS's view of "harm" has threatened to impose pumping limits on San Antonio and the irrigators unless they or Texas does so first.[5] Despite Texas's legislative efforts, including the creation of a new "Edwards Aquifer Authority" ("EAA"), the court remains unsatisfied and is apparently ready to federalize the Edwards Aquifer or eviscerate Texas' groundwater law in order to impose pumping limitations. According to the mayor of San Antonio, the effect of such limitations would "stick a dagger in the economic heart of the community."[6]

Not even national security or the readiness of the nation's armed forces stationed in Central Texas are immune from the reach of the ESA theory embraced in the Edwards Aquifer case. The Department of Air Force is confronted at Kelly Air Force Base (located in San Antonio) with the same problem facing Mr. McFadin. Whether the base is closed or whether activities can be expanded depends now on whether there will be sufficient water in the event pumping is limited from the aquifer.[7]

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[5] *Sierra Club v. Babbitt*, No. MO-91-CA-069 (W.D. Tex. May 26, 1993) (amended order) ("*Sierra Club I*"). The court relied heavily upon testimony by a FWS official to the effect (1) there were "takes" as a matter of fact and as a matter of administrative interpretation of the ESA, and (2) the Texas legislative session ending May 1993 represented the "last chance" for the legislature to solve the supposed "take" problem before the "blunt axes" of the ESA would have to be dropped on Texas. *Id.* Amended Findings of Fact and Conclusions of Law ¶ 161 (May 26, 1993).

[6] "Led hearing on species act brings out anger in Boerne [Texas]," *San Antonio Express News*, March 21, 1995, at 1 (statement of Nelson Wolff, Mayor of San Antonio).

[7] Texas is concerned about the growing interpenetration between ESA §§ 7 and 9 as applied by the FWS. If the FWS cannot use its overexpansive interpretation of "harm" pursuant to ESA § 9 to directly reach activity on private land (such as the pumping of groundwater or the clearing of cedar trees) that it believes is "harming" a listed species, then it will attempt to

Margaret Rodgers, who owns land in Travis County, has received letters from the FWS informing her that clearing her land to build a fence may "take" an endangered species--the golden-cheeked warbler. The letters stated that she could be subject to a fine of up to $50,000 and imprisonment up to one year. Understandably, she stopped trying to build the fence. The letters did not accuse her of killing or injuring a warbler; in fact, they did not even say that any warblers live, or have ever been seen, on her property--the mere clearing of her land was sufficient reason to prompt the FWS to send its letters. Hundreds of other landowners in Texas are in Mrs. Rodgers' predicament.

Mr. McFadin and Mrs. Rodgers at least have notice that they risk civil and criminal penalties in using their land. But because FWS does not make clear the extent of its resource management program, other Texas landowners and governmental entities are unaware that they are also subject to penalties for making ordinary use of their land.

I. STEP TWO OF THE CHEVRON STANDARD--"DEFERENCE TO ADMINISTRATIVE INTERPRETATION"--IS AN INADEQUATE STANDARD OF REVIEW BECAUSE THE CHALLENGED FWS REGULATION SUBSTANTIALLY ALTERS THE TRADITIONAL STATE/FEDERAL BALANCE.

Petitioners argue that the Court should review the FWS "harm" regulation under the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Petitioners' Brief* at 20. Step one of the *Chevron* analysis determines whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to unambiguously expressed intent of Congress." 467 U.S. at 842-843. Texas agrees with the Court of Appeals and Respondents that the FWS

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increase its efforts to control those supposed harmful activities indirectly through forced consultation with a federal agency (pursuant to ESA § 7) having *some* federal program delivery nexus with the landowner. For example, in the Edwards Aquifer situation, the FWS could pressure the Farmers Home Administration through the ESA § 7 consultation process to refrain from making or guaranteeing loans to farmers seeking financing for farming activities which depend on the pumping of aquifer water.

"harm" regulation fails step one of the *Chevron* test and is *ultra vires*.[8]

Petitioners argue, nonetheless, that if the Court finds the ESA silent or ambiguous regarding the issue of whether habitat modification by itself constitutes a "take," then it should apply step two of the *Chevron* analysis and give "substantial deference" to FWS's interpretation. *Petitioners' Brief* at 16. Texas disagrees. While *Chevron's* "deference to agency interpretation" of an ambiguous statutory term may provide a proper standard for conventional review of a regulation, it is inadequate for reviewing a regulation which deeply intrudes into traditional state authority and upsets the appropriate balance between federal and state governments.

The *prudential* presumption of judicial "deference to the administrative agency" must yield to giving greater weight to *constitutional* concerns regarding federalism and dual sovereignty when a federal agency intrudes into areas reserved to the states. In such cases, the Court should more closely scrutinize the agency regulation to ensure that Congress clearly and unambiguously intended the intrusion. Thus, a heightened standard of review--"*Chevron* Step Two-Plus"--for the FWS "harm" regulation should be adopted by the Court because fundamental doctrines of federalism and the self-governing rights, powers, and duties of states and local governments are at stake.

A. The Plain Statement Rule.

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court articulated the "plain statement rule" with respect to determining whether Congress intended to override state self-governing rights and powers. "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). To make its intention clear and manifest, Congress must be "unmistakably clear in the language of the statute." *Id.* at 460-461 (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The plain statement rule, furthermore, ensures that when an interpretation of a statute would "upset the usual constitutional balance of federal and state powers, . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Id.* at 460 (citation and quotation marks omitted). This rule rests on the understanding that while "Congress may legislate in areas traditionally regulated by the States," the power to do so is "an extraordinary power in a federalist system," which courts "must assume that Congress does not exercise lightly." *Id.* at 460.[9]

B. Constitutional Issues Should Be Avoided Where Possible.

It is axiomatic, when reviewing whether a regulation is *ultra vires*, that constitutional issues--including the preservation and maintenance of the constitutionally appropriate state/federal balance--should be avoided when an otherwise acceptable construction of a statutory provision is possible.[10] The FWS's overexpansive interpretation of "harm" raises serious constitutional issues which can be avoided through a narrower and more appropriate construction of the word "harm"--such as that construction adopted by the court of appeals in this case.

[8] Texas supports the Court of Appeals' ruling and the Respondents' position in this regard. Texas will limit its brief to federalism-based issues because the conventional *Chevron* analysis issues are being briefed by the parties to this case.

[9] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) "[T]he historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."

[10] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *New York v. United States*, 112 S.Ct. 2408, 2408 (1992).

C. The Constitutional Issues: State Sovereignty and Self-Government.

The proper balance between the federal government and the states is preserved textually by the Tenth Amendment[11] and the Guarantee Clause,[12] and is embedded in the inherent structure of the Constitution.[13] As declared in *Texas v White*, 7 Wall. 700, 725 (1869):

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

By constituting a federal government of limited powers, while reserving "the powers not delegated to the United States, nor prohibited by it" to the states and the people, the Constitution established a framework in which the states retained "substantial sovereign authority." *Gregory v Ashcroft*, 501 U.S. 452, 457 (1991).[14] If the states or the people have not conferred a power upon Congress, then *a fortiori* a federal agency cannot assume that power in derogation of the Tenth Amendment.

The Guarantee Clause is predicated on the proposition that state governments are accountable to their citizens with respect

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[11] U.S. Const. amend. X (the "Tenth Amendment"). "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[12] U.S. Const. art. IV, § 4 (the "Guarantee Clause"). "The United States shall guarantee to every State in this Union a Republican Form of Government . . ."

[13] *See, Nevada v Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting).

[14] In *New York*, 112 S.Ct. at 2417 (1992), the Court stated:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

to fundamental decisions about how to allocate, control, and use resources and define property rights.[15] A state's "republican form" of government is diminished when its ability to make decisions is fettered, constrained, or overridden by a federal agency acting *ultra vires*.[16] The vitality of the Guarantee Clause was renewed in *New York v United States*, 112 S.Ct. 2408, 2432-2433 (1992) in which the Court acknowledged the suitability of the Guarantee Clause to protect states from an over-intrusive federal government.[17]

The control of elected officials by the electorate and their accountability to the citizens who entrust them to office is the *sine qua non* of a republican form of government.[18] "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their

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[15] *See Federal Energy Regulatory Commission v Mississippi*, 456 U.S. 742, 762 (1982) ("*FERC*").

[16] Of course, pursuant to the Supremacy Clause and assuming a basis for exercising a power (*e.g.*, the Commerce Clause or the Spending Clause), Congress can intrude into state sovereignty and override state law. The requirement, however, is that Congress must plainly state that it intends to do so.

[17] In *New York*, the Court ruled that the Low-Level Radioactive Waste Policy Act did not violate the Guarantee Clause because under the Act "[t]he States . . . retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." *New York*, 112 S.Ct. at 2433.

[18] Professor Tribe has strongly urged the revitalization of the Guarantee Clause's protection of state governments:

> *[The Guarantee Clause] might plausibly be invoked in support of the proposition that the Constitution recognizes in the National Government a duty, running directly "to every State in this Union" rather than to individuals, to respect the state's most fundamental structural choices as to how its people are to participate in their own governance . . .* When Justice O'Connor observed, in her powerful dissent in *[FERC]*, that "federalism enhances the opportunity of all citizens to participate in representative government," [456 U.S. at 789] . . . she may have hit upon an important link between the tacit postulate of state sovereignty and the textual guarantee of republican government.

Laurence Tribe, American Constitutional Law 397-398 (2d ed. 1988) (emphasis added).

rulers [citing J. Locke, *Second Treatise of Government*, § 149]."[19]

Preserving state sovereignty and federalism is not, however, an abstract "states' right" goal. Rather the Court has recognized that such preservation is critical to protecting the rights and powers of citizens. As the Court stated in *New York*, 112 S.Ct. at 2431 (citations and quotation marks omitted):

> The Constitution does not protect the sovereignty of the States ... as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power ... [A] healthy balance of power between the States and the federal government will reduce the risk of tyranny and abuse from either front.

Reflective of the citizens' rights, values, desires, and concerns, Texas and its local governments have erected a system of laws which defines and protects the property of their citizens and have established a comprehensive resource management system, including land using planning, zoning, environmental protection, resource protection, and water rights protection, control, and allocation. This system has been diminished by the FWS and its overexpansive interpretation of "harm."

The hobbling of a state government's abilities to protect the property and self-governing rights of its citizens results in a diminishment of the state's republican form of government.

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[19] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) (hereinafter *"Guarantee Clause and State Autonomy"*), citing The Federalist No. 39 (James Madison). In *New York*, the Court relied on Professor Merritt's article for the following proposition: "Accountability [of state officials to the public] is ... diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 112 S.Ct. at 2424.

Federal abrogation, furthermore, of a state's property protection and regulatory framework constitutes a violation of the Guarantee Clause--unless Congress clearly intended to supersede the state's laws.[20] Without clear and manifest intention by Congress, a federal agency cannot convert a sovereign state into a mere subordinate "field office" of the federal government. *See New York* 112 S.Ct. at 2434.

D. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE ESA CLEARLY INDICATE THAT CONGRESS DEFERRED TO STATE LAW IN AREAS CONSTITUTIONALLY RESERVED TO THE STATES.

As originally passed, the ESA was very deferential to the states, apparently due to the constitutional concerns identified above and the historic pre-eminence of state law in regulating wildlife, natural resource management, and private land use. Congressional deference is manifested in ESA §§ 4(d), 6(c)(1)(E)(ii), and 6(g)(2)(B), which make state law controlling in many instances in determining when a "take" of a listed wildlife species has occurred. The FWS's view that the ESA, through the simple inclusion of the word "harm," allows FWS to regulate land use and displace state authority is incompatible with this Congressional deference to state law.

Moreover, there are strong indications in the legislative history of the ESA that Congress chose not to displace state authority in the area of regulating private land use. Senator Williams' bill, as introduced, defined "take" to include the "destruction, modification, or curtailment of [a listed species']

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[20] Professor Merritt explained:

> [T]he words of the guarantee clause suggest a limit on the power of the federal government to infringe state autonomy: the citizens of a state cannot operate a republican government, "choos[ing] their own officials" and "enact[ing] their own laws," if their government is beholden to Washington. [The Guarantee Clause], therefore, may be read as a promise to preserve the state autonomy necessary to foster republican government.

Guarantee Clause and State Autonomy at 25.

A. The FWS "Harm" Regulation Upsets the State/Federal Balance by Intruding into State Water Law.

Water law--the determination of allocation, ownership, and control of water resources--has long been established as an area of traditional state authority and has long received extraordinary deference from both Congress and the courts. *California v. United States*, 438 U.S. 645, 653 (1978). Congress has oftentimes preserved the states' right to determine which systems of law to follow. *Id.* at 658.

Texas follows the "rule of capture" for groundwater. *Houston & T.C. Railway Co. v. East*, 81 S.W. 279 (Tex. 1904). The rule of capture has several important implications pertaining to this case. First, it means groundwater is the private property of the surface owner subject to the surface owner's "capture" of the resource. Second, it is a rule of no liability.[9] Third, the rule of no liability extends to groundwater pumping that affects springflow relied upon by surface appropriators.[10]

The case for federal deference to state water law is even stronger in Texas than in other western states. Federal lands do not comprise a large percentage of property owned in Texas. More than 96 percent of the land in Texas is privately owned. Furthermore, Texas has few of the massive federal water projects that have been the source of so much of the Supreme Court's jurisprudence in the area of water.

The following are examples of how the FWS "harm" regulation is being applied to displace long-standing Texas water law. These applications unavoidably infringe upon private property rights protected by Texas' property law framework, and

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checked warbler; "[t]he critical-habitat designation doesn't add anything to the constraints on the average landowner." "Agency defends plan for songbird habitat," *San Antonio Express News*, July 27, 1994, at 1.

[9] That is, adjoining landowners do not have a cause of action for damages or injunction resulting from the pumping of underground water. *See e.g. City of Sherman v. Public Utility Commission*, 643 S.W.2d 681 (Tex. 1983).

[10] *Pecos County W'CID v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.--El Paso 1954, *writ ref'd n.r.e.*)

also infringe on Texas' self-governmental rights to determine how its water resources will be allocated, controlled, and used.

1. The Edwards Aquifer: Federal Regulation of State Water Law Through the "Harm" Definition.

Sierra Club v. Babbitt,[11] currently before the federal court in the Western District of Texas represents an effort to impose federal regulation pursuant to the ESA over pumping in the *entire* Edwards Aquifer region of Central Texas.[12] The district court held that when springflows at the Comal and San Marcos Springs fed by the Aquifer drop below a specific rate, endangered fountain darters are "taken" in violation of ESA § 9.[13]

The court has threatened several times to impose pumping limits on the Edwards Aquifer unless Texas develops a regulatory system to limit pumping to whatever extent is necessary to avoid "takes," even in a repeat of the drought of record.[14] Most recently, on March 6, 1995, the court stated that it "has no alternative under the law [the ESA] but to do whatever is necessary to keep the Comal and San Marcos springs flowing."[15] The court further indicated that it believes that it has the authority to order Texas to implement a pumping reduction plan adopted by the court, and that it will do so, should Texas fail to do so on its own.

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[11] *Sierra Club v. Babbitt*, No. MO-91-CA-069 (W.D. Tex. May 26, 1993) (amended order) ("*Sierra Club I*")

[12] The Edwards Aquifer, which extends over 3600 square miles in six counties in Central Texas, feeds the San Marcos and Comal Springs ("Springs"), where the fountain darter and four other listed species are found. *Sierra Club v. Babbitt*, 995 F.2d 571, 573 (5th Cir. 1993) ("*Sierra Club II*"); *Sierra Club I*, Amended Findings of Fact and Conclusions of Law ¶¶ 5, 24, 25.

[13] *Sierra Club I*, Amended Findings of Fact and Conclusions of Law ¶ 81. According to the Fifth Circuit, the FWS was found guilty of the "takes." *Sierra Club II*, 995 F.2d at 574.

[14] The plan must also limit pumping to whatever extent is necessary to avoid any appreciable reduction in the likelihood of the species' survival and recovery and any appreciable diminution of the value of critical habitat for the survival and recovery of any listed species. *Sierra Club I*, at 6 (W.D. Tex. May 26, 1993) (amended order).

[15] *Sierra Club I*, Order on the Sierra Club's Second Motion for Additional Relief, at 2, 8 (W.D. Tex. March 16, 1995).

In response to the court's 1993 "urgings" and in order to avoid the FWS "blunt axes," the Texas legislature created the Edwards Aquifer Authority ("EAA") in 1993 to manage the Edwards Aquifer. Because the implementation of the act creating the EAA was objected to under Section 5 of the Voting Rights Act, the federal court appointed a monitor in February 1994[16] to gather and evaluate "information necessary to allow the court to take appropriate action to prevent violations of the [ESA]."

This application of the "harm" regulation in the Edwards Aquifer litigation has sweeping ramifications. It has the potential to negate an entire body of Texas groundwater law, to eviscerate the authority of several local groundwater conservation and regulatory bodies, and erode the vested property rights of those individuals who must rely on the Edwards Aquifer for water to drink, irrigate crops, or run businesses. As noted above, Texas follows the rule of capture with respect to groundwater. By holding that groundwater pumping causes a "take" under ESA § 9, the *Sierra Club* court possibly subjects the pumpers (in addition to the FWS) to civil and criminal liability for the very same act that, under Texas law, is not only legal, but falls under a private property rule of no liability. *See City of Sherman v Public Utility Commission*, 643 S.W.2d 681 (Tex. 1983); *Pecos County WCID v Williams*, 271 S.W.2d 503 (Tex. Civ. App. - El Paso 1954, *writ ref'd n r e*) (no liability for landowners whose pumping of underground water affected flow of spring relied on by adjacent landowner).

The potential reach of the "harm" regulation over water use and land regulation in this case is truly astonishing.[17] The

[16] *Sierra Club I*, Order Appointing Joe G. Moore, Jr. as Monitor, at 1-2 (W.D. Tex. Feb. 25, 1994)

[17] The American Bar Association's Section of Natural Resources, Energy, and Environmental Law Journal stated moreover

> [T]he *Sierra Club* suit presents a situation in which the connection between the activity and the "taking [under the ESA] is extremely remote. The suit literally would have FWS regulate groundwater withdrawal by an irrigator based on conditions at a spring located almost one hundred miles away from that irrigator's activity. Moreover, the irrigator's activity alone is not what is causing those conditions at the spring to occur, but rather it is the cumulative effect of a regionwide activity. That activity is not associated with direct destruction of habitat, rather, it is the result of the general sheltering and welfare of a regional population (*i.e.*, the supply of water to residences and businesses).
>
> *If the ESA was intended to cover natural resource management issues such as those raised in the Sierra Club lawsuit, one has to question what situations the ESA could not cover.* For example, if it could be shown that acid rain in northeastern forests resulting from midwest power plant production is resulting in the depletion of endangered species habitat, could FWS regulate power plant practices? . . . Another scenario might involve an interstate water dispute in which one state argues that an upstream state is diverting so much water that an endangered species' habitat is threatened. One's mind does not have to wander far to come up with similar examples of how FWS could use the ESA as a resource management tool on a regional or even national scale.
>
> "Phase Three of the ESA: Using Endangered Species Protection as a Natural Resource Management Tool," NATURAL RESOURCES & ENVIRONMENT JOURNAL, Winter 1992, at 39 (emphasis added)

[18] *Sierra Club I*, Findings of Fact and Conclusions of Law ¶¶ 16, 17.

[19] Texas agrees with the arguments made by the State of Arizona in its amicus brief that the FWS "harm" regulation is constitutionally suspect as an overbroad construction of a criminal statute in that it criminalizes lawful land uses on nonfederal lands. Therefore, Texas supports Arizona in its analysis that traditional insistence on clear statutory statements by Congress is a prerequisite to criminalization of ordinary activities. The Edward Aquifer case indicates the problems of an overly broad interpretation of "harm": it is unclear which of the thousands of pumpers of the Edwards Aquifer would be criminally culpable for the purported "takes" of the fountain darter, or upon what principled basis a court could convict, or the federal government could prosecute pumpers throughout the entire Edwards Aquifer region.

Edwards Aquifer is the major source of water for over one million people: It supplies water to San Antonio and other cities, as well as to farmers, ranchers, businesses, and military installations.[18] These individuals, businesses, and cities must either decide to stop pumping water, at great cost and political detriment to themselves, or face civil and criminal sanctions in the future.[19]

The threat of a court-run regulatory system is increasing. Under the FWS interpretation of "harm," FWS and the court have the authority to impose restrictions on private and public property immediately, rather than continuing to press Texas to do it for them. In addition, the FWS could bring a civil or criminal action,

or the Sierra Club could bring a citizen suit, against those who are pumping water from the Aquifer.

2. Proposed Listing of the Barton Springs Salamander and the Arkansas River Shiner: Further FWS Plans to Manage State Waters.

A 1994 FWS proposal to list the Barton Springs salamander as endangered stated that designating Barton Springs (the only place the salamander is found) as critical habitat "would actually be detrimental to conservation efforts . . . because it would promote the misconception that the Barton Springs are the only areas important to the conservation of the species."[40] The springs are fed by an aquifer, and the FWS believes that it has the authority to regulate activities--primarily urban development[41]--that might affect the quality and amount of the water in the aquifer. The area of land that provides water to the aquifer that feeds the Barton Springs is 354 square miles.[42]

On August 3, 1994, the FWS proposed to list the Arkansas River shiner (a fish) as an endangered species.[43] In that proposal, the FWS implied that groundwater uses in three states would have to be modified to preserve the species.[44] The FWS recognized that groundwater is an extremely important source of water in Texas, Kansas, and Oklahoma. FWS noted that withdrawals of groundwater in the Canadian River Basin in Texas were as much as thirty-three times higher than the annual natural recharge in 1980.[45] The FWS concluded that under current conditions of groundwater usage, suitable habitat to support Arkansas River shiner populations is nonexistent. In other words, the FWS declared that those three states would have to reform current water usage. Drastic changes to surface water uses would also be demanded by the FWS.

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[40] 59 Fed Reg 7968, 7977 (Feb 17, 1994).

[41] *Id* at 7971, 7977

[42] *Id* at 7969

[43] 59 Fed Reg 39532.

[44] *Id* at 39535

[45] *Id*

C. The FWS Overexpansive Definition of "Harm" Results in Federal Land Use Regulation That Effectively Preempts State and Local Land Use Planning.

The FWS's overexpansive interpretation of the word "harm" is producing an unprecedented shift in resource management power from the states and local governments to an unelected and unresponsive federal bureaucracy. FWS rests its resource management scheme on the word "harm." This term was added by a technical amendment to the ESA in 1982, without debate. It is inconceivable that so innocuous an addition could justify the pervasive resource management scheme spawned by FWS's "harm" definition.

Pursuant to its interpretation of "harm," FWS has acted to regulate state and private land in Texas. In particular, it prohibits landowners from undertaking ordinary, otherwise legal activities not directed against endangered or threatened species. This prohibition is extensive--it affects land in almost all of Texas' 254 counties.

It is impossible for landowners to know the full *geographical extent* of the prohibition, however, because FWS rarely delineates the habitat of listed species. Moreover, FWS does not limit its oversight to land that contains habitat, delineated or not; it relies on its regulatory definition to restrict land use hundreds of miles away from habitat, on occasion, if it feels that use of that land might--however indirectly--affect protected habitat.

Nor is it possible to predict what *kinds of uses* of land are prohibited. Under its interpretation of "harm," FWS need not show that a land use actually results in physical injury to an individual member of a species; to the FWS, the modification of habitat is itself enough to demonstrate that a "take" has occurred. The regulatory definition of "harm" presumes that proscribed injury to wildlife may occur by any activity that "significantly impair[s] essential behavioral patterns." 50 C.F.R. § 17.3. Only FWS, however, knows what habitat modifications are "significant" enough to come under that prohibition. It is clear, moreover, that FWS's interpretation of "harm" does not require any showing of actual death or injury to an individual of a listed species, despite protestations in brief by FWS that it does.

As a result, landowners use their land at the risk of possible civil and criminal sanctions under the ESA. Their only recourse is to seek an "incidental take" permit from FWS under ESA § 10(a). Such permits are rare, seldom available to individuals, and often very expensive.

This system of prohibitions and permits amounts to a pervasive land regulation program not contemplated by Congress in passing the ESA. Congress has provided for a system--ESA § 5 federal land purchases--that would pay landowners for their land if necessary to protect listed species. FWS has reversed that system, by requiring landowners to pay for the use of their own land. The FWS potentially unbounded regulation of land use based on the word "harm" is contrary to the intent of Congress and raises serious constitutional and federalism issues.

1. The FWS Land Use Regulation System Applies To Land Throughout Texas and, for the Most Part, Its Boundaries Are Undefined.

FWS has listed 42 species of fish and wildlife as endangered or threatened whose habitat is at least in part within Texas.[46] FWS has proposed listing another four species of fish and wildlife in Texas,[47] and it has identified another eleven for which it believes it has sufficient information to support such a proposal.[48] FWS has many more listings under consideration: It is considering another 155 species in Texas for which it has

[46] *See* FWS, *Threatened and Endangered Species of Texas* (1992). FWS regulations list another four species in Texas: the Louisiana black bear, the Mexican spotted owl, the Coffin Cave mold beetle, and the Bone Cave harvestman. 50 C.F.R. § 17.11, at 93,105,120,121 (1994). FWS added the southwestern willow flycatcher to the list of endangered species on February 27, 1995. 60 Fed. Reg. 10693.

[47] *See* 59 Fed. Reg. 7968 (Feb. 17, 1994) (proposal to list Barton Springs salamander as endangered); 59 Fed. Reg. 35674 (July 13, 1994) (proposal to list jaguar, which does not currently live in Texas but may cross border from Mexico, as endangered); 59 Fed. Reg. 39532 (Aug. 3, 1994) (proposal to list Arkansas River shiner as endangered); 59 Fed. Reg. 39532 (Aug. 3, 1994) (proposal to list cactus ferruginous pygmy-owl as threatened in Texas).

[48] 59 Fed. Reg. 58982 (Nov. 15, 1994) (list of animals FWS is reviewing for possible addition to its list of endangered and threatened species).

information indicating that a proposal to list is 'possibly appropriate.'"[49]

The species already listed as endangered and threatened are found in most of the counties in Texas. Taking into account the migratory route of the whooping crane adds considerably more counties. In all, 210 of the 254 counties in Texas are already covered to some extent.[50] The vast majority of these species are on private and state land, since the vast majority of land in Texas is private or state-owned.[51] The federal government owns less than two percent of Texas land--a far lower percentage than elsewhere in the West.

While it is possible to know in general where these species are found in Texas, it is usually impossible for a landowner to know whether his or her land is regulated by FWS, for two reasons. First, *FWS does not delineate the habitat* of most listed species. Although the ESA requires a species' "critical habitat" to be designated to the maximum extent determinable and prudent at the same time it is listed,[52] FWS usually does not designate critical habitat when the species is listed or afterwards. For example, FWS has designated critical habitat for only 10 species found in Texas.[53]

[49] *Id.* FWS states that "persuasive data on biological vulnerability and threat are not currently available to support proposed rules." *Id.*, at 58983.

[50] The August 1992 FWS study provides, for each species, a map highlighting the counties that include range of the species, including the migratory path of the whooping crane.

[51] Indeed, the majority of all listed species in the United States are on nonfederal land. In a December 1994 report, the General Accounting Office stated, "Over 90 percent (712 of 781) of the listed species [including plant species] in the United States for which the Service had responsibility as of May 10, 1993, have some or all of their habitat on nonfederal lands." General Accounting Office, *Species Protection on Nonfederal Lands* 4 (1995). Of the 359 listed animal species, 247 (about 69 percent) have over 60 percent of their total habitat on nonfederal lands. *Id.*, at 5.

[52] 16 U.S.C. § 1533(a)(3).

[53] The FWS's reluctance to designate critical habitat is understandable in light of the public outrage ignited by the leaked proposal to designate about 800,00 acres throughout Central Texas as critical habitat this past summer. The use of its overexpansive "harm" definition (as determined by biologists

For the other listed species in Texas, which do not have designated critical habitat, FWS gives only general information on the species' location, such as merely listing the counties in which the species is found.[54] Such information is of little or no use to landowners who need to know whether their land may be affected by the FWS prohibition on habitat modification. Nor is it usually possible for landowners to make such a determination themselves. In effect, FWS puts the burden on landowners to prove that their land does not contain habitat.

The second reason why the geographical boundaries of the FWS regulation as to a listed species are unclear is that FWS's application is *not limited to habitat*, whether or not it is delineated. FWS believes that it may regulate any activity that might affect habitat, even if the activities and the habitat are hundreds of miles apart. Regulation is not therefore limited to actual habitat, but has been applied by FWS to also reach a vast amount of additional land in Texas.[55]

2. THE FWS LAND REGULATION SYSTEM DOES NOT MAKE CLEAR WHAT USES OF LAND ARE PROHIBITED; IN PARTICULAR, USES MAY BE PROHIBITED WITHOUT ANY EVIDENCE THAT THEY RESULT IN PHYSICAL INJURY TO AN INDIVIDUAL MEMBER OF A SPECIES.

The reach of the FWS's regulation of land is extended further because the FWS "harm" interpretation does not require that the purportedly prohibited activities cause physical injury in fact to an individual member of a listed species. Under the FWS interpretation of "harm," habitat modification, without more, equals a prohibited take.

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and technicians) against landowners is easier than engaging in the public process for designating critical habitat.

[54] *See* FWS, *Threatened and Endangered Species of Texas* (1992)

[55] Examples of this broad regulation have already been given. The proposed listing of the Barton Springs salamander would affect 354 square miles of watershed for the aquifer that feeds Barton Springs. The judge in the *Sierra Club* case pending in the Western District of Texas has repeatedly threatened to impose aquifer-wide pumping regulations on the basis of alleged modifications to spring-fed habitat literally a hundred or more miles away from pumpers who would be affected by such an order.

In its brief, Petitioners dispute this. They repeatedly state that the definition of "harm" prohibits only habitat modification that "actually kills or injures wildlife." Petitioners admit, however, that this language does not limit the regulatory definition to actions that cause physical injury to an individual member of a listed species.[56] The language Petitioners emphasize does not, however, narrow the scope of the definition in any way.

The substance of the FWS regulatory definition is in the second sentence, which states, in effect, that "harm" equals "habitat modification." The second sentence makes clear that habitat modification may "injure[] wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Therefore, to establish "harm"--and thus a "take"--FWS need only show that essential behavioral patterns may be "significantly impair[ed]" by habitat modification.

This language is remarkably vague. In reality, it is clear that FWS generally ignores the vague and redundant terms and simply interprets the definition as equating "harm" with "habitat modification." Thus, for example, the clearing of cedar trees by a landowner has been bootstrapped into a "take" of a golden-cheeked warbler whether or not one is actually killed or injured and the pumping of Edwards Aquifer groundwater by a farmer or rancher is bootstrapped into a "take" of a fountain darter located one hundred or more miles away.

Statements of the FWS in Texas, and actions taken by it in Texas, confirm this assertion. For instance, in a presentation to a committee of the Texas legislature, Mr. Sam Hamilton, State Director for FWS in Texas, stated: "When the golden-cheeked warbler was listed in 1990, it received the full protection of the ESA *and that included protecting the habitat it depends on*."[57]

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[56] *Petitioners Brief*, at 6-7. "Nothing in the regulation indicates that the injury, of whatever type, is to an individual, as opposed to some indefinite injury to the species in general."

[57] *House Committee on Natural Resources Subcommittee on Mitigation of Property Rights* (August 9, 1994) (statement of Sam Hamilton) (copy on file with Texas House of Representatives Archives, Tape 1, Side A) (emphasis added)

Mr. Hamilton admitted that available uses of property decreased because of the mere listing of the warbler.

Mr. Hamilton's statements are based on FWS's expansive interpretation of "harm" definition. Once a species is listed, the use of property--public or private--within the species' range, *or potential range*, is immediately and presumptively affected.[58] There is nothing in the ESA to suggest that this was intended by Congress, especially where it results in so pervasive a displacement of property rights and traditional state police powers.

a. The Golden-Cheeked Warbler: Federal Land Use Restrictions Imposed on Private Property by Application of the "Harm" Regulation.

FWS's treatment of the habitat of the golden-cheeked warbler, which it designated as endangered in 1990, presents an example of the FWS overexpansive interpretation.[59] The golden-cheeked warbler is found in 33 Texas counties in Central Texas.[60]

Since 1990, FWS has sent dozens of letters to landowners in Central Texas (the "bird letters") informing them that using their property in various ways would be a "take" of the warbler.[61]

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[58] Secretary Babbitt stated to a United States Senate subcommittee investigating the National Biological Survey Act of 1993 that property in the range or potential range is "under a cloud that cannot be lifted" until accurate scientific data is available. "Good data will remove uncertainty and in the vast majority of cases, increase property values by showing conclusively there is no problem." Testimony before Senate Subcommittee, *Endangered Species Act--Incentives to Encourage Conservation by Private Land-Owners: Hearings Before Subcomm. on Environment and Natural Resources of the Committee on Merchant Marine and Fisheries House of Representatives*, at 25, 103rd Cong., 1st Sess. 65 (1993).

[59] 55 Fed. Reg. 18844 (May 4, 1990) (emergency listing); 55 Fed. Reg. 53153 (Dec. 27, 1990) (final listing).

[60] FWS, *Threatened and Endangered Species of Texas* B7 (1992).

[61] These letters have been issued and not rescinded despite the statement by Secretary Babbitt to then-Governor Ann Richards in a September 22, 1994 letter that "[m]ost warblers live on rocky slopes. Since most agricultural and building activity does not occur on rocky slopes, those activities should not affect warbler conservation." The letter is attached in the Appendix at 6a.

Several of the bird letters are attached at Appendix 9a-39a.[62] The usual pattern of the letters is as follows:

--they state that the property would[63] or could[64] provide suitable habitat for the golden-cheeked warbler;[65]

--they sometimes state that the property is part of a larger area that contains habitat occupied by the warbler[66] or that warblers have been sighted nearby,[67] but almost never that warblers have actually been sighted on the property itself or are known to occupy habitat on the property;

--they state that clearing or development-related activities would[68] or could[69] constitute a "take" of the warbler; and

--they state that the activities would require FWS authorization through an ESA Section 10(a) permit[70] or they "recommend" that clearing or other similar activity be discontinued.[71]

The bird letters thus equate modifying habitat *per se* with a "take." They do not state that the land use will result in death or injury to warblers, or even that it will "significantly impair essential behavioral patterns." On the contrary, when the letters

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[62] Ten of the fourteen attached letters are from 1994, three are from 1993, and one is from 1991.

[63] Letters Appendix, 11a, 13a, 15a, 27a, 35a

[64] Letters Appendix 21a, 23a.

[65] Other formulations include "prime habitat" for the warbler (Letter 9a), habitat likely to be occupied by the warbler (Letter 33a), and vegetation that is possibly occupied by the warbler (Letters 19a, 25a).

[66] Letters 35a, 37a.

[67] Letters 13a, 19a, 30a, 37a

[68] Letters 13a, 15a, 23a, 27a, 35a

[69] Letters 30a, 37a.

[70] Letters 13a, 15a, 23a, 27a

[71] Letters 17a, 19a, 25a, 33a. Another form is to recommend that authorization under the ESA be secured before any development. Letters 30a, 35a, 37a. Letter 9a "respectfully urges" that clearing be discontinued, but only after describing the ESA's civil and criminal sanctions and informing the landowner that the matter is under investigation by the FWS Law Enforcement Office.

add to the above structure, they usually state only that "disturbing" habitat constitutes "harm,"[72] or that "disrupting" the breeding and/or foraging activities of the warbler constitutes a take.[71] FWS thus ignores its own statement, at the time it promulgated the "harm" definition, that it chose the word "impair" rather than "disrupt" "to limit harm to situations where a behavioral pattern was adversely affected and not merely disturbed on a temporary basis with no consequent injury to the protected species."[74]

b. The Piping Plover: Federal Land Use Restrictions Imposed on State Property by Application of the "Harm" Regulation.

The piping plover was listed as an endangered species on December 11, 1985.[75] Its listing has impacted the value of land legal title to which is held by the Texas for the benefit of school children supported by the Texas Permanent School Fund ("PSF"). The PSF is managed by the Texas General Land Office ("GLO"), a state agency.

In 1984, after consultations with the Texas Parks and Wildlife Department and FWS, the GLO issued a seismic exploration permit for land in the Lower Laguna Madre (a bay) in Kenedy County, Texas. FWS required the state to investigate whether the piping plover occupied the area. Despite the fact that no piping plovers were found in the area, FWS insisted that additional measures be undertaken, to avoid impacts to *potential* habitat. The added requirements proved so burdensome and potentially expensive that all exploration efforts were abandoned. The result is a potentially large loss of revenue, present and future, to the PSF for the benefit of Texas schoolchildren, and a denial of a state agency's ability to meet its statutory obligations.

[72] Letters 17a, 21a

[71] Letters 19a, 25a, 33a Other letters state only that the warbler is "sensitive" to factors associated with residential development Letters 13a, 15a, 27a, 30a, 35a, 37a

[74] 46 Fed Reg 54748, 54750 (Nov 4, 1981)

[75] 50 Fed Reg 50733 (Dec 11, 1985)

3. The Permit Process is Lengthy and Expensive, and in Effect Reverses the Land Acquisition Program Created in the ESA.

Landowners subject to the FWS resource management scheme have only one recourse: seek a ESA § 10(a) "incidental take" permit.[76] The applicant must submit a habitat conservation plan for the species.[77] This process is necessarily expensive, since it requires hiring legal and technical consultants and preparing lengthy applications.[78] The process is also lengthy and has only resulted in 31 permits as of June 1994.[79] The FWS's "harm" regulation expands the "incidental take" permit program in a fundamental way not contemplated by the ESA: the permit process is triggered in situations where there has been no actual physical harming of a protected species, and it has not been determined that the activities would actually "kill" or "injure' a listed species.

In addition, the permit process imposes requirements not contemplated by the ESA. Although ESA § 9 does not prevent private landowners from takes of listed plants, the conservation plan must, *inter alia*, ensure that any listed plants located on the tract in question are not jeopardized.

The most striking aspect of the permit process is how FWS uses it to overturn the land acquisition program created by the ESA § 5. ESA §5 provides that landowners be paid for the use of their land if its acquisition by the federal government is necessary to protect listed species. In implementing its "habitat modification is harm" regulation, on the other hand, FWS often "extorts" substantial concessions from the applicant before it approves the ESA § 10(a) permit. FWS has in effect reversed the program actually created by Congress.

[76] In order to secure an ESA § 10(a) permit, the landowner must submit a "habitat conservation plan" ("HCP") 16 U.S.C. § 1539(a)(2)(A)

[77] ESA § 10(a)(2)(A), 16 U.S.C. § 1539(a)(2)(A)

[78] *See* 50 C.F.R. § 17.22(b)(1) (application requirements)

[79] General Accounting Office, *Species Protection on Nonfederal Lands* 8 (1995)

CONCLUSION

Under *Chevron* step two analysis, review of a challenged agency regulation falls under the prudential "deference to the administrative agency" standard. Because, however, the "harm" regulation adopted by FWS results in federal intrusion into areas of traditional state authority, the plain statement rule supersedes this deference. ESA § 9 contains no authority supporting the notion that Congress intended to include habitat modification within the prohibition entailed in ESA § 9 or that Congress intended deep intrusions into the sovereign power of the states. In sum, the ESA provides no indication that Congress intended to shift vast resource management powers and rights (such as water resource management and land use planning) from the states to a federal bureaucracy.

The "harm" regulation should, furthermore, be measured against the language of the ESA and Congressional intent in a manner to avoid constitutional issues such as the federalism and state sovereignty issues raised by Texas. The FWS's interpretation of "harm" places the weight of an enormous *de facto* federal resource management scheme on a single word, "harm," added without debate through a technical amendment to a ten-word definition. Congress did not intend this single word to authorize such a scheme.

For these reasons, FWS interpretation of the term "harm" should be held invalid and the Court of Appeals decision should be affirmed

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ATTORNEY GENERAL OF TEXAS

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JAVIER AGUILAR*
SPECIAL ASSISTANT ATTORNEY GENERAL
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PAUL TERRILL
ASSISTANT ATTORNEY GENERAL

EUGENE MONTES
ASSISTANT ATTORNEY GENERAL

LETTER TO ANN RICHARDS FROM BRUCE BABBITT

THE SECRETARY OF THE INTERIOR
WASHINGTON
September 22, 1994

Honorable Ann W. Richards
Governor of Texas
Austin, Texas 78711

Dear Governor Richards:

I appreciated receiving your recent letter suggesting ways in which the Department could work more effectively with the State of Texas and its citizens to meet the goals of the Endangered Species Act.

Like yourself, I recognize the success the Act has had in Texas as well as in the rest of the country.

I am also convinced that effective implementation of the act is consistent with the traditional rights and responsibilities of property owners. I believe, however, that the built-in flexibility of the Act has not been routinely used in a way that gives private landowners the security and certainty they need when making important land-use decisions. Too often, the Federal Government has failed to pursue creative conservatism solutions with landowners, making the listing of species a first and last resort.

Your persuasive advocacy of the concerns of ranchers and farmers in Texas has been a valuable contribution to us as we seek ways to meet the goals of the Act. Your letter contained several constructive proposals that I instructed my staff to analyze immediately. Some of those points need further review. However, I believe that several of your ideas exemplify the new flexibility we need in enforcing the Act.

As you are aware, I have personal knowledge of the State and local government efforts to create conservatism initiatives protecting the warbler. The Fish and Wildlife Service's work thus far clearly indicates that , if the appropriate habitat conservation plans are implemented within a reasonable period of time, the designation of critical habitat for the warbler will be neither necessary nor prudent because it will provide no net benefit to the species. I have therefore instructed the U.S. Fish and Wildlife Service to cease work on warbler critical habitat designation. Instead, Service personnel will direct their energies towards working with the State, local governments, property owners and other interested citizens to establish habitat conservation plans that protect both our natural heritage and our economic potential.

I agree with you that normal agricultural and ranching activities in Texas have little impact on golden cheeked warbler habitat.

Assertions that protection of the warbler in Texas would have a significant negative impact on such practices are wrong. The Department testified recently before a joint hearing of the State Legislature's Natural Resources Committee and said unequivocally that if land has been plowed or farmed for years, it is not warbler habitat. While the Act does not give us the authority to exempt specific land-use practices, as a practical matter traditional ranching and farming activities will not hinder warbler conservation. Regrowth cedar that has invaded cleared fields is also not habitat, and can be cleared without concern. Most warblers live on rocky slopes. Since most agricultural and building activity does not occur on rocky slopes. those activities should not affect warbler conservation.

I believe the Department has been remiss in failing to give adequate guidance on this matter, which has led to an abundance of misinformation on the topic. I have asked U.S. Fish and Wildlife Service Director Mollie Beattie to work

closely with the State to issue such guidance as soon as possible before the end of the year. You should know that in July, the Service changed its policy to ensure that when a listing occurs, the listing package will include a document specifying activities that will not be affected by the listing.

I also agree with your proposal to examine and recommend ideas for changes to the implementation of the Act in Texas. I have asked Director Beattie to work with your office and affected constituents to develop a process designed to achieve this goal.

Making the flexibility in the Act work will require input from affected citizens, State and local governments. The State of Texas has continually offered constructive advice and input into our process. In fact, Texas has become a national leader in establishing a working relationship with the Federal Government on specific endangered species issues. I will continue to welcome any information from Texas concerning listed or candidate species, including evidence to support a petition that would delist a species.

Be assured that future information provided by Texas on any species will receive serious consideration.

Your personal involvement has been key to developing solutions for these natural resources issues. I look forward to a continued working relationship with both you and the Texas Legislature.

Sincerely,

s/ Bruce Babbitt

LETTERS TO CENTRAL TEXAS LANDOWNERS

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
Ecological Services
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011

February 20, 1991

Mr. & Mrs. Mike Igua
P.O. Box 4748
Lago Vista, TX 78645

Dear Mr. & Mrs. Igua:

It has come to our attention that clearing of a strip of woodland has recently occurred on a tract of land located south of FM 1431 in the vicinity of Lago Vista, Texas. We understand that you are one of the joint owners of the property. Information available to us indicates that this property supports prime habitat for the federally-listed endangered golden-cheeked warbler. Destruction of habitat of an endangered species may constitute a "take" of that species as defined by the Endangered Species Act, which prohibits "take" of a federally-listed species unless the "take" is incidental to otherwise lawful activity and a permit in compliance with the Act has been obtained. In this case, a permit under Section 10(a) of the Act would apply. Information on the Section 10(a) permit process is enclosed.

Destruction of endangered species habitat, without a permit, that results in "take" of a federally-listed endangered species could be held to be a violation of the act and could expose a violator to the criminal penalties provided for under Section 11(b)(1) of the Act or to the civil penalties provided for under Section 11(a)(1) of the Act. Section 11(b)(1) provides for a fine of not more that $50,000 or imprisonment up to one year, or both. Section 11(a)(1) permits assessment of up to $25,000 as a civil penalty for each violation.

This matter is currently under investigation by Special Agent Alex Hasychak of the Fish and Wildlife Service Law Enforcement Office in San Antonio and by personnel of this office. If you are indeed an owner of the property in question, we respectfully urge that you cease any further land clearing activities and contact Alex Hasychak at (512) 229-5412 or Joe Johnston of this office at (817) 885-7830 for additional information on compliance of such activities with the Endangered Species Act.

Sincerely,

Robert M. Short
Field Supervisor

Enclosure

cc: Law Enforcement, FWS, San Antonio, TX
Regional Director, FWS, Albuquerque, NM (FWE/HC)
Regional Solicitor, USDI, Tulsa, OK

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

Lot in Jester Point, Phase I, or 7101 Foxtree Cove,
Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10 (a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of

development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 24, 1993

Phil Frazier
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78746

Dear Mr. Frazier:

This responds to your letter, dated May 24, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

0.321 acres located on Lakeview Drive in Comanche Trail Subdivision, Travis County, Texas.

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would not provide suitable habitat for the black-capped vireo and the cave invertebrates, but would provide suitable habitat for the golden-cheeked warbler.

Our records indicate that golden-cheeked warblers have been observed on the periphery of this property. Current biological information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity

in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

December 3, 1993

Keith E. Young
KEY Group Engineering
3701 Bee Caves Road, Suite 102
Austin, Texas 78746

Dear Mr. Young:

This responds to your letter, dated August 31, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Part of 25.4 area tract located 4.1 miles from 1431 off Lime Creek Road, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would provide suitable habitat for the golden-cheeked warbler, the black-capped vireo and/or the cave invertebrates.

The subject tract is part of a large tract occupied by golden-cheeked warbler, black-capped vireo and/or the cave invertebrates. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological

information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Patrick Noack
2000 Yaupon Valley Road
Austin, Texas 78746

Dear Mr. Noack:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 23-acre tract located off Yaupon Valley Road in Westlake Hills, Travis County, Texas. Information received from the Travis County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service (Service) has reviewed this property for endangered species concerns in a letter, dated June 10, 1992, (see enclosed copy). In this letter, based on biological surveys provided by Horizon Environmental Services and other information available at that time, our agency advised that development of this tract would require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). Further development of this property would be prohibited under section 9 of the Act. We are providing information on this section 10(a)(1)(B) permitting process for your information.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill,

trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

The Service recommends no further development activities occur on this lot and that all construction and vegetation clearing stop immediately. Failure to stop these activities immediately could result in a violation of the Act and possible criminal or civil actions that could result in fines and/or imprisonment.

Should you have any questions regarding the determination on this property, or would like to have a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Jerri Garner
25613 River Fern Court
Leander, Texas 78641

Dear Ms. Garner:

This letter is in reference to recent clearing activities on the property across River Fern Court from your horse stable operations near Leander, in Williamson County, Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are very likely present on your property close to the area that has been cleared.

If the activities taking place on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Harm" in this definition of "take" in the Act means an act which actually kills or injures wildlife. Such

act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Incidental taking," authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the appropriate enclosures for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, of the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Jana Grote
/s/ Joseph E. Johnston

Sam D. Hamilton
State
Administrator

cc Jean Nance

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Austin Americana Enterprises
Rex Bohls
1301 S IH-35
Austin, Texas 78741

Dear Mr. Bohls:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 473 acre tract of land known as the Friendship Ranch in Hays County, Texas. Information received from the Hays County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service reviewed this property in a letter to the Doug Hodge Company on October 16, 1991, for endangered species concerns (see enclosure). In that letter we stated that, based on aerial photographs and other data available to this office, the property could provide suitable habitat for the federally listed and protected golden-cheeked warbler (*Dendroica chrysoparia*). We also included information regarding minimal survey (warblers) using the property.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such a conduct "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary

for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

We have not received any information, since that correspondence, to change our determination that the subject property could provide suitable habitat for the warbler. If there are warblers present on this property, development could require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). We are providing information on the section 10(a)(1)(B) permitting process for your consideration and urge you to contact this office for further assistance on how to comply with the Act.

Should you have any questions regarding this property, or would like to schedule a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State
Administrator

Enclosure

cc: Alex Hasychak, FWS, Special Agent, Law Enforcement

United States Department of the Interi

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 25, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 7871(

Dear Mr. Sherrod:

This responds to your fax, dated September 17, 1993, requesting that this office evaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Two tracts on River Hills Road off FM 2244 (Bee Caves Road), Austin, Travis County, Texas

We have reviewed the information on the 1991 and 1993 surveys you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but could provide suitable habitat for the golden-cheeked warbler.

Because of sightings on or adjacent to these tracts, we believe that clearing or development related activities on this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an

otherwise lawful activity and section 7 or section 10(a)(1)(B) permit under the Act has been obtained. Therefore, development of this acreage would require authorization under the Act.

Thank you for providing pertinent information regarding this evaluation. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 7, 1994

This letter is in reference to recent clearing activities on your property on FM 1340 near Hunt, in Kerr County, Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are possibly present on your property close to the area that has been bulldozed.

If the activities taking place on the subject site disrupt the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Incidental taking", authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat

is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the enclosure for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, or the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

United States Department of the Interi

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 14, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter dated March 4, 1994, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

Painted Bunting Subdivision, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. Based on current biological information, we do not believe that this property would provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

Your bird survey indicates that two golden-cheeked warblers were observed in the canyon. Current information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels,

predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on Lots 6-13, would constitute a "take" as defined by the Endangered Species Act. The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and section 10(a)(1)(B) permit under the Act has been obtained. Therefore, construction of residences on these lots would require authorization under the Act.

However, construction on Lots 1-4 and 14-15 (drawing enclosed) would not require authorization under the Act if the following conservation measures are incorporated in the construction.

1. Remove only those trees and shrubs necessary for construction of driveway, septic tank and house.

2. Confine the development activities on the front 200 feet of the lot.

3. Use only native plant species for landscaping.

4. Confine exterior construction activities so that it occurs outside the breeding season for the golden-cheeked warbler (breeding period is from March 1 through August 1), so as to avoid disruption of breeding behavior.

We believe that destruction of the habitat located beyond the front 200 feet of the lot could result in a "take" of the endangered golden-cheeked warbler and thus, require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Act. This response is intended to assist you in such compliance. However, you are ultimately responsible for compliance with all laws, and this letter cannot assure you complete protection from any future liability or exempt you from any current or future federal, state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 23, 1994

Fran & Larry Collmann
9911 Anderson Mill Road
Austin, Texas 78750

Dear Mr. & Mrs. Collmann:

This responds to your letter, dated September 19, 1994, requesting this office re-evaluate the 13.942 acres located near Spicewood Springs Road and Loop 360 off White Cliff Dr., Austin, Travis County, Texas property. We have re-evaluated the new information you provided.

As stated in our letter June 1, 1994, our records indicate that golden-cheeked warblers have been sighted on the western, southern and eastern boundaries of this property. Mr. Lee Sherrod's letter to you of June 13, 1994, indicated the possibility of black-capped vireos in the area. Current information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on the majority of this tract, could constitute a "take" as defined by the Endangered Species Act. The Act prohibits "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development.

However, we also said, there may be a possibility of building a single house on the 13.942 acres without constituting "take" if the following conditions are observed. We wish to reiterate that this property is very close to habitat that is occupied by the golden-cheeked warbler and/or black-capped vireo. To avoid harassment (a possible "take" violation) of the species that may occur in the area, we wish to recommend the following conservation measures:

1. Construction of only one single family home on the northeast portion of the property, the area which is already cleared.

2. The driveway be constructed in the already cleared roadway.

3. Exterior construction activities on this property not occur between March 1 and August 1.

4. Remove only the trees that are needed for construction of the house and septic field.

5. Use only native plants and grasses for landscaping.

6. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

7. Prohibit the use of pesticides, herbicides and fertilizers.

If these conservation recommendations are not followed, then we believe a take could occur and recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act. Section 10(a)(1)(B) permit procedures are enclosed.

Thank you for providing pertinent information to help re-evaluate this property. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Glenn Williams and Terry Wynn, Partners
P.O. Box 64138
Lubbock, Texas 79464

Gentlemen:

This letter is in reference to recent vegetation clearing activities on 611.208 acres of your property located near Spanish Pass Road and Tower Road in Kendall County, Texas. This property supports vegetation that is likely to be occupied by the federally listed endangered golden-cheeked and/or black-capped vireo.

If the development activities on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler and/or black-capped vireo, these activities could constitute a "take" of listed species.

The Endangered Species Act (Act) prohibits the "take" of federally-listed species unless the "take" is incidental to otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. "Take" is defined as harass, harm, pursue, hunt, shot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

We recommend that clearing activities on the property be discontinued and you contact Alma Barrera for additional

information on compliance of such activities with the Act at (512) 482-5436

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

cc: Regional Director, Region 2
Solicitor, Department of the Interior, Tulsa, OK
Fish and Wildlife Service, Law Enforcement, San Antonio, TX

United States Department of the Interi...

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 9, 1994

Stan & Donna Buck
305 Golden Oaks Drive
Georgetown, Texas 78628

Dear Mr. & Mrs. Buck:

This responds to your letter, dated March 23, 1994, requesting this office to review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot 8, Lake Georgetown Estates II, located on County Road 262, Georgetown, Williamson County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

The subject lot is part of a block of habitat occupied by the golden-cheeked warbler. Areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological

information indicate the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities in this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development. Procedures for the section 10(a)(1)(B) permit process are enclosed.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 22, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter, dated June 28, 1994, regarding the re-evaluation of the HE Brodie tract, located Barton Creek Loop 360, Lamar and Ben White Blvd., Austin, Travis County, Texas.

Our records indicate that golden-cheeked warblers have been observed along the Barton Creek greenbelt adjacent to this property and some observations along the property line. The subject tract is part of a large tract occupied by golden-cheeked warblers. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological information indicates the warbler is sensitive to several factors associated with development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors.

We believe that clearing or development-related activities on part of this property (the water quality buffer and transition zones), could constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take"

unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act.

As discussed during our meeting of July 12, we believe some development can occur outside the City of Austin water quality buffer and transition zones, 800 feet from the middle of Barton Creek, without constituting "take" if the following conditions are observed.

1. Exterior construction activities within 1000 feet from the middle of the creek not occur between March 1 and August 1.

2. Remove only trees that are needed for construction.

3. Use only native plants and grasses for landscaping.

4. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

If these conservation recommendations are not followed, then we believe a take could likely occur and we recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act.

We appreciate your concern for endangered species and your desire to comply with the Act. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Field Supervisor

Enclosure

cc: City of Austin, Environmental & Conservation Services Dept.
City of Austin, Power & Light
Jim Nuckles, Travis County Tax Appraisal District

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
POST OFFICE BOX 1306
Albuquerque, N.M. 87103

August 19, 1992

In Reply Refer To:
Region 2/RD

Chairman John Hall
Texas Water Commission
1700 North Congress Avenue
Austin, Texas 78711

Dear Chairman Hall:

The United States Fish and Wildlife Service (Service) commends the efforts of the Texas Water Commission (TWC) to protect and ensure proper management of the limited water resources of the Edwards Aquifer (Aquifer). The TWC's proposed Water Management Plan (Plan) is a major and positive step forward by the State of Texas to resolve a long-standing water crisis that threatens public health and safety, an entire region's economy, and various ecological resources.

The Service has completed a careful review and evaluation of the TWC's proposed plan. We have determined that if the modifications outlined below are made, your plan could increase protection and assurances of flows at San Marcos and Comal Springs, and therefore could provide a sound basis for resolving endangered species issues.

You have asked the Service to provide a careful review of the TWC plan. Taking into consideration the amount of droughts in the region, there is a high probability of unintentional Marcos and Comal Springs if your proposed Plan, subject to our recommended changes below, is implemented. Based on this review and incorporation of the recommended changes, the Service supports the proposed TWC Comprehensive Water Management Plan for the Edwards Aquifer.

However, our analysis indicates that even with full implementation of the Plan, there is still the possibility that some "taking" of endangered species may occur. To ensure compliance with the Endangered Species Act and address the possibility for "takings" of endangered species, we recommend that the State of Texas, or an appropriate regional management agency, apply for an incidental take permit from the Service. The Habitat Conservation Plan (HCP) that would accompany such an application should be designed to address the potential for lawful "incidental takings" of endangered species. Based on current data, the following provisions would be required as part of the HCP:

- Initially, direct pumpage from the Aquifer is to be limited, in the aggregate, to no more than 450,000 acre-feet per calendar year.

- Within 10 years, direct pumpage from the Aquifer shall be reduced by 50,000 acre-feet to 400,000 acre-feet per calendar year.

- In order to protect flows at San Marcos and Comal Springs, a special drought management plan must be developed and implemented during extreme drought. Specifically, the drought management plan must reduce direct pumpage from the Aquifer to a rate of 350,000 acre-feet per year

time the water level in the J-17 index well in Bexar County falls below 625 feet msl.

- TWC may allow additional withdrawals of "interruptible or (surplus) water supplies when levels at the J-17 index well are above 665 feet msl. However, such withdrawals should be limited to 88,000 acre-feet to assure that spring flows are not adversely affected during critical drought conditions. Also, allocations of such interruptible water supply should provide for the diversion of at least one-half of the water downstream of the springs and associated critical habitat areas, rather than directly from the aquifer.

- All wells used for domestic and livestock purposes should be registered with TWC, or an appropriate regional management agency, to enable the monitoring of their cumulative impact on the Aquifer.

- Maintain moratorium on new wells until the State or local rules go into effect.

- The section 10(a) permit length would be 20 years or less.

Also, from the review we've conducted, it is clear that there is a relationship between pumpage from the Aquifer and flows at San Marcos and Comal Springs. Maintenance of springflows are clearly enhanced as direct pumpage from the Aquifer is reduced. Consequently, the Service recommends a study be conducted over the next 5 years to determine the feasibility of various water users diverting 50,000 to 75,000 acre-feet of their Aquifer water withdrawals from some point downstream of the springs and critical habitat areas.

We also encourage other Federal agencies to demonstrate a leadership role in water conservation and the protection of endangered species. The Endangered Species Act (ESA) states ". . . that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." This requirement applies to all Federal agencies which contribute, directly or indirectly, to the withdrawal of water from the Edwards Aquifer. The Department of Defense, Department of Agriculture, Department of Transportation, Environmental Protection Agency, and Department of Housing and Urban Development are examples of Federal entities that must play a vital role in the protection of endangered species that are dependent upon the Edwards Aquifer.

Again, the Service supports your efforts and believes that the sensitive springs systems will be afforded a significantly higher degree of protection than they now have. We are very excited and encouraged by the progress that you and your colleagues have made toward developing a much needed and long overdue management plan for the Edwards Aquifer. I particularly appreciate your efforts to look at the "big picture" and provide a plan that considers invaluable natural resources such as springflows, instream flows, and flows to the bays and estuaries, as well as consideration for human well-being. We look forward to continuing our work with you in this endeavor to protect the unique ecosystems that depend on the waters of the Edwards Aquifer.

Sincerely,

s/ Michael Spear

Regional Director

Enclosures

cc:

U.S. Senator Lloyd Bentsen
U.S. Senator Phil Gramm
Honorable Henry B. Gonzalez
Honorable Lamar S. Smith
Honorable Albert G. Bustamante
Governor Ann Richards
Sam Hamilton, State Administrator, FWS, Austin, TX
Andrew Sansom, Executive Director, Texas Parks & Wildlife Dept., Austin, TX

SIERRA CLUB LONE STAR CHAPT...

April 15, 1994

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

TO: The Honorable Bruce Babbitt, Secretary
United States Department of the Interior
Office of the Secretary
18th and C Streets, N.W.
Mail Slot #MS6217
Washington, D.C. 20240

All Federal agencies listed on Exhibit A attached to this notice

The City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit B

The Texas Natural Resource Conservation Commission (TNRCC)

All other Violators (Defined Below)

Re: Notice of Endangered Species Act Violations

Dear Secretary Babbitt, all Federal agencies listed on Exhibit A attached to this notice, the City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer including, without limitation, those listed on Exhibit B, the TNRCC, and all other violators:

We am writing on behalf of the Sierra Club and Clark Hubbs to notify each of you, pursuant to Section 11(g)(2)(A)(i) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1540(g)(2)(A)(i), of violations of the ESA, 16

U.S.C. 1531 et seq., by each of you, and of the Sierra Clubs and Clark Hubbs intent to sue concerning these violations.

Unlawful actions and failures or refusals to act by all of you cause severe overdrafting of the Edwards Underground River, also known as the Edwards (Balcones Fault Zone) Aquifer, San Antonio Region, hereinafter, the Edwards. Overdrafting of the Edwards poses a substantial and imminent threat of jeopardy to the continued existence of endangered and threatened species and to the public health and safety of 1.5 million people. Both the species and the people are dependent on clear, clean natural Edwards water. Overdrafting of the Edwards moves hydrogen sulfide, a hazardous substance, into the fresh water in the Edwards. Overdrafting of the Edwards threatens to poison the Edwards for everyone.

This threat is urgent. Overdrafting has already resulted in takings of endangered species in 1989 and 1990, and according to the largest pumper, San Antonio, threatens to do so again this summer and in 1995 and 1996. Overdrafting has already resulted in jeopardy to endangered species at Comal Springs in 1989 and 1990, and according to San Antonio threatens to do so again in mid-1995 and mid-1996. Overdrafting has already resulted in some movement of bad water, contaminated by hydrogen sulfide, a hazardous substance, in 1956. It threatens to do so again in a repeat of the drought of record, or in a drought less serious than the drought of record but slightly more serious than the droughts of 1984, 1989 and 1990.

This threat requires a vigorous coordinated federal-state-local response, beginning immediately. Michael Spear, Assistant Director of the U.S. Fish & Wildlife Service (USFWS), lead agency in charge of the Edwards species, testified in November 1992 that the Texas legislative session ending May 1993 represented the last chance for a state solution, before the blunt axes of ESA 7 and 9 have to be dropped. That legislative session produced a statute, S.B.

1477 which, according to the State of Texas, is [illegible]zen. No federal, state or local entity has a plan adequate to protect endangered species and human water supplies against overdrafting of the Edwards. The States last plan does not come close to protecting these waters, according to an independent mid-1993 review by the University of Texas.

The background facts are set forth in the Findings of Fact and Conclusions of Law entered on February 1, 1993, by the Honorable Lucius Bunton, Senior United States District Judge, in Sierra Club v. Lujan, 1993 WL 151353 (W.D. Tex.), as amended May 26, 1993, appeal dismissed sub. nom. Sierra Club v. Babbitt, 995 F.2d 571 (5th Cir. 1993). A copy is attached as Exhibit C and incorporated by reference in this notice of violation.

The Sierra Club and Clark Hubbs hereby give notice of the following violations:

(1) The Secretary of the Interior and the U.S. Fish & Wildlife Service have violated and are violating ESA 4, 16 U.S.C. 1533, by (a) failure to act on the listing petitions for certain Comal Springs species; (b) failure to designate critical habitat for those species and for the Texas blind salamander; (c) failure to develop recovery plans for the Comal Springs species and/or population and for the Texas blind salamander; (d) failure to implement key provisions of the San Marcos Recovery Plan; and (e) failure to promulgate regulations to protect threatened species against reduction in springflows due to excessive pumping of the Edwards.

(2) The Secretary of the Interior and all Federal Agencies listed on Exhibit A (together, the Federal Violators), including but not limited to the U.S. Fish and Wildlife Service, the U.S. Departments of the Interior, Transportation, Agriculture, Defense, Army and Air Force, the U.S. Defense Base Closure and Realignment Commission, and the Agency for Toxic Substances and Disease Registry, have violated and are violating ESA 7, 16

U.S.C. 1536, by failing to review and utilize their authorities to plan and carry out programs for the conservation of the Edwards, Comal and San Marcos species against reduced springflows due to excessive pumping and by failing to engage in coordinated multi-agency consultation to insure that no actions or activities authorized, funded or carried out by them or by other federal agencies are likely to jeopardize the continued existence of any of the Edwards, Comal and San Marcos species.

(3) The Federal Violators, the TNRCC, and the City of San Antonio and other individuals and entities who withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit B, have violated and are violating ESA 9 by authorizing, funding or carrying out pumping, or by authorizing, funding or carrying out activities that allow, maintain, encourage or increase pumping, from the Edwards to an extent that reduces Edwards levels and Comal and San Marcos springflow rates to below the points at which endangered wildlife are actually killed or injured.

The Sierra Club and Clark Hubbs intend to amend and supplement the Sierra Clubs complaint in Sierra Club v Babbitt, seeking leave from Judge Bunton for this purpose. The Sierra Club and Clark Hubbs intend to allege violations of ESA Sections 4, 7 and 9 and of other federal statutes, against specific defendants, as set forth in the proposed amended and supplemental complaint, a copy of which is attached as Exhibit D, and incorporated by reference in this notice of violation. The Sierra Club and Clark Hubbs reserve the right to sue others to whom this notice of violation is sent for the violations covered by this notice, in the proposed amended and supplemental complaint or in a future amended and supplemental complaint. In particular, the Sierra Club and Clark Hubbs give notice that they intend, as necessary, to sue pumpers for violations of ESA Section 9 and seek injunctive relief restricting pumping to prevent violations of Section 9. Such relief may be requested as early as this summer.

Excessive pumping jeopardizes both endangered species and San Antonio's and others water supply. In summary, federal, state and local authorities have the power and duty to protect the Edwards against excessive pumping. They have failed and are failing or refusing to carry out their responsibilities. As a result, excessive pumping by San Antonio, the San Antonio military bases, agribusinesses and others imperils the Edwards ecosystem.

The Sierra Club and Clark Hubbs plan to take prompt legal action to obtain judicial remedies for this emergency.

Sincerely,

Ken Kramer, Director
Lone Star Chapter of the
Sierra Club

Stuart Henry
SBN 09484000
202 West 17th Street
Austin, Texas 78701
(512) 479-8125
(512) 479-8269 (fax)

P.M. Schenkkan
SBN 17741500
727 E 26th Street
Austin, Texas 78705
(512) 471-3280
(512) 471-6988 (fax)

Attachments

cc: Governor Ann Richards
TO: Bruce Babbitt, et al.
April 15, 1994
Page PAGE 4

1. U.S. Agency for Toxic Substances and Disease Registry
By serving David Satcher, Administrator
1600 Clifton Road, N.E.
Atlanta, GA 30333

2. U.S. Defense Base Closure and Realignment Commission
By serving James A. Courter, Chairman
Rosslyn Metro Center Bldg.
1700 North Moore Street
Arlington, VA 22209

3. U.S. Department of Agriculture
By serving Mike Espey, Secretary
14th and Independence Avenue, S.W.
Washington, D.C. 20250

4. U.S. Department of Commerce
By serving Ronald H. Brown, Sr., Secretary
14th St. and Constitution Avenue, N.W.
Washington, D.C. 20230

5. U.S. Department of Defense
By serving William J. Perry, Secretary
The Pentagon
Washington, D.C. 20301

6. U.S. Department of the Air Force
By serving Sheila E. Widnall, Secretary of the Air Force
The Pentagon
Washington, D.C. 20330

7. U.S. Department of the Army
By serving Togo D. West, Jr., Secretary of the Army
The Pentagon
Washington, D.C. 20310

8. U.S. Department of the Navy
By serving John H. Dalton, Secretary of the Navy
The Pentagon
Washington, D.C. 20350

9. U.S. Department of Education
By serving Richard W. Riley, Secretary
400 Maryland Avenue, S.W.
Washington, D.C. 20202

10. U.S. Department of Energy
By serving Hazel R. O'Leary, Secretary
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

11. U.S. Department of Health and Human Services
By serving Donna E. Shalala, Secretary
200 Independence Avenue, S.W.
Washington, D.C. 20201

12. U.S. Department of Housing and Urban Development
By serving Henry G. Cisneros, Secretary
451 Seventh Street, S.W.
Washington, D.C. 20410

13. U.S. Department of the Interior
By serving Bruce Babbitt, Secretary
18th and C Street, N.W.
Mail Slot # MS6217
Washington, D.C. 20240

14. U.S. Department of Justice
By serving Janet Reno, Attorney General
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

15. U.S. Department of Labor
By serving Robert B. Reich, Secretary
200 Constitution Avenue, N.W.
Washington, D.C. 20210

16. U.S. Department of State
By serving Warren Christopher, Secretary
2201 C Street, N.W.
Washington, D.C. 20520

17. U.S. Department of Transportation
By serving Federico F. Pena, Secretary
400 Seventh Street, S.W.
Washington, D.C. 20590

18. U.S. Department of the Treasury
By serving Lloyd M. Bentsen, Secretary
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

19. U.S. Department of Veteran Affairs
By serving Jesse Brown, Secretary
810 Vermont Avenue, N.W.
Washington, D.C. 20420

20. Environmental Protection Agency
By serving Carol M. Browner, Administrator
401 M Street, S.W.
Washington, D.C. 20460

21. Farm Credit Administration
By serving Billy R. Brown, Chairman
1501 Farm Credit Drive
McLean, VA 22102

22. Farmers Home Administration
By serving Michael V. Dunn, Administrator
14th Street and Independence Avenue, S.W.
Washington, D.C. 20250

23. Federal Communications Commission
By serving Reed E. Hundt, Chairman
1919 M Street, N.W.
Washington, D.C. 20554

24. Federal Deposit Insurance Corporation
By serving Andrew Hove, Chairman
550 Seventeenth Street, N.W.
Washington, D.C. 20429

25. Federal Emergency Management Agency
By serving James Lee Witt, Director
Federal Center Plaza
500 C Street, S.W.
Washington, D.C. 20472

26. Federal Home Loan Mortgage Corporation
By serving Leland C Brendsel, Chairman
8200 Jones Branch Drive
McLean, VA 22102

27 Federal Housing Finance Board
By serving the Chairman
1777 F Street, N.W.
Washington, D.C. 20006

28 Federal Labor Relations Authority
By serving Jean McKee, Chairman
607 Fourteenth Street, N.W.
Washington, D.C. 20424-0001

29 Federal Trade Commission
By serving Janet D Steiger, Chairman
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

30 General Services Administration
By serving Roger W. Johnson, Acting Administrator
18th and F Streets, N.W.
Washington, D.C. 20405

31. International Development Cooperation Agency of the United States
By serving J. Brian Atwood, Director
Department of State Building
320 Twenty-first Street, N.W.
Washington, D.C. 20523

32. International Trade Commission
By serving Don E. Newquist, Chairman
500 E Street, S.W.
Washington, D.C. 20436

33. Interstate Commerce Commission
By serving Gail C. MacDonald, Chairman
Twelfth Street and Constitution, N.W.
Washington, D.C. 20423

34. National Labor Relations Board
By serving James M. Stephens, Chairman
1099 14th Street, N.W.
Washington, D.C. 20570

35. Office of Thrift Supervision
By serving Jonathon L. Fiechter, Acting Director
1700 G Street, N.W.
Washington, D.C. 20552

36. U.S. Postal Service
By serving Marvin Runyon, Postmaster General
475 L'Efant Plaza West, S.W.
Washington, D.C. 20260

37 Resolution Trust Corporation Oversight Board
By serving Jack Ryan, Chief Executive Officer
801 17th Street, N.W.
Washington, D.C. 20434

38. Securities and Exchange Commission
By serving Arthur Levitt, Jr., Chairman
450 Fifth Street, N.W.
Washington, D.C. 20549

39. Selective Service System
By serving Robert W. Gamhino, Director
1515 Wilson Boulevard
Arlington, VA 22209-2425

40. Small Business Administration
By serving Erskine Bawles, Administrator
409 Third Street, S.W.
Washington, D.C 20416

No. 94-859

In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, SECRETARY
OF THE INTERIOR, ET AL.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE STATE OF ARIZONA EX REL. M.J. HASSELL, ARIZONA STATE LAND COMMISSIONER AND STATE OF COLORADO IN SUPPORT OF RESPONDENTS

GRANT WOODS
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State of Arizona

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*Counsel of Record

habitat unsuitable for a listed species is a "take." In fact, the "harm" regulation may have a more extensive effect upon nonfederal landowners than it does on federal agencies because FWS considers that management limitations may be applicable to lands that have not been designated as critical habitat if "harm" would otherwise result.[19] Such contradictory positions emphasize the infirmity of the "harm" regulation.

4. Constitutional Authority for the Harm Regulation Is In Doubt.

Another series of constitutional questions arises because the "harm" regulation operates as a federal constraint against modifying flora on nonfederal lands. Significant questions exist as to whether the federal government has authority under the United States Constitution to enact such legislation. See *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (leaving open the question of the extent, if any, to which the Property Clause empowers Congress to protect animals on nonfederal lands); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 309-310 (1981) (Rehnquist, J., concurring); *Comment, Endangered Species Act: Constitutional Tensions and Regulatory Discord*, 4 Colum. J. Envtl. L. 97 (1977); G. Coggins,

[19] *See, e.g., Determination of Critical Habitat for the Northern Spotted Owl; Final Rule*, 57 Fed. Reg. 1796, 1825 (Jan. 15, 1992), ("If an action that is committed by a non-Federal entity affects spotted owls, that action would be subject to review under Section 9 of the Act. Section 9 prohibits intentional and non-intentional "take" of listed species and applies regardless of whether or not the lands are within critical habitat.")

and W. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?* 61 Iowa L.J. 1099 (1976).

Congress was sensitive to these issues when it enacted the Endangered Species Act in 1973. Senator Williams' bill, as introduced, defined "take" to include "the destruction, modification, or curtailment of [a listed species'] habitat or range." *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 27 (1973) (hereinafter *1973 Senate Hearings*). Some testimony given then in support of that language was quite similar to the arguments Petitioners and their amici now make in support of the "harm" regulation.[20] Senator Stevens, a former Solicitor of the Department of Interior, expressed concern about the scope of congressional authority to exercise jurisdiction over flora on nonfederal lands:

> Senator STEVENS: I understand that, but my problem is I just wonder if we are again getting ourselves into some situation with regard to

[20] Witnesses representing environmental groups stressed that this expanded definition of "take" was needed because "an animal or plant which is killed as a result of habitat destruction, in fact, in some respects is deader than if it is shot or chopped down, because there may be no further chance for its kind to ever return to that area." *1973 Senate Hearings* at 80 and 86 (testimony of John Grandy of the National Parks and Conservation Association); *see also id.* at 104 (similar statement by Tom Garrett of Friends of the Earth), 81 and 108 (additional statements by Mr. Grandy), 123-125 (statement of Stephen R. Seater of Defenders of Wildlife), and 129 (statement of Robert Hughes of the Sierra Club).

> extension of Federal jurisdiction to flora in private hands.

1973 *Senate Hearings* at 90. The Senate Committee later deleted the "habitat modification" language, and its report stressed that the States should have the lead "in protecting domestically endangered species," with the federal role primarily being to appropriate funds "to acquire lands" and to support the efforts of States. S. Rep. No. 93-307, 93d Cong., 1st Sess. at 2-5, *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991-93.

Similar comments and concerns were expressed in the House. At the 1973 House hearings, environmental groups urged that the House bill's definition of "take" be expanded to include "habitat modification." *See Endangered Species: Hearings on H.R. 376 and Other Bills Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 251, 287, 299, 301, 307 (1973) (hereinafter 1973 *House Hearings*). Representative Dingell objected, stating:

> I am sympathetic with your goal of preserving the species from not only the actual, direct taking, but also from habitat change. I wonder if it would not better serve to protect habitats . . . to leave the term "taking" as it is with perhaps some additional language relating to other matters.

1973 *House Hearings at* 305. The House Committee did not expand the term "take" to include "habitat modification." Representative Sullivan explained:

> [The ESA] will meet this [destruction of a habitat] problem by providing funds for acquisition of critical habitat [because private landowners] are understandably unwilling to do so at excessive cost to themselves.

119 Cong. Rec. 30,162 (daily ed. Sept. 18, 1973).

The 1982 Senate hearings reveal that the U.S. Department of the Interior had continuing questions over its constitutional authority to regulate removal of plants (modification of habitat) on private lands. G. Ray Arnett, the Assistant Secretary of the Interior for Fish, Wildlife and Parks, testified as follows:

> Senator CHAFEE: Mr. Arnett, under section 9, dealing with taking, there is nothing involved in the taking of individual species of endangered plants. We are going to have testimony, I am sure, asking for the expansion of the act's prohibitions to include the takings under section 9 for plants. What do you think of that?
>
> Mr. ARNETT: We have given this much thought, Senator, and are studying the question and would like to get back to you on this because there seems to be a constitutional question raised about the applicability of this particularly on private lands. . . . [W]e are looking at the constitutionality of it as prohibiting [the] taking on private lands, a guy's backyard, or ranch, or farm. I don't know where we are going to come back on that as yet. I would be happy to get back to you on that.
>
> Senator CHAFEE: Whatever the constitutional problems, it would seem to me that they would apply to fish and wildlife as much as plants if the problem is private lands, wouldn't it?
>
> Mr. ARNETT: Not to my knowledge sir. I am not an attorney. I am just listening to the problems

> that our Solicitor raises along these lines. As I say, it is being studied right now. On Federal lands we currently have the authority that makes this possible. We may not have the additional authority on other lands. It may be detrimental. It may not. It may be unconstitutional.

Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. On Environment and Public Works, 97th Cong., 2d Sess. 10 (1982).

Congress was aware of concerns about the extent of its constitutional authority to regulate habitats on nonfederal lands. Both houses deleted language that would have explicitly granted such authority to FWS. Accordingly, neither the inclusion of the word "harm" nor the ambiguous incidental "take" provisions added by Congress in 1982 should be construed as granting or confirming FWS's authority to regulate the modification of a habitat on nonfederal lands. "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993).

C. The Act Should Not Be Construed in a Way That Intrudes Upon Traditional State Authority Over Nonfederal Lands and Upsets the Balance of Federal and State Powers.

Even if this Court somehow finds that the intent of Congress was ambiguous, the lower court's decision should be affirmed because the regulation intrudes upon

the States' traditional police power to regulate land use, and thereby alters the balance of power between the states and the federal government. This is particularly important because "the political debate at the hearings had focused on federal-state sovereignty. . . . " Salzman, *supra*, 14 Harvard Envt'l L. Rev. 311, 316. When this Court is urged to interpret an Act of Congress in a way that may "upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides this balance." *New York v. United States*, 112 S. Ct. 2408 at 2425 (1992) (emphasis supplied), (*quoting Gregory v. Ashcroft*, 111 S. Ct. at 2401 (1991)).

Congressional intent has become of paramount importance to the determination of when an Act of Congress has transgressed the limitations of the Tenth Amendment. Over time the line of demarcation between state and federal authority has become increasingly difficult to discern. Whereas formerly the Court determined transgressions by reference to "integral" or "traditional" powers, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 566 (1985), the Court reasoned that because the residuary sovereignty of the states is secured by the procedural safeguards inherent in the structure of the federal system, the limits of federal authority should not necessarily be defined with reference to "integral" or "traditional" powers. 469 U.S. at 552-555. Under this analysis, the "harm" regulation is invalid because it skews the effects of the political process upon the Act.

The Act resulted from a political process in which deference to states featured prominently. Congress chose

to direct state activity regarding endangered species through incentives and cooperation, rather than direct regulation of nonfederal lands. By refraining from regulation of nonfederal lands, Congress continued its traditional deference to state law in matters of land use, a deference which is apparent in other sections of the ESA. *See, e.g.*, 16 U.S.C. §§ 1533(d), 1535(c)(1)(E)(ii), and 1535(g)(2)(B).

Congress has regularly demonstrated a large degree of deference to states in regard to real and personal property rights and land use planning matters, which traditionally have been considered within the exclusive authority of states. As this Court stated in *United States v. Fox*, 94 U.S. 315 (1876):

> [T]he title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State.

94 U.S. at 320-321. *See also United States v. State of California*, 281 F.2d 726 (9th Cir. 1960); *see generally Katzenbach v. McClung*, 379 U.S. 294 (1964). This deference includes direction to federal agencies to cooperate with local land use planning and zoning measures that would otherwise not apply to federal property. *See, e.g., Federal Urban Land Utilization Act*, 40 U.S.C. § 533; *Federal Land Policy and Management Act of 1976*, 43 U.S.C. § 1701, particularly § 1712(c)(9). State regulation of wildlife habitat is also an area of historic state dominance and congressional deference. *See Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled*

on other grounds, Hughes v. Oklahoma, 441 U.S. 332 (1979). In areas where states historically have played a major role, this Court wisely does not interpret ambiguous federal legislation as displacing that role. *See United States v. New Mexico*, 438 U.S. 696, 715 (1978).

Considering the long history of congressional deference to states in the management of nonfederal lands and natural resources, which is reiterated in the Act, it is inconceivable that Congress would so radically alter that policy by the use of a single word in a section of the Act that does not even mention habitat modification. This Court should not permit a single-purpose federal agency to override the political process and usurp state authority over land uses, which are fundamental to the health and welfare of citizens.

The suggestion by amici scientists (Brief of Amicus Curiae Scientists, *Sweet Home* (No. 94-859) at 24-26) that this Court should expand federal authority to protect species through the "public trust" doctrine in order to validate the assumption of power by FWS is both legally unsound and bad public policy. *See generally*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631 (1986). This Court need not and should not become a party to the agency's intrusion upon legislative prerogatives and state interests by extending a doctrine that historically has been limited to public rights in navigable waters and their submerged streambeds to encompass the much broader issue of wildlife habitat conservation.

Finally, FWS threats to prosecute state officials for "take" violations if they issue permits or otherwise authorize uses of nonfederal lands that FWS considers harmful to endangered species implicates the concerns about political accountability that have troubled this Court in the past:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [Whereas if the Federal Government legislates directly, thereby making the decision] in full view of the public . . . it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program remain insulated from the electoral ramifications of their decisions. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

New York v. United States, 112 S. Ct. at 2424 (citations omitted). By authorizing wildlife biologists to coerce nonfederal governments to regulate nonfederal lands in accordance with the needs of endangered species, the "harm" regulation acquires the potential to become the greatest of all unfunded federal mandates,[21] as well as

[21] In fact, the enormous cost of preserving habitats on nonfederal lands, and (by inference) the unavailability of federal funds to acquire such habitats, is offered by amici scientists as a justification for the regulation. Brief of Amici Curiae Scientists, *Sweet Home* (No. 94-859) at 17-19.

shifting liability from the federal government to the states.[22]

These troubling issues may and should be avoided completely by this Court affirming the lower court's conclusion that the "harm" regulation is invalid because it exceeded the authority granted by Congress.

CONCLUSION

For the reasons stated, the decision of the court of appeals should be affirmed.

Respectfully submitted,

GRANT WOODS
Attorney General
State of Arizona

MARY MANGOTICH GRIER*
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007
(602) 542-7783

Counsel for State Land

*Counsel of Record

March 22, 1995

[22] For example, land use restrictions imposed under the threat of a "take" prosecution may result in the assertion of inverse condemnation claims against a state for refusing to issue a permit otherwise authorized by applicable state law, whereas the liability should be that of the federal government.

Citation Rank(R) Database Mode
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12/1/94 Wall St. J. (Page Number Unavailable Online)
1994 WL-WSJ 2054731

The Wall Street Journal

Thursday, December 1, 1994

Agenda '95-'97

A Mayor's Plea: MANDATE No More

By Gregory S. LASHUTKA

Opposition to "unfunded MANDATES" has become the latest populist cause against an over-reaching federal government. Oddly enough, this revolt has been led not by ordinary citizens, but by mayors, county commissioners and governors, on behalf of their taxpayers. When Republican and Democratic state and local officials unite on an issue, even members of Congress take notice.

While federal MANDATES aren't direct taxation, they have pretty much the same effect. It's like having your Uncle Sam take you to lunch, order your food, and then hand you the check. Consider these examples from Columbus:

-- After old paint solvents were found in a gravel lot that our city wanted to pave, the Environmental Protection Agency's initial demand was that we ship tons of soil to a Texas incinerator at a cost of $2 million. A subsequent health-risk assessment led to a simpler cleanup for just $50,000.

-- Implementation of the new Transportation Employees Act to randomly test city truck drivers for alcohol and drug use will cost between $50,000 and $100,000 annually.

-- The Underground Storage Tank Act requires us to move all city fuel tanks above ground. The cost to our Fire Division is $950,000 -- equal to three or four new fire trucks.

-- The Federal Register estimated that obtaining a stormwater discharge permit under the Clean Water Act would cost $76,681. Our actual cost: $1.5 million.

-- When home samples of lead in tap water peaked slightly over the federal maximum, we were forced to mail a notice to all our customers within 60 days, even though the event was short-lived and a insignificant health risk. Since Columbus does its water bills on a 90-day cycle, we had to spend $42,000 for an extra mailing.

Faced with continual surprises of this nature, Columbus did a

first-of-its-kind study in 1991 to determine how much MANDATES were affecting us. From 1970 to 1985, 20 toxic-management MANDATES had been imposed on local government. Since then, more than 75 have been added. Columbus estimated its total spending on 14 major environmental MANDATES would be $1.6 billion from 1991 to 2000; each Columbus family's share, reflected primarily in water and sewer bills, would be $850 a year. This amounts to a massively regressive hidden tax that hits families and retired people especially hard.

And the regulations just keep on coming. Every six months, the Federal Register prints an index of every new and proposed rule that might affect local governments. As an experiment, we in Columbus decided to request copies of the 524 rules listed in the April index. We received 207, just 39% of those requested. The pile of paper was five feet tall -- 7,067 pages of rules, along with 9,490 pages of supporting documents. The average rule was 34 pages long.

Every city, village, and hamlet is supposed to read them and figure out how to apply them. Columbus is America's 16th largest city, and even we don't have the staff to handle them. How are smaller cities supposed to cope? More frightening still, how can business owners understand and pay for the even greater number of employer MANDATES?

No one in Washington ever considers the cumulative effect. Each bureaucracy scrutinizes only one narrow subject at a time. Yet everything in government budgeting involves setting priorities and making trade-offs. Paving more streets means less money for street lights. Hiring more police means less money for parks and recreation. Local officials are elected to rank priorities and decide how to spend available revenues. MANDATES upset this balancing of community needs, because we are required to rank MANDATES No. 1, regardless of their importance.

It's time to stop the usurpation of state and local authority. The voters are clearly demanding a reduction in the size and scope of the federal government.

President Clinton, a former governor, has suggested he understands the problem. In 1992, he wrote, "It is time to radically change the way the government operates -- to shift from top-down bureaucracy to entrepreneurial government that empowers citizens and communities to change our country from the bottom." It was good campaign rhetoric; it would make good policy. Last year he signed an executive order banning unfunded MANDATES, but it contained huge loopholes.

We must do much more. Sen. Dirk Kempthorne (R., Idaho), the former mayor of Boise, and Rep. Gary Condit (D., Calif.) led the bipartisan charge this year to ban the enactment of unfunded MANDATES, only to be thwarted by most of the Democratic leadership.

Now that Republicans are in charge on Capitol Hill I expect them to pass a tough "no money, no MANDATES" bill. This alone would be a great victory, signaling a shift of power and responsibility back to the state and local levels. Yet there are so many MANDATES already on the books that severe pruning is needed to provide real relief to local taxpayers.

This is not to say that all regulations should be junked. Some government rules are necessary; and the city of Columbus regulates plenty on its own. But the federal regulatory process has broken down. Too many rules are oriented toward process, not actual outcomes. Regulations should be based on cost-benefit analysis, actual health-risk assessments, and sound science, not speculation. Flexibility must be built in to account for the diversity of conditions in American cities.

Finally, states and local governments should be full partners in writing and implementing regulations, not vassals of Big Brother. If we make these changes, we can better protect our citizens, reduce the cost of services and make government more responsive and accountable to the people we serve.

Mr. LASHUTKA is the Republican mayor of Columbus, Ohio.

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Chairman STEVENS. Thank you very much, Mr. Marzulla. We are pleased you could be with us today.

Mr. Box, we appreciate the fact that you have had your Scholars' Committee, and I want to offer to you the chance of sitting down and discussing that draft with our staff to see if we could meld these two drafts. I think ours has, at least from my point of view, the advantage of simplicity as compared to yours, but I do believe that we would like very much to see if we could sort of share the expertise of your Scholars' Committee with those of our staff and come up with a draft.

I think that Senator Levin has one provision in his bill about preemption we would like to include. You have touched on that with your draft. Would that be possible in the near future, to arrange a meeting with your Scholars' Committee and our staff?

Mr. BOX. I know that our staff will be glad to work with yours. The Scholars' Committee itself has been disbanded since the meeting in Cleveland, but——

Chairman STEVENS. Perhaps you could work with our staff to get a draft and submit it back to them and see what they would think about it——

Mr. BOX. I think that we would——

Chairman STEVENS [continuing]. Because they reviewed the subject apparently about the same time I was doing it and you came up with your draft and we came up with ours later in ignorance of that, I might add. But we are heading in the same direction, clearly.

Mr. BOX. Absolutely.

Chairman STEVENS. I would very much like to work with you on it.

Mr. BOX. We would be glad to help coordinate that and get the information disseminated to the appropriate people.

Chairman STEVENS. As an ex-State legislator, I am very interested in the workings of your conference. You say that you have a three-fourths support for the position presented here from the members of the National Conference, is that right?

Mr. BOX. Any policy to be adopted by the organization as a whole requires a three-fourths vote. I should point out that in referring to the scholars' draft report, not everything in there has been subjected to that vote. That draft has been recommended by the participants in the Federalism Summit, which was made up of five different organizations, and in that capacity, I recommend it to you as something that deserves further consideration because of the fact, as you pointed out, that it does have remarkable similarity to both the content of your bill as well as Senator Levin's bill.

The specific points that I incorporated in my testimony today and in my written testimony are factors in that draft which have been included in NCSL policy. So those specific items, our organization has approved by a three-fourths majority. There are many things in the draft which have not been subjected to that vote but which, nevertheless, is recommended to you by the five organizations for consideration.

Chairman STEVENS. When I came to the Senate, I came from the State legislature of Alaska, and having served there in a capacity as one involved in a fairly new State, we spent a lot of time trying

to figure out what our powers were. I came here with a definite feeling that the Federal Government had expanded far beyond its original scope and it was, in fact, encroaching upon the powers of State legislatures. Is that a feeling that is still prevalent within your organization?

Mr. BOX. I think the most important point that we hope to impress upon the Members of Congress is that State legislatures are, under the Constitution, coequal partners in our system of federalism. We feel very strongly that the States have a certain role to play and the Federal Government has a certain role to play.

We believe that it is essential that this balance of federalism be reestablished, and that is why we support the proposals pending before this Committee, because we believe that it is essential that Congress recognize when they are preempting State authority and that they recognize that there are certain Constitutional justifications for preemption at some times and certain Constitutional restrictions that would prevent preemption at other times. That is the reason that we are here testifying in favor of this proposal.

Chairman STEVENS. Thank you.

Mr. Marzulla, when President Bush announced the wetlands doctrine, he indicated that approximately 50 percent of the wetlands of the United States had been in some way affected by development. Since my State has 50 percent of the wetlands and we have only used less than one percent of our wetlands in any type of development, it was obvious to us at the time that the doctrine he was talking about was for what we call the contiguous 48 States. However, it soon developed that the Federal agencies were exercising most of their powers under that new doctrine in our State.

It was never legislated, as you know. It was a doctrine that came from Section 404 of the Clean Water Act that was supposed to deal with dredge spoil. I have a hard time finding dredge spoil up in the tundra. But as a practical matter, that was both the combination of the excessive extension of an Act of Congress by the courts in Section 404 but then a further extension by administrative edict by the powers that had been really expanded by the courts.

You mentioned that in other situations. This bill of ours really would not completely put that genie back in the bottle, back in my opinion. It would just make certain that everyone who had anything to do with the Federal legislation or the Federal regulations would be forced to articulate the source of their power. Do you disagree with that?

Mr. MARZULLA. No. I do not disagree with that. Indeed, I think, Mr. Chairman, that you have stated it quite correctly. My suggestion is that had the Clean Water Act examined the source of congressional power, it would have found that under the Interstate Commerce Clause, Congress has power to legislate with respect to the navigation easement which the Federal Government holds over all interstate waters. It would have then been abundantly clear that theories such as the glancing bird theory, that is, if a bird flying over might look down and decide that it would like to land on that property, then the Corps of Engineers has authority over it, would have been Constitutionally infirm and I think that that would have led to Congress being clearer about the point.

That does not certainly solve all the problems. Perhaps it does not put the genie back in the bottle, but it starts to lure him back that way. Absent, however, greater attention by Congress to the details of the legislation, that is, in the case of the Clean Water Act, some legislation that talks about wetlands rather than navigable waters, you are quite right, Senator, that the problem is not solved.

Chairman STEVENS. I think that is missed by a lot of my colleagues who oppose the legislation, because I believe that the wetlands doctrine probably would have developed even with the Tenth Amendment Enforcement Act being in place if Congress had the votes to pass the bill to bring it about, but it would not have come about through interpretation of the courts in the strained manner in which it did.

Do you perceive any limits on the Tenth Amendment in terms of its application in this area of restraining Federal power?

Mr. MARZULLA. Clearly, there are limits. The nature of the Constitution is that it limits all governmental power in order to protect our precious American freedoms. That was the first and most fundamental determination of the Framers of the Constitution. First, it said, government may do only certain things, so that, for example, as Justice O'Connor points out, Congress may legislate with respect to commerce, let us say with respect to newspapers, but it may not in so doing infringe on freedom of speech. Conversely, the powers of the States are limited by the powers of the Federal Government in the same way that the powers of the Federal Government are limited by the State authorities guaranteed under the Tenth Amendment.

Justice O'Connor, and the Supreme Court has several times used this analogy, speaks of the Federal power and the State power being mirror images of each other. The power which the Federal Government has, the State does not, and vice-versa. What that means, of course, is that to the extent that Congress exercises a power that it does not have, that it is unconstitutionally infringing upon power reserved to the States or local government or to the people, respectively.

Chairman STEVENS. I do thank you both very much.

Senator Glenn?

Senator GLENN. Thank you, Mr. Chairman.

I certainly support the idea of Congress having more information about the consequences of bills it is considering, especially as they affect State or local laws. We have a requirement in Section 423(e) of the Unfunded Federal Mandates Reform Act that requires committees, when they are reporting legislation, to include in their report a very explicit statement on the extent to which the underlying legislation preempts State, local, and tribal law and an explanation as to the effect of such a preemption. That Act just went into effect on January 1 of this year.

I would like to get both your views on that and ask also if you do not think we should see if that requirement works over a reasonable period of time before we lock in a supermajority point of order and all the other processes that would be required with this legislation.

Mr. BOX. Senator, we appreciate your efforts in that regard but we would suggest that that is only the first step. As far as it goes, it has been very useful. We have not seen congressional committees actually, I guess, carrying it to the end that we would like to see. That is why we refer to it as the first step. It is kind of like increasing the awareness on the Hill of the need for looking at the effects of preemptive legislation, but I would suggest that it probably does not go quite as far as it should in actually preventing preemption and guaranteeing that State authority will not be nullified by congressional act.

Senator GLENN. Mr. Marzulla?

Mr. MARZULLA. Yes, Senator. By all means, it is extremely helpful for Congress to commence making an inquiry that, by and large, has not been made heretofore, and that is, to what extent is it infringing upon the core State powers guaranteed to State and local government under the Tenth Amendment.

This bill, however, I think, is helpful in that analysis by going farther and requiring that Congress also identify and examine the source of its Constitutional authority to legislate in the first instance. That is to say, it is important to know whether a proposed statute will infringe or preempt on State or local legislation, but it is equally important to know whether Congress has the authority to pass such a law in the first place. The two go hand-in-hand.

As I indicated, the Supreme Court has been quite clear in noting that the boundary between State and Federal authority is, in fact, a dividing line which neither may cross. So to the extent that Congress says, we are infringing or we are preempting State law, it should also be examining, do we have the right to do that under the Constitution?

Senator GLENN. How do you think agencies are supposed to decide if: "Exercise of State power directly conflicts with the exercise of Federal power" in a rulemaking decision? Is it as simple as that, an either/or? Who is supposed to decide these things, anyway, if we pass this? Mr. Marzulla?

Mr. MARZULLA. It seems to me, Senator, that in the first instance, it is the job of the agency in analyzing the nature and extent of its authority to promulgate a regulation to define what it can and cannot prescribe by that regulation. So in the first instance, obviously, the agency is going to have to make that determination.

Frankly, if the U.S. Army Corps of Engineers had to sit down and decide how it is that navigable water means, in an example I have given in my testimony, desert land in Nevada which gets 7 inches of rain per year and has no water body located upon it, I suspect that they would have realized that their authority could not extend that far.

As I understand the bill, thereafter, the regulation would be subject to challenge, as are all regulations under the Administrative Procedure Act, as being arbitrary, capricious, or otherwise not in accordance with the law, and it is not unusual for rules, of course, to be challenged on Constitutional grounds when they are challenged.

Senator GLENN. Is this not going to just invite litigation, though? We already have too much litigation now.

Mr. MARZULLA. It seems to me the question—it is a little like that commercial about automobile repairs. It is sort of "litigate me now or litigate me later". As I pointed out, the Superfund statute passed by Congress in 1980 was ruled unconstitutional, admittedly by a single district judge in Alabama, I might add, 2 months ago after the expenditure of billions and billions of dollars. The entire program has been disrupted.

Had the particular problem been addressed earlier, I suspect that never would have happened. So my suggestion is that examining the Constitutional authority, examining the Constitutional blueprint is going to cause Congress to adopt legislation which is within its authority. You can hardly expect to close your eyes, pass a piece of legislation hoping it is Constitutional, and then not expect that to be litigated at some point.

Senator GLENN. Mr. Box, I ask you the same thing. How are agencies supposed to decide if an exercise of State power directly conflicts with the exercise of Federal power in a rulemaking decision?

Mr. BOX. Senator, in all honesty, States have had more problems with regulatory preemption than we have had with congressional preemption. I think that probably the biggest need here is for greater awareness and oversight of what the agencies are doing to the States with their promulgation of rules. By requiring some kind of recognition of an intent to preempt and a statement of authority to do so, we provide a little added oversight of agency rulemaking authority and that is the reason that we support some kind of restriction on their freewheeling ability today to promulgate rules regardless of their preemptive effect.

Senator GLENN. All of our problem with rulemaking and regulation, and we have not passed really good regulatory reform yet, of course, but what we had in some of the proposals that we were working on earlier, last year and the first part of this year, is the idea that much of the blame rests right here. We need to look in the mirror and Congress is where the blame lies. We need to bring back some of these things that are a misuse of well-intended wetlands laws or endangered species laws and so on, so that they can be rechallenged again here in the Congress and we can correct some of these things.

I think that is a key part of any of the regulatory reform legislation going through, any that I thought we should get through, anyway, because I think much of the problem starts right here. We pass laws here that are not specific enough. Then we send them over and expect somebody to ferret out whatever our intent was with those laws and then write the rules and regulations. Sometimes they are a little overzealous in what they do and get all carried away with it, and then there are sometimes where there are things that happen that were never really intended under the original law and I think those things should be brought back and reviewed on a regular basis by the Congress itself so we can correct some of those things.

If we did something like that and had a good working system, would that take away some of the necessity for the legislation like we are considering here today, Mr. Box?

Mr. BOX. I think that is an important ingredient, Senator.

Senator GLENN. Mr. Marzulla?

Mr. MARZULLA. Yes. I would certainly agree, Senator. Indeed, I am anxious to see how the Small Business Regulatory Reform Act will work, which, as you know, is designed basically along the lines you just described.

It is clear that congressional oversight of what is, in effect, a delegation to an Executive Branch agency of legislative authority is absolutely critical. When you tell the EPA, the Corps of Engineers, the Department of the Interior that it has authority to do something under a broad law and to fill in the details, you are, in effect, giving legislative power to that agency. I heartily agree with you that it is important that Congress keep an eye on what that agency is doing with the authority that Congress has delegated to it.

Senator GLENN. There seem to be two parts to the legislation. One is that Congress and the Federal agencies understand what State and local laws they are preempting and be clear about it when they do, and that notion makes a lot of sense to me. It is the second part of the bill that bothers me. That is where the bill seems to establish a bias against Federal action in all three branches of the Federal Government.

If we were to drop the provisions that create this bias, a supermajority point of order, the instructions to the courts, and that structure and just keep the informational requirements of the legislation, would that be something you could support or do you think that would weaken it too much? Mr. Marzulla?

Chairman STEVENS. You do not need to answer. I would vote against the bill myself.

Mr. MARZULLA. I confess that I am not the expert on senatorial procedure sufficient to be able to offer any advice on that subject. I am sorry.

Senator GLENN. Mr. Box, do you agree with the Chairman?

Mr. BOX. I think there are two essential things that need to be accomplished in the legislation, Senator. One is that Congress show an intent to preempt and a knowledge of what they are preempting, and two, that Congress have specific Constitutional authority for the actions taken. I think that with those two essential building blocks, we can negotiate on just about anything else, but it is essential that those two items form the nucleus of any bill if the Tenth Amendment is going to be used to restore the balance.

Senator GLENN. Let us take it back home to your home State of Alabama for a moment. Are there any requirements either in the State Constitution or in law for points of order or preemption analysis that limit how the State Government treats local governments? If so, how are they working?

Mr. BOX. There is an important distinction that I will have to point out to you. Yes, of course, local governments are creatures of the legislature and the municipal code sets up all of their authority, and that is an act of the legislature. But our Constitution more clearly delineates the division, the dividing line between State and local governments, unlike the rather fuzzy dividing line drawn by the U.S. Constitution between State and Federal authority.

The line is very clear in Alabama what cities are supposed to do and what the State is supposed to do. So we do not have quite the

same problem in deciding who has the authority in a specific area. That is more——

Senator GLENN. Is that in your Constitution?

Mr. BOX. It is more clearly delineated both in the Constitution and in statutory authority. Now, some would say that our Constitution is, in fact, too specific, but the fact remains that because of that clear delineation within our Constitution, we do not quite have this problem of uncertainty.

Senator GLENN. Do you have any idea how many States have laws on the books that limit preemption of local government actions?

Mr. BOX. I am sorry, Senator. I could not answer that, but I will be glad to try to find out.

Senator GLENN. We might want that for the Committee record, if we could.

Chairman *Stevens.* Senator, I do not know, but a municipality is not the creature of a State. The State Government is not a creature of the Federal Government.

Senator GLENN. No, I agree with that, but——

Chairman STEVENS. That is a question that is tautological. How can you answer that, because the States create the municipalities.

Senator GLENN. Mr. Marzulla, do you know of any situations like that, like I was talking about?

Mr. MARZULLA. No. I am afraid, Senator, I do not. I would underscore, however, sort of the lack of analogy between the clear division of authority under the Constitution. That which belongs to the State does not belong to the Federal Government and vice-versa, as compared with the relationship between a State Government and a municipality, which it creates and uncreates.

Under our system—the Supreme Court said this well over 100 years ago—both the States and the Federal Government are indestructible. Indeed, we fought a civil war over that precise issue. The State of Alabama can—or let us take other States—can probably create or uncreate or redraw the lines of counties or of cities or create combined districts or whatever. Congress cannot do that any more than the States can redraw the powers of the Congress, short of, of course, a Constitutional amendment.

So the analogy is not a very good one. There is the Federal Government on one hand, the State on the other hand, both granted specific powers by the Constitution, which is the supreme law of the land.

Senator GLENN. You are a strong proponent, as I understand it, Mr. Marzulla, of Federal takings legislation. However, many State and local governments oppose the legislation because it effectively preempts their right to regulate certain activities, zoning, as an example. This would seem to run counter to the letter and spirit of the Stevens bill. How do you reconcile these apparent contradictions?

Mr. MARZULLA. I am glad you asked me that question, Senator. First of all, let me say that I agree with your earlier opening statement. Much legislation is proposed by Congress, by supporters of the Tenth Amendment who, at the same time, seek to preempt State law with respect to specific issues of common law or statutory law. That is not the case with respect to S. 605, which is currently

pending floor action in the Senate. There is a general misconception.

Some people have said that it would affect zoning law, but the statute is specifically limited to its impact upon the action of Federal agencies. A close examination of the statute, I think, would limit that. It was drawn in that way precisely to address Tenth Amendment concerns. That is, the analysis that went into that bill was precisely the one that you endorsed at the commencement of this hearing, which is that the Federal Government has no business prescribing takings standards for State and local government.

It would not—let me underscore that, because I have heard this statement made over and over again—it does not touch zoning. It does not touch State law in any way. It impacts only Federal legislation and Federal agency action.

Senator GLENN. We live in a different world than we used to have way back when the Framers put the Constitution together. We live in a world where barriers and opportunities among organizations and businesses and governments and nations are changing rapidly. Recently, Congress has responded to some of these changes. We passed NAFTA. We passed the Uruguay Round. We passed the Telecom bill, just to name three of them.

But the legislation we are considering today seems to take another view, where such Federal action on behalf of the American people would be much more limited. Given the national and international issues before us, is that desirable or even possible, for us to return to an era of much more limited Federal Government? Do you think it would have that impact of preventing us from acting on such things as NAFTA, the Uruguay Round, Telecom, and so on? Mr. Box?

Mr. BOX. I do not think that it would have that effect, Senator. There are certain clearly delineated responsibilities of the Federal Government. Everything that you just mentioned is uniquely Federal in nature and I do not think that, in recognizing or requiring that Congress recognize when it is preempting State authority and stating its Constitutional authority for doing so, we in any way limit the Constitutional authority of Congress to act in the areas that you mentioned. So I do not see that problem at all.

Senator GLENN. Should water standards be set by the Federal Government, then?

Mr. BOX. Senator, as long as you can show me the Constitutional authority for taking action, I will support anything you want to do.

Senator GLENN. I repeat my question. If you were voting today, if you were in our position and had to vote today on water standards for safe drinking water for the country, it is a Federal law. Would you vote for that or against it?

Mr. BOX. I think that there are certain aspects——

Senator GLENN. That is not what I asked.

Mr. BOX. Would you like to show me the details of the bill first?

Senator GLENN. No. I would like to know if you are going to vote for safe water standards of the people of the country, all across State lines, or not?

Mr. BOX. Insofar as it affects——

Senator GLENN. No, not insofar.

Mr. BOX. I understand, Senator, but you are asking me to—there are some things that I feel should be left up to the legislature and there are some——

Senator GLENN. What I am getting at is this. Matters of health and public safety that go across State lines should apply, I think we would all agree, to everybody, clean air, clean water, and so on. Should we have Federal laws in those areas or not?

Mr. BOX. There is a problem right now that exists between the State of Georgia and the State of Alabama that may not be resolved any other way. So if you can help us solve that problem, then I think that would be a matter of Federal regulatory——

Senator GLENN. This is a good example, though, of things, because I think this is where I see us coming apart on support for the bill here, because I think there are a lot of things like this, whether it is clean air, clean water, safety, nuclear matters that are on the floor over here right now that we take action on for the good of all of the people of this country if there was not a single State line out there. I think those should be there. It seems to me that this would make it much, much more difficult to pass things like that, as I understand this legislation, and the intent of this legislation.

Mr. Marzulla, what is your comment on that? Do you think we should have clean water standards, clean air standards that apply to all the people of this country and all States? That is not covered in the Constitution. The Constitution does not say you should have clean air, clean water, and so on. How would you do it under this legislation?

Mr. MARZULLA. There are certainly Constitutional powers, Senator, including, most notably, the interstate commerce power, which permit Congress to reach the flow of pollutants across State lines, whether they be in the air or in the water.

My suggestion is that if Congress were to recognize that it is Constitutionally limited, however, with respect to its authority, it might choose to reconsider whether there was a good reason for taking away from local government the function that it has served ever since people began drinking from water wells, and that is a primary responsibility at the State and local level for guaranteeing the health and safety of the local residents, and that includes inspecting restaurants and dealing with outbreaks of diseases and checking water supplies and——

Senator GLENN. But you would have your standards, then, set by the States and not by the Federal Government, just in the interests of their own people, is that right?

Chairman STEVENS. Senator, you have used 20 minutes now. Can you tell me how much longer you want for these witnesses?

Senator GLENN. I am ending now. This will be fine. We will go on to the next one.

Mr. MARZULLA. My suggestion is that to the extent that it is a health issue, that water standards have historically been set by the States and that absent a showing that the States are unable to do that and that the only way to do it is at the Federal level and that there is Constitutional authority to do so, I am afraid the conclusion is, yes, sir, that it is the province of the States.

Mr. BOX. Senator, if I might——

Senator GLENN. I would just disagree with you very, very strongly on that. I think that shows a real difference in approach to how we approach the responsibilities of the people of this country. That is a big difference between traveling here and traveling in Europe and other places. Every time I am out of this country, I drink nothing but carbonated water of one kind or another and eat no leafy stuff and everything else. In this country, I do not even think anything about going into almost any town, except for locally in Washington, D.C.—— [Laughter.]

I overstated myself a little—and drinking the water. But I just think you have certain responsibilities, that people of this country should be able to go across State lines and know they are getting a fair shake on food standards and clean air, clean water, and not have to worry about matters of public health like that, and I think to take any step with any legislation that would go against something that fundamental just on the basis that the Constitution was all knowing and all seeing when it was written, I just think is wrong.

Mr. BOX. Senator, if I may, let me clarify something. I think the point did not come across. In supporting legislation of this type, we are not saying that there is never any justification for preemption.

Senator GLENN. Right.

Mr. BOX. We are simply saying that absent some justification, then there are certain steps you should follow. The issue of clean drinking water and clean air are issues certainly of national importance and may very well be sufficient justification to cause Congress to preempt certain State regulations.

Senator GLENN. But you have supermajority requirements and judicial review and points of order and all this sort of thing that make it that much more difficult.

Chairman STEVENS. Senator, that is exactly why the bill is there. It is there to assure that Congress understands it has some bounds. What the Senator has just said, in effect, is the inherent power doctrine that has been espoused so often by people, unfortunately, on your side of the aisle, and it really comes down to a political concern.

Mr. Box, I know you are of the same political persuasion as the Senator from Ohio, but I have to tell you, there are limits on the Congress, and unless Congress wants to really recognize inherent power concepts, and we are going to hear that now from Mr. Rubin, I think, the inherent power of Congress to act whenever there is a problem. Without regard to the Framers of the Constitution, without regard to the oath we take to support the Constitution, we are supposed to vote because someone perceives a problem and only we can solve it.

My position remains that the Constitutional limits apply to Congress. They apply to the courts. They apply to the States. If we are going to have a system of government that is going to survive, we are all going to have to live within our own province of the shared powers of this democracy.

Unfortunately, we constantly hear this inherent power concept. That is exactly what Senator Glenn has just announced, that there is inherent power. If there is a problem, it has to be solved. If there is a problem in interstate commerce, if someone is going across a

line and wants to be sure that they have clean water, if Congress wants to be sure they have clean water and good sanitation, we have the power to act.

All I ask, all this bill asks is that we articulate the basis of that power. It is there. I voted for the clean water legislation. I introduced it, as a matter of fact, along with Senator Kennedy, and I am an avid supporter of the Tenth Amendment. This is another one of those red herrings we get every time we try to reassert the balance between the States and the Federal Government, and it is going to be an interesting debate. I am not sure we will get to it this year.

Senator GLENN. Mr. Chairman, I am not putting forth any red herrings here, and I do not like you saying that I am. But I want to know. I asked a very clear question. Is this going to make it more difficult to have clean water and clean air in the country and the answer to me is yes.

Chairman STEVENS. No. It is not.

Senator GLENN. Then you insert some different powers and we go ahead and do it, and maybe we do that.

Chairman STEVENS. The powers are there and you have to use the powers you have.

Gentlemen, we are going to have to move on. I said we would end this by 4 o'clock. But it is going to be a long debate. There is no question that the tendency of this town is to expand the powers of the Federal Government and ignore the fact that we have a series of 50 States which have equal—equal—Constitutional powers under our system. We are either going to preserve them or we are going to go to just a situation where we totally ignore the independent sovereign States of this Constitutional democracy. I am going to persist in this and I appreciate your support. Thank you very much.

Again, gentlemen, we will be submitting some questions. Take your time, but we would appreciate your answers. We appreciate your courtesy in being here.

We are going to hear the opposite point of view. If I had the time, I would take equal time to Senator Glenn in questioning his witnesses. These are Senator Glenn's witnesses.

Senator GLENN. I will give you some of mine.

Chairman STEVENS. The first one is Ms. McManamon, Associate Professor at Widener University School of Law from Wilmington, Delaware, and Edward Rubin, Professor of Law from the University of California at Berkeley.

You are the first witness, Ms. McManamon. Thank you.

TESTIMONY OF MARY BRIGID McMANAMON, ASSOCIATE PROFESSOR OF LAW, WIDENER UNIVERSITY SCHOOL OF LAW, WILMINGTON, DELAWARE

Ms. MCMANAMON. Good afternoon, Mr. Chairman and Senator Glenn.

Before I begin my remarks, I would like to take a moment to say thank you first to the Committee staff members, in particular Dominique Apollon, who worked very hard to facilitate my appearance here this afternoon.

First, I would like to say that the Tenth Amendment Enforcement Act of 1996 is an extremely significant piece of legislation and I would like to thank you for organizing these hearings so that we can all come here and participate in the decision as to the wisdom of this Act.

Second, I would like to acknowledge my research assistants, Jennifer Harding and Rachel Lowy from the Widener University School of Law, who are with me here this afternoon. Their tireless efforts were invaluable to my preparation for this hearing.

Without further ado, let me now address the bill before this Committee. The findings, the purpose, and even the title of the Tenth Amendment Enforcement Act imply that all three branches of the Federal Government have violated the U.S. Constitution. To stop this supposedly illegal conduct, the Act would erect procedural hurdles intended to effect a change in the interpretation of the Tenth Amendment and, more importantly, to change from the judiciary to the legislature the power effectively to interpret the amendment in the future.

These changes would alter both the balance of power between Nation and States and the relation among the various branches of the Federal Government. In effect, therefore, the Act purports to amend the basic structure of our government, that is, our Constitution.

If it is true that the expectations of ordinary American citizens concerning the role of government in our society are incompatible with the Constitution, then we should be talking about a Constitutional amendment. Since we are not, all I can say is that trying to change the structure of government with a statute is problematic, at best.

First, let me address the change in the balance of power between Nation and States that the sponsors of this bill hope to bring about. The testimony before this Committee has uniformly claimed that this shift would be merely a return to the true meaning of the Tenth Amendment.

There are two problems with that contention. One, while the lessons of history are indeterminate, American history and Constitutional practice do not support their contentions. Two, the true interpretation of a Constitutional provision under our Constitution is the interpretation given by the Supreme Court.

The U.S. Constitution was a resounding rejection of the Articles of Confederation. The following analogy by the historian Albert Beveridge captures the problem vividly: "The existing American system," that is, before the Constitution, "was a very masterpiece of weakness. The so-called Federal Government was like a horse with 13 bridle reins, each held in the hands of separate drivers who usually pulled the confused and powerless beast in different directions."

As early as 1784, George Washington, the father of our country, declared, "The States' unreasonable jealousy of Congress and of one another will, if there is not a change in the system, be our downfall as a Nation. They made the Federal establishment a half-starved limping government that appears to be always moving upon crutches and tottering at every step."

I mention this history because it gives context to the meeting in Philadelphia that formed our Constitution. The delegates who gathered in 1787 had a mission. They were seeking a central government with much stronger powers than under the Articles of Confederation. Their purpose was made plain in the opening lines of the Constitution. Its first three words, "We the people," made clear at the outset that what followed was not a confederation of States.

The Tenth Amendment was added to the Constitution to reiterate the dual sovereignty embraced by the new American political science of separated powers. As the Supreme Court noted in *United States v. Darby,* "There is nothing in the history of the Tenth Amendment's adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment."

Furthermore, unlike a similar clause in the Articles of Confederation, the Tenth Amendment did not reserve to the States only those powers that were not expressly given to the Federal Government. Implied powers were also given to the Federal Government. The doctrine of implied powers, and consequently fewer reserved powers, was clearly confirmed early in our history in the venerable cases of *McCulloch v. Maryland* and *Gibbons v. Ogden.*

The Supreme Court confirmed that, reading the Tenth Amendment with the necessary and proper clause and the supremacy clause, as long as Congress is seeking a legitimate end, it may use "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited." The U.S. Supreme Court has never repudiated this understanding of Congress' power and the Tenth Amendment.

That brings me to my second point. Under our system of checks and balances, it is the judiciary that declares the true meaning of the Constitution. As the Supreme Court declared in *Cooper v. Aaron,* "*Marbury v. Madison* declared the basic principle that the Federal Judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our Constitutional system."

The supporters of this bill contend that the Federal Judiciary has interpreted the Tenth Amendment incorrectly. To declare, as do the supporters of this bill, that the judiciary is no longer the branch to give the definitive ruling on the meaning of the Constitution is to reject 200 years of Constitutional tradition and is, therefore, to amend the Constitution.

Turning to the specifics of the Tenth Amendment Enforcement Act, it presents a multi-pronged attack on Federal power. I will address one aspect of it, the supermajority provision. If this Act is passed, a minority of the Members of either House will be able to kill a piece of legislation based on their interpretation of the Constitution. This new procedure would change the traditional rule that legislation is to be passed by a majority of a quorum. As James Madison said, "The fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority." Such

a provision would lead to the erosion of our central Constitutional commitments to majority rule and deliberative democracy.

Before the Congress takes such a revolutionary step, let me urge you to think about Edmund Burke's caution. He said, "Where the great interests of mankind are concerned through a long succession of generations, that succession ought to be admitted into some share in the councils which are so deeply to affect them. If justice requires this, the work itself requires the aid of more minds than one age can furnish. It is from this view of things that the best legislators have been often satisfied with the establishment of some sure, solid, and ruling principle in government, a power like that which some of the philosophers have called a plastic nature, and having fixed the principle, they have left it afterwards to its own operation."

This Burkean imperative has been embodied in the Supreme Court's common law approach to making the necessary adjustments in the distribution of power between the Federal Government and the States. Why, after 200 years, should we reject the way business has been done? Even now, the Supreme Court is in the process of fine tuning the balance of power. Moreover, the decisive election of 1994 gave us a Congress more than capable of enacting substantive measures favoring the States.

In short, the process our founders gave us is working as it was meant to. There is no need to tie the hands of future generations with this sweeping change. Thank you.

[The prepared statement and letter to Senator Glenn of Ms. McManamon follows:]

PREPARED STATEMENT OF MARY BRIGID McMANAMON

Mr. Chairman and Members of the Committee, thank you for the invitation to testify before you. I come here as an academic, or more particularly, as a student of our federalism. The bill we are considering today has important implications for the over 200-year-old balance of power between Nation and States. I am, therefore, very happy to be a part of these discussions.

The findings, purpose, and even the title of the "Tenth Amendment Enforcement Act of 1996" imply that all three branches of the Federal Government have violated the U.S. Constitution.[1] As one of the sponsors himself testified: "This legislation would begin to put an end to unaccountable Federal power by reminding Congress and the agencies that the Tenth Amendment's principle of limited government must be obeyed."[2] To stop this supposedly illegal conduct, the provisions of the Act erect procedural hurdles intended to effect a change in the interpretation of the Tenth Amendment and, more importantly, to change which branch of government—legislature or courts—gets to *effectively* decide on its interpretation. Thus, the proposed scheme would transform the way this country develops much of its Constitutional law. To all intents and purposes, this legislation, therefore, would amend the Constitution as it has been interpreted since the very early days of our Nation without going through the Constitutionally prescribed procedure.

[1] While the Bill implies that the actions of the Federal Government have been unconstitutional, supporters of the Act who testified on March 21, 1996, explicitly make that claim. *See, e.g.*, Testimony of Atty. Gen. Charles Molony Condon, S.C., before the Senate Governmental Affairs (Mar. 21, 1996) ("What [Federal officials] were doing was illegal." "The legislation that is before you promises a meaningful solution to the Federal Government's continued disregard of the Tenth Amendment.") [hereinafter all testimony cited was before the Senate Committee on Governmental Affairs, Mar. 21, 1996]; Testimony of Rep. Eldon Mulder, Alaska ("Violations of the Tenth Amendment and improper court interpretations conflicting with the Tenth Amendment which are occurring today should be corrected."); *see also infra* note 2 and accompanying text.

[2] Testimony of Sen. Orrin Hatch; *accord*, Testimony of Sen. Robert Dole; Testimony of Sen. Don Nickles.

The Act presents a multi-pronged attack on Federal power. The aspects of the legislation that I will address are the assumptions embedded in the Act about the meaning of the Tenth Amendment and the provisions that limit the traditional judicial power to declare the meaning of the Constitution. Because the sponsors believe that the Federal courts have misinterpreted the Tenth Amendment, the Act provides:

> 1. It shall not be in order in either the Senate or House of Representatives to consider any bill, joint resolution, or amendment that does not include a declaration of congressional intent [that it has Constitutional authority, is more competent than the States, and intends to interfere with State powers] as required under section 3.
> 2. The requirements of this subsection may be waived or suspended in the Senate or House of Representatives only by the affirmative vote of three-fifths of the Members of that House duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate or House of Representatives duly chosen and sworn shall be required to sustain an appeal of the ruling of the chair on a point of order raised under this subsection.[3]

Thus, in many instances, the authority to determine the Constitutionality of legislation is in the hands of a minority of one house of the Congress. That is, if two-fifths plus one of one house vote "no" on an appeal of the ruling of the chair, the legislation cannot go forward. Additionally, the bill would limit judicial review of legislation.[4]

The supporters of the bill hope, through these measures, to achieve an interpretation of the Tenth Amendment that tips the balance of power in favor of the States. These provisions fly in the face of two longstanding American Constitutional principles. First, since *Marbury v. Madison*,[5] it is the duty of the Federal judiciary to declare the meaning of the Constitution. While the legislative branch must do its best to uphold the Constitution, it is nonetheless the responsibility of the Third Branch to rule definitively on the Constitutionality of laws. Second, our representational government has been based on rule by the majority. To place the determination of Constitutionality in many cases in the hands of a minority of one house of Congress is to change fundamentally the way the People are represented in Congress.

In effect, therefore, this Act is revolutionary and, as such, raises two major concerns: one historical and the other normative. The historical concern is important because history ties us—as we consider restructuring American government—to the founding vision of American Constitutionalism and the Constitutional practice derived from that vision. Our history gives us the authority to act according to legitimate American Constitutional tradition. The normative concern is important because it reveals the political and moral content of the ideals embedded in this tradition and how to realize and extend them in the best way for our Nation.

Let me start with the historical consideration. First, we need to examine the charge that the courts have misinterpreted the Tenth Amendment. Co-sponsors of this bill declared before this Committee that they wish to *restore* the balance of power to the States.[6] They presumably wish to return to an earlier, halcyon day when the balance of power tipped in favor of the States. I am not sure what that day would be. Based on several references to the "Constitution of the Founders," I assume that the sponsors are thinking longingly of the days of Alexander Hamilton, James Madison, and George Washington.[7] Those references are surely misplaced.

There *was* a time when the States were, for the most part, independent sovereigns. In those days, the document that defined the terms of our union was the Articles of Confederation. It is true that, under that regime, the State legislatures enacted some very creative pieces of legislation that responded to the needs of their citizens. Very popular, for example, were statutes that provided various forms of debtor relief to aid citizens in financial difficulty. Unfortunately, even staunch supporters of States' Rights acknowledged that there had to be some sort of change. The inability of the Federal Government to raise revenue, to regulate

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[3] S. 1629, 104th Cong., 2d Sess. § 4 (1996).

[4] *Id.* § 6.

[5] 5 U.S. (1 Cranch) 137 (1803).

[6] Testimony of Sen. Robert Dole ("We are going to shift power out of Washington and *return* it to our States. . . .") (emphasis added); Testimony of Sen. Orrin Hatch ("I will work with you Mr. Chairman to make sure that (the bill] achieves passage and that we *once again* take care to see that the Tenth Amendment's principles are observed.") (emphasis added); Testimony of Sen. Don Nickles (quoting Sen. Dole's remarks with approval).

[7] *See* Testimony of Sen. Orrin Hatch, Sen. Don Nickles, Sol. Gen. Timothy Tymkovich, Colo., Atty. Gen. James S. Gilmore III, Va., Prof. Nelson Lund, and Prof. John Kincaid.

commerce, and to stop the destructive competition among the States spurred the calling of the Constitutional Convention.

It is in this context that we must understand the drafting of the Constitution. The men who gathered in Philadelphia were for the most part Federalists; that is they were seeking a central government with much stronger powers than under the Articles. Two of the Framers who have been cited in support of this legislation, Alexander Hamilton and James Madison, were among the more ardent Federalists. Hamilton actually wished to abolish the States. Short of that, he proposed a plan to the Constitutional Convention that would make the States mere administrative districts of the central government—their relation to the Federal Government under his plan would be much like the relation of a county to a State. Moreover, he would have given the national government the power to enact *any* laws *whatsoever*.[8]

It is therefore odd to cite these men in support of a bill that would revolutionize the relationship between the Federal Government and the States by increasing the States' sovereignty. It should also alert us to the danger of evaluating historical evidence too superficially. History is important, but its lessons are often indeterminate concerning the great Constitutional controversies of our time. For the supporters of this bill, history is at best indeterminate. At worst, American history and Constitutional practice have convincingly rejected their position.

The Constitution presented to the States for ratification was a document of compromise. It was, nonetheless a Federalist document. It boldly declared so in the opening lines: "The preamble was noteworthy chiefly for its first three words, 'We the people,' which made clear at the outset that what followed was not a confederation of States."[9] To clarify the dual sovereignty embraced by the new American political science of separated powers, the people insisted on the inclusion of the Tenth Amendment. This amendment, however, did not herald a return to the era of confederation and its obstacles to effective national government. While under the Articles, the States reserved "every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States,"[10] the Tenth Amendment does not contain the word "express." In other words, the new Federal Government was to have implied as well as express powers. In short, fewer powers are reserved to the States under the Constitution.

What then is the role of the Tenth Amendment? It is a structural feature of American government. In a document whose essential purpose is to create a *central* government, it reminds us that the Federal Government does not replace *all* government. The States still have a governmental role to play. But the Tenth Amendment says nothing about the *parity* between the "dual sovereigns." Nothing in the Tenth Amendment Constitutionally precludes the Federal Government from acting on implied powers should the circumstances warrant it, as long as the governmental role of the States is not obliterated.[11]

How was the Tenth Amendment interpreted in the early republic? The very first Supreme Court opinion to discuss the Tenth Amendment is *McCulloch v. Maryland*[12] At issue in that case was the legality of the Bank of the United States as well as the ability of one of the States to tax it. The Court, speaking through Chief Justice John Marshall, himself instrumental in the ratification debates, recognized that the omission of the word "expressly" from the Tenth Amendment indicated that the Federal Government had implied powers as well as those expressly noted in the Constitution.[13] Moreover, according to the Court, the scope of those powers is broad: as long as the end is legitimate, Congress may use "all means which are appropriate, which are plainly adapted to that end, [and] which are not prohibited."[14] This broad power given to the Federal Government in the "necessary and proper clause" has important implications for the States. That clause and the Tenth

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[8] JOHN C. MILLER, ALEXANDER HAMILTON: PORTRAIT IN PARADOX 161–63 (1959); *see* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 281–311 (Max Farrand ed., 1911) (noting Hamilton's address to the Convention).

[9] WILLIAM PETERS, A MORE PERFECT UNION 140 (1987).

[10] Article IX of the Articles of Confederation.

[11] As the Supreme Court declared:

> Our conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise fully their reserved powers.

United States v. Darby, 312 U.S. 100, 123–24 (1940).

[12] 17 U.S. (4 Wheat.) 316 (1819).

[13] *Id.* at 406–07.

[14] *Id.* at 421 (emphasis added).

Amendment are two sides of the same coin. With a greater array of powers given to the central government, there are fewer powers "reserved" to the States. Furthermore, the Court held, because of the Supremacy Clause, "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[15]

This understanding of the implied powers given to the Congress was cemented in *Gibbons v. Ogden.*[16] In that case, Marshall, again speaking for the Court, held that the Federal Government's power to regulate interstate commerce is plenary. He declared:

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.[17]

With this holding, the Court rejected "the Tenth Amendment as an active principle of limitation."[18]

In sum, it is difficult to understand how the supporters of this legislation find authority in the *Founders'* Constitution. The Tenth Amendment must be read in its historical context. From the moment that the majority of the country decided to reject the Articles of Confederation and form a more perfect union, the role of the States as sovereigns was significantly reduced. Moreover, any lingering doubts over the independent sovereignty of the States was definitively answered by the outcome of the Civil War.

I do not mean to imply that the history of Federal power is monolithic. Quite the contrary. In fact, that is the beauty of our Constitution. Each generation has been able to make the adjustments in the balance of power between Nation and States necessary to meet its own problems. For example, perhaps in response to an overly nationalistic Congress following the Civil War, the Supreme Court pulled back a little in its blessing of Federal power. This trend in the Court continued into the early twentieth century, with the Court refusing to let the Federal Government deal with pressing issues. In the face of a catastrophic financial emergency, however, the political branches persisted, and during the mid-1930's, the Court relaxed its stance vis-à-vis Federal power.[19]

The same continuous, albeit subtle, adaptation of the balance to meet society's changing needs is continuing today. Supporters of the bill acknowledge that the Supreme Court has recently showed a tendency to readjust the balance to give the States a little more power. Only last year, in *United States v. Lopez*,[20] the Court held that the Congress had overstepped the bounds of its Commerce Clause powers in passing the Gun-Free School Zones Act. Just three weeks ago, the Court held in *Medtronic, Inc. v. Lohr*[21] that the States' historic police powers cannot be supplanted, that is Federal law will not preempt them, unless that intent is *clearly* found in the legislation. In *Medtronic*, the Court held that the Medical Device Amendments of 1976 did not preempt the development of State tort law.

Thus, the plastic structure given to our government in the Constitution has allowed the various elements of government to devise appropriate solutions to the problems before them. Whatever the adjustments each generation has made to the balance of power between Nation and States, however, the doctrine of implied powers set out in *McCulloch* has never been repudiated.

The second lesson from history important to our discussions is the import of the Supreme Court's opinions from *McCulloch* to *Lopez*. The Act's supporters refer to misinterpretation of the Tenth Amendment by the judiciary, and they wish to replace that interpretation with their own. To do so would be a radical break with tradition. Since *Marbury v. Madison*[22] in 1803, reaffirmed in our own century in

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[15] *Id.* at 436.
[16] 22 U.S. (9 Wheat.) 1 (1824).
[17] *Id.* at 197.
[18] FELIX FRANKFURTER, THE COMMERCE POWER UNDER MARSHALL, TANEY AND WAITE 40 (1937).
[19] For an in-depth discussion of the development of the Federal commerce power and its relation to the Tenth Amendment, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 5–6 (2d ed. 1988).
[20] 115 S. Ct. 1624 (1995).
[21] 64 U.S.L.W. 4625 (Jun. 26, 1996).
[22] 5 U.S. (1 Cranch) 137 (1803).

Cooper v. Aaron,[23] it has been the role of the judiciary to declare what the law is. One may not believe that judicial review is the best way to determine the meaning of the Constitution. To reject it now, however, is to effect a fundamental change in our Constitution, that is, the structure of American government.

The third lesson of history is the traditional representational expectations of "We the People." Except in certain, specified instances, such as overriding a presidential veto, legislation is to be passed by a majority of a quorum. In the words of James Madison: "[If a supermajority were required,] [i]n all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority."[24] It makes no difference that this measure is presented in the guise of a Rule of Congress, the result is the same: The power will be transferred to a minority. Such a change is a break with longstanding tradition.

This bill cannot be seen as a return to mythical idyllic early days. It must, therefore, be evaluated as a normative political choice. The drafters have chosen to revolutionize the way power is divided between the Federal Government and the States and between the Congress and the judiciary. I have two normative concerns with the proposed legislation. First, I question the wisdom of using the legislative process to effect so fundamental a change. Second, I am concerned about the reduction in the People's representation in the legislature.

Edmund Burke cautioned against just such revolutionary lawmaking when he reflected on the actions of the French General Assembly. In his view, only with slow change, step by step, with constant adjustments, can we derive wise solutions. As he so eloquently stated:

> Where the great interests of mankind are concerned through a long succession of generations, that succession ought to be admitted into some share in the councils which are so deeply to affect them. If justice requires this, the work itself requires the aid of more minds than one age can furnish. It is from this view of things that the best legislators have been often satisfied with the establishment of some sure, solid, and ruling principle in government—a power like that which some of the philosophers have called a plastic nature; and having fixed the principle, they have left it afterwards to its own operation.[25]

This Burkean imperative has been embodied in the Supreme Court's common law approach to making the necessary adjustments in the distribution of power between the Federal Government and the States. Why, after over 200 years, should we reject the way business has been done?

American Constitutionalism has developed its own unique dual character: First, it steadfastly seeks change that is tested by experience, and second, it eschews extremism and embraces accommodation and compromise. This pragmatic approach has served our Nation well, especially since its most notable breakdown during the Civil War. The founding generation was tempered with this pragmatist imperative and generations of legislators, judges, and Americans have learned to value its teachings. What does it imply for our present concern? Simply put, it abhors the sweeping radical change this bill will engender. Instead, if change is needed, it counsels incremental case-by-case changes more suitable to a court. Moreover, courts are the primary interpreters of the Constitution. If the sweeping enforcement of the Tenth Amendment is indicated, "We the People" should be asked to decide the matter. When "We the People" are not given the opportunity for Constitutional change, the pragmatist imperative should be embraced.

As to my second concern, I will simply quote the eloquent plea of several other law professors on a similar issue:

> This proposal violates the explicit intentions of the Framers. It is inconsistent with the Constitution's language and structure. It departs sharply from traditional congressional practice. It may generate Constitutional litigation that will encourage Supreme Court intervention in an area best left to responsible congressional decision.
>
> Unless the proposal is withdrawn now, it will serve as an unfortunate precedent for the proliferation of supermajority rules on a host of different subjects in the future. Over time, we will see the continuing erosion of our

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[23] 358 U.S. 1 (1958).

[24] Federalist No. 58.

[25] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 198 (Thomas H.D. Mahoney ed., 1955) (1790).

central Constitutional commitments to majority rule and deliberative democracy.[26]

Why do the sponsors of this legislation seek to revolutionize the way our law is shaped? Even they recognize that the Supreme Court is in the process of fine tuning the balance of power. Moreover, the decisive election of 1994 gave us a Congress more than capable of enacting substantive measures favoring the States. In short, the process our Founders gave us is working as it was meant to. There is no need to blindly tie the hands of future generations with this sweeping change. To suddenly shift the balance of power in this way fails to take into account that today's solution may not be the best for the country now or in 20 or 30 years. To choose the solution that is preferred now may hamper creative solutions to our unforeseen woes. If what they are saying is that the expectations of ordinary Americans concerning the role of government in contemporary society are incompatible with the Constitution, then they should put it to the test. Go to "We the People" and ask them if they wish to amend the Constitution. Otherwise, we should leave well enough alone. The system is working. Any perceived imbalance in the relation between Nation and States can be adjusted in the way provided in the Constitution.

WIDENER UNIVERSITY
Wilmington, DE, July 24, 1996

Hon. JOHN GLENN
U.S. Senate, Washington, DC.

DEAR SENATOR GLENN: As you know, the Tenth Amendment Enforcement Act of 1996 is an important piece of legislation. I was glad to have the opportunity to voice my concerns about it at the July 16, 1996, hearing before the Senate Governmental Affairs Committee. At that time, you expressed apprehension over the Act's provisions directing the Federal courts "to strictly construe Federal laws and regulations which interfere with State powers with a presumption in favor of State authority and against Federal preemption." S. 1629, 104th Cong., 2d Sess. §2(e) (1996); *see id.* §6. I, too, find aspects of those provisions problematic. From your questions, however, I believe my comments may not have conveyed my concerns clearly. I would, accordingly, like to clarify my remarks on that matter. Would you please, therefore, include this letter in the record along with my previously submitted testimony?

In deciding cases, Federal judges frequently need to interpret statutes, and in so doing, must divine the intent of Congress. For example, Judge Thomas J. Meskill of the Second Circuit found that in 1988 alone, "Federal courts discussed congressional intent in at least 1,516 cases." Thomas J. Meskill, *Caseload Growth: Struggling To Keep Pace*, 57 Brook. L. Rev. 299, 301 (1991). Unfortunately, Judge Meskill went on to say, "Anyone reading our published opinions and those of other circuits will see the words 'silent,' 'scant' and 'inconclusive' over and over again in courts' discussions of the legislative history of particular statutes. Judges spend valuable judicial resources trying to determine what Congress meant by what it said, resources that could profitably be devoted to other matters." *Id.* at 301–02. Other Federal judges concur: "A consistent complaint from Federal judges is the lack of guidance from Congress as to how it wants Federal courts to handle particular statutes." Erwin Chemerinsky, *Reporter's Draft for the Working Group on Principles To Use When Considering the Federalization of Civil Law*, 46 Hastings L.J. 1305, 1317 (1995).

Far from craving the unfettered right to declare whatever they want to be the meaning of a statute, Federal judges would love to have some guidance as to the intent of Congress. *See, e.g., Hearings on Statutory Interpretation and the Uses of Legislative History Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 53–54 (1990) (testimony of Stephen G. Breyer, Chief Judge, U.S. Court of Appeals for the Second Circuit); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417 (1987); Meskill, *supra*, at 302–03; Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges in It?* 1991 Duke L.J. 647, 667. In fact, after a congressionally-mandated study, the Federal Courts Study Committee concluded that to solve this problem, "[o]ne reasonable step is a checklist that could be used by the staffs of substantive committees of the Congress, and the Office of Legislative Counsel in the Senate and the House (and counsel and

[26] Letter from Prof. Bruce Ackerman et al. to Speaker Newt Gingrich, reprinted in LEGAL TIMES, p. 10 (Jan. 9, 1995).

solicitors in Executive Branch agencies) reminding them to include items such as these in their review of legislation:

- whether a private cause of action is contemplated;
- whether pre-emption of State law is intended;
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing Federal legislation;
- whether State courts are to have jurisdiction and, if so, whether an action would be removable to Federal court; and
- the types of relief available."

Report of the Federal Courts Study Committee 91 (1990) (checklist edited).

In light of these judicial cries for congressional guidance, I conclude that advice from Congress to the courts as to whether a *particular* statute should be strictly construed on the issue of preemption does not violate our system of separated powers. Indeed, such counsel would aid in implementing congressional intent. But I do not believe that the adoption of a blanket rule of construction covering all legislation is wise or appropriate.

The Tenth Amendment Enforcement Act would do much more than direct Congress to be explicit in each piece of legislation about its intentions vis-à-vis preemption. The proposed Act would create a default rule of construction for all laws enacted in the future that, in Senator Stevens' words, "really is a concept of trying to tell the courts to narrowly construe the powers of the Federal Government, and to broadly construe the powers of the people." *Hearing on S. 1629 Before the Senate Comm. on Governmental Affairs*, 104th Cong., 2d Sess. (Jul. 16, 1996) (question by Sen. Ted Stevens). I fear that, for many reasons, such a course would probably lead to mischievous results.

First, issues of Federal preemption arise in myriad contexts. As one commentator noted, "In recent years, the [Supreme] Court's pre-emption decisions have involved challenges to State civil rights, consumer and whistleblower protection, nuclear safety, and environmental, tort, anti-trust, and similar regulations." Charles Rothfeld, *Federalism's Smoking Guns*, Legal Times, Sept. 30, 1991, at 34. To assert that Congress should establish a uniform approach to preemption in all of those areas, and others perhaps not even imaginable at this time, is to deny political reality. The same Congress may wish to use its power to the fullest to regulate one area, and in another, allow the States to develop concurrently their own methods of handling a particular problem. To deny all future Congresses this flexibility unless they have the foresight to make the right declarations at the outset is to make Congress' normally difficult job of governing the country much more difficult.

In addition to the changing context of preemption issues, there may very well be unforeseen developments in a particular area. Many areas of Federal regulation, such as the labor laws, are the work of generations. Yet the Tenth Amendment Enforcement Act would require clairvoyance on the part of Congress as to how a particular statute will ultimately fit into what may become an extremely complex scheme. Moreover, State legislatures may create new laws that interfere with a Federal statute after it is enacted. Thus the initial congressional declaration of intent may no longer be accurate. Congress might have had a different position on the question of preemption had it anticipated this later-enacted State law. But because Congress was not prescient, the Tenth Amendment Enforcement Act would tie the hands of the courts in attempting to find Congress' intent in the face of such changed circumstances.

Finally, insofar as these provisions of the Act are an attempt to change the Constitution without an amendment, they raise serious concerns about the legality and the wisdom of the proposed law. I addressed those concerns in my previously submitted testimony, however, and I will not repeat my remarks further.

I hope these comments have clarified my answer to your question. If you would like further explanation, be sure to let me know.

Very truly yours,

MARY BRIGID MCMANAMON,
Associate Professor of Law.

Chairman STEVENS. Dr. Rubin?

TESTIMONY OF EDWARD L. RUBIN, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY

Mr. RUBIN. Thank you for having me.

To me, this legislation is extremely ill-advised. It may be unconstitutional. It is always hard to predict what the Supreme Court will do. But I think more to the point is, as Professor McManamon points out, it runs against the spirit of the Constitution.

The Constitution is very general in the way it sets up the legislative process and specifically abjures any effort to tell future generations how their democratically elected Congress is supposed to act. Really, the only provision is the requirement that money bills start in the House, and that was done, as you know, at a time when the Senate was elected by State legislatures and not by the people.

But other than that, there is no effort to prescribe to future generations how their majoritarian elected representatives are supposed to govern. The notion behind that is that it is hard to tell in the future what the situation will be, and so the best judgment is left up to the people who are elected by the American people at that time.

If you think about it, what this legislation really does is lay a very heavy hand on the future. It is likely that the future Congresses will chafe under that restriction. How would this Congress feel if it were subject to legislation that skewed the legislative process that had been passed 30 years ago, let us say by the 1966 Congress? What may very well happen is that a future Congress will chafe under those kinds of restrictions, and then finally getting enough votes to overturn it, it will then proceed with its own supermajority provision in retaliation and what we will get is an escalation of these kinds of provisions that really will do serious damage to the Constitutional structure.

I do not think there is any warrant in either the language of the Constitution or in the policies that underlie the Constitution for making a change of this nature. There are some specific provisions in the Constitution to limit what a majoritarian legislature can do—the Bill of Rights, for example. There are specific States' rights that are guaranteed in the Constitution. The States have the right to appoint the officers of their militias. The territorial integrity of States is guaranteed. The States are guaranteed equal representation in this body, in the Senate.

But the Supreme Court, which regularly interprets the Constitution, has shied away from basing Constitutional interpretations on these broad, vague provisions, such as the Tenth Amendment. The Tenth Amendment, after all, also mentions the people, but none of the individual rights decisions, even at the high water mark of the Warren Court in *Roe v. Wade,* rests on the Tenth Amendment, nor do they rest under the analogous language of the Ninth Amendment. The reason is that these provisions are too general to justify overruling a majoritarian body that represents the will of the people at that particular time.

That is not to say that the Tenth Amendment cannot serve as a guide. If this Congress wants to enact ordinary legislation guided by the Tenth Amendment, let us say, legislation limiting the various substantive bills that have been passed in the past, that would be fine. But this bill is something different. This is not an effort simply to be guided by the Constitution. This is the effort to, as a means of Constitutional interpretation, lay a hand on the future, and that is not a way that the Constitution has been interpreted

before. The Constitutional interpretation that overrules majoritarian decisions have not rested on the Ninth and Tenth Amendment. They are too vague. They do not have any content which would justify that kind of decision making.

What underlies this, the policy that underlies this, of course, is federalism. I just want to suggest briefly that that policy really does not support this kind of legislation for three reasons. First of all, State power is not under attack. Second of all, the States do not need this kind of help. This legislation is going to help special interests, not the States. And third of all, the vision of federalism that this embodies is what I would call States' rights federalism, as opposed to the ordinary kind of federalism arguments that are made which focus mainly on the issue of decentralization.

First of all, if you look over the course of the 20th century, State governments have been growing to the same extent that the Federal Government has. The notion that the Federal Government is taking power away from the States just is not really borne out. The notion of dual sovereignty that Mr. Marzulla referred to is really something that political scientists use to describe the period before the Civil War.

What we have now is cooperative federalism. State and Federal Governments tend to work together. Programs that are enacted by the Federal Government tend to be programs where the States, by and large, participate in them. There has not been a history of the Federal Government trying to interfere with the basic political processes of the State, such as disrupting the powers of a State legislature or interfering with the ability of the State to run its courts. This is just not something that we have seen.

The reason for this is something that legal scholars have been talking about for 40 or 50 years now, is that, of course, the States are adequately represented in this body and in the Federal Government in general. Not only is the national legislature composed entirely of State representatives, but State authorities, such as governors, State legislators, have very good access to regulators and to the President, which is as it should be.

But this legislation will have an effect, though. This legislation will empower special interests, because anytime that you make legislation more difficult to enact, the effect is to favor small minority groups that want to block the legislation. They are the ones who are going to have their power amplified by this kind of legislation.

Mr. Box, for example, suggests that States be notified of any statute, any State statute that potentially is preempted. Think of the complexity of that. Think of how hard it will be to figure out exactly which statute, particularly if you take the kind of broad interpretation that Mr. Marzulla was suggesting, which seems to suggest that any interference with private property would be an interference with State law. It is not unreasonable, because, after all, State law does comprehensively establish property rights and property law is an element of State law, but does that mean that every Federal enactment that affects private property—the Internal Revenue Code is potentially subject to this? Federal criminal provisions that are subject to property are subject to this kind of analysis?

And if that is the case, then what is going to happen is that every time there is that possibility, there will be the ability to en-

gage in judicial challenges to the legislation and those judicial challenges are going to be fueled by people who lose out, typically by special interest groups who want to block legislation that the majority of the people through their representatives are supporting.

Now, I am not trying to suggest that there will never be a State which feels that its interests have been hurt by Federal legislation because what happens very often is that there are differences of opinion among the States and some States lose out in that political process, but that is as it should be and that is the way the Nation is constituted.

Let me just give a brief example which I know is of concern right now, which is the Low-Level Radioactive Waste Policy Act, passed in 1980 and amended in 1985. That does preempt and displace a certain amount of State legislation, but that Act, not surprisingly, given the dynamic that I just described, was originally proposed by the National Governors Association and was negotiated all along the way in conjunction with the States.

There were several States, but one State felt that it had lost out. That was New York. I guess they felt that they should be able to continue sending waste to other States because they are more crowded or their land is more valuable or what else, but they had lost out in the process and so what they did is they challenged the legislation in the Supreme Court and they won and the legislation was invalidated.

But that does not seem to me to favor the power of the States. Rather, what that does is give one particular State the power to block legislation that most of the States wanted. Under legislation like the one proposed, that kind of challenge is going to happen much more often and it is going to succeed much more often.

Let me just suggest the third point, which is that when we think about federalism and the arguments given in support of federalism, that the States should have a right to experiment, the States are closer to the people, the States should be able to engage in healthy competition between themselves, we are generally talking about a brand of federalism that I call decentralization federalism and that is where a single national policy is implemented differently in different States because we feel that decision makers closer to the ground, closer to the particular situation, can make better decisions and can vary the legislation in appropriate manners, and perhaps what some of the testimony earlier was directed to is the notion that we ought to decentralize the operation of some of those environmental statutes in order to make them more flexible.

But the kind of federalism that is embodied here is what I call States' rights federalism, which gives the States an absolute right to block certain kinds of Federal action. Typically, that has been invoked in situations where most people in the country think that the individual State is wrong on moral grounds and that is where the State interests have been overridden. This occurred, for example, with the issue of desegregation. It occurred in the issue of how to dispose of low-level radioactive waste. In a study I did, there were some States that were running their State prison systems on a model of slave plantations, and the Federal authorities, there the courts, countermanded that.

Those have been the kinds of issues where issues of rights have come up. But typically, the kinds of considerations that are being raised here involve issues of decentralization and those can be adequately dealt with on the policy level by Congress. If Congress feels that the Federal statute is not flexible and the representatives of the States through Congress feel that it is inflexible, then it is fully within Congress' power to make it more flexible and to engage in regulatory reform without laying the kind of heavy hand on the future that can only destabilize and disrupt the Constitutional system that was originally envisioned.

[The prepared statement of Mr. Rubin follows:]

PREPARED STATEMENT OF EDWARD L. RUBIN

My name is Edward L. Rubin. I am a Professor of Law at the University of California, Berkeley, School of Law (Boalt Hall), where I teach Constitutional Law and Administrative Law. I have just completed a book, with my colleague Malcolm Feeley, which explores the changing concept of law in the modern State, using the Federal courts' prison reform decisions as a case study.

In my view, Congress would be ill-advised to enact the proposed "Tenth Amendment Enforcement Act." Although it is difficult to predict what the Supreme Court will do, it seems quite possible that the Act would be declared unconstitutional as a violation of Article III or of the Supremacy clause, or that the Court would simply refuse to enforce it if a subsequent Congress were to enact a law without abiding by its provisions. More importantly, the proposed Act is contrary to the spirit of the Constitution. The Constitution avoids any effort to structure the process by which legislation is enacted; the sole exception is that money bills must be initiated in the House. Presumably, this reflects a recognition that the future is difficult to predict, and that, once the National legislature is democratically selected, it should be free to use its own best judgment. This Congress should not assume that it is much wiser than any subsequent Congress will be, and it should not disrupt the system established by the Constitution on the basis of that assumption.

The principal limits on the powers of Congress that are specified in the Constitution involve individual rights. A few States' rights are also specified, such as the right to appoint officers to the State's militia (Art. I, §8, cl. 16), the right to the integrity of its boundaries (Art. IV, §3) and the right to an equal vote in the Senate (Art. V). We have a reasonably clear idea what these provisions mean—what the Framers intended, if one prefers that approach to Constitutional interpretation. The Tenth Amendment, on which the proposed legislation is based, does not have any specific language, and there is no legislative history to explain it. On its face, it merely declares what Justice Stone described as "a truism": that anything that is not delegated by the States has been retained. *United States v. Darby*, 312 U.S. 100, 124 (1941). This cannot really serve as a basis for restricting the power of the National legislature because it does not specify any particular set of limits. The same Amendment, after all, also States that rights not delegated are reserved "to the people." Yet virtually no one has seriously suggested that this clause should serve as a limit on congressional action, over and above the specified protections in the Bill of Rights. Even *Roe v. Wade*, 410 U.S. 113 (1973), generally regarded as one of the most expansive individual rights decisions, did not go so far as to rely on this Amendment, or the analogous Ninth Amendment, for its authority. These two Amendments are simply too general to limit the decisions of a popularly elected legislature that represents all the people of the United States. Of course, such generalities can be used by Congress to guide its own judgment in carrying out its Constitutional role. But the proposed legislation does not guide the judgment of the present Congress; it restricts the judgment of all future Congresses. That is inconsistent with the spirit of the Constitution.

The idea behind the proposed legislation seems to be that the general value of federalism should be protected. Even if it is wrong for this Congress to limit the authority of future Congresses, the desire to protect federalism might be seen as justifying the provisions that limit the authority of executive and independent agencies (§5) and of the courts (§6). But such a view represents a misunderstanding of federalism for three reasons. First, the powers of the States are not declining and they are not under attack. Second, no special enactments are needed to protect State power; the proposed Act will merely increase the powers of special interest groups, not the powers of the States. Third, the arguments generally offered in favor of such

provisions have nothing to do with federalism, but with the separate concept of decentralization.

On the first point, any examination of State governments in this country will reveal that the size of these governments, and the range of issues they address, has been increasing, not decreasing, over the course of the last century. The Federal Government has also grown, as we all know, but it has done so by increasing its areas of concern, not by taking power away from the States. The reason is that the State governments and the Federal Government generally work in partnership. There is very little National legislation that prohibits States from regulating particular areas, beyond those forbidden to States by the Constitution, such as foreign affairs or monetary control. There is no legislation that interferes with the States' ability to elect its legislature or operate its courts. Federal legislation generally empowers State and Federal agencies to work together in addressing some particular subject of public concern. This is the process that political scientists describe as cooperative federalism. Many people feel that there is too much governmental regulation in this country, but the antidote for that problem is to deregulate certain areas at both the State and Federal levels. The growth in regulation generally represents a joint effort of the Federal Government and the State, not an action by the Federal Government at the expense of the States.

The second point explains why we have cooperative federalism. As leading legal scholars have been pointing out for 40 years, the States are amply represented in the Federal Government. Congress consists entirely of representatives elected within the individual States. State governors have better access to the President than virtually anyone else in America, which is as it should be, and State regulators communicate continuously with their Federal counterparts. As a result, the Federal Government will rarely take any action that is contrary to the interests of the States, taken as a group. The proposed legislation is thus unnecessary; the States simply do not need the help it offers them in order to participate in the legislative or regulatory process. But the proposed legislation will certainly have an effect. It will make many statutes more difficult to enact and many regulations more difficult to promulgate. In addition, it will skew judicial interpretation of statutes and regulations in particular directions. The groups that will be benefitted by this legislation are special interests, specifically those interests that are opposed to the legislation or regulation in question. The proposed Act creates many such barriers. It requires complex recitations that must be interpreted by the Courts, potentially tying up virtually every statute Congress passes in lengthy litigation. In addition, it adds additional formalities and additional costs to the regulatory process and it interferes with the decisionmaking functions of the judiciary. All these additional formalities and complexities will provide opportunities for special interests to frustrate the policies that State representatives have adopted through congressional action.

I am not trying to suggest that no individual State will ever find itself in opposition to come particular Federal action. States often disagree among themselves, and sometimes, an action that most States want will be opposed by a minority. But one of the main functions of our National government is to resolve such disagreements in a fair and democratic manner. Thus, Federal action generally empowers the majority of States, on a given issue, rather than disempowering them. An example is the Low-Level Radioactive Waste Policy Act of 1980, which made States partially responsible for disposing of the waste that was generated within their borders. This was National legislation, and it did displace State law and policy in many cases, but it was originally proposed by the National Governors Association and enacted after extensive negotiation among State governments. The 1985 amendments to the Act were the result of further negotiation. But New York State was unhappy with the result, because it had previously been able to dump its waste in other States, and felt, presumably because it is more crowded and its land values are higher, that it should be able to continue doing so. Having lost out in the political process, New York took the case to the Supreme Court, and the Court invalidated the Act on federalism grounds in *New York v. United States*, 505 U.S. 144 (1992). New York State may well have been acting in the interest of its own citizens. But the Supreme Court's decision is hardly a triumph for federalism. It gave one State the power to stop National legislation that most States wanted, and that served their interests. Under the proposed legislation, judicial invalidations of this sort are bound to increase, and individual States, or interest groups, will have a better chance of stopping National legislation that most States want.

The third point is that results of this nature, where generally desired legislation is blocked by a few States or an interest group, are hardly ever justified. Most of the arguments in favor of federalism do not justify it; in fact they have nothing to do with federalism at all. Instead, they address an entirely different issue, which can be called decentralization. Decentralization is a managerial policy where a uni-

fied regime decides to give more decisionmaking authority to its sub-units. The British Army, for example, is decentralized; in the French Army, decisions are made at central headquarters, but British commanders in the field have a great deal of discretion. Federalism, in contrast, means that the sub-units, States in our case, not only have decisionmaking authority, but have a right to that authority that the majority can never overrule. Obviously, British commanders do not have rights in this sense. They are given discretion because the British think that is the best way to win a war, not because they regard their commanders as having a personal right to make decisions.

Virtually all the arguments for federalism are really arguments for decentralization. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), Justice O'Connor states that federalism "increases opportunity for citizen involvement," "makes government more responsive by putting States in competition for a mobile citizenry" and "allows for more innovation and experimentation in government." These are arguments for decentralization, not federalism. They state a single, National policy, such as increasing citizen involvement, or encouraging governmental innovation and then assume, often correctly, that these policies are best implemented if decisionmaking is decentralized. "States rights," when used the way the proposed Act uses it, involves a different notion of federalism; it interferes with National policy, because it gives individual States the power to resist legislation that the majority of States believe to be desirable. Under that type of federalism, for example, States would decide for themselves whether they wanted to be responsive to their citizenry, or compete for a mobile population. To put this another way, States rights federalism allows some States to take actions that most other States believe is wrong—to maintain segregated schools, to dump their radioactive waste in other States, or, in my own study, to run their prisons like a slave plantation. Most people do not have this in mind when they argue in favor of federalism. Rather, what they have in mind is the decentralization of decisionmaking authority as a means of achieving some particular goal.

Decentralization can be achieved by Congress without any special procedural rules or interpretive presumptions. If the majority of States think that decentralization is desirable, it will become National policy; if that same majority finds that decentralization is having undesirable effects, it will change that policy. The proposed legislation would interfere with that decisionmaking process. It would enable a few States, or some special interest, to block legislative efforts that the majority of the States wanted. Even efforts to decentralize might be blocked in certain cases. Moreover, the proposed Act is inconsistent with the spirit of the Constitution. It would skew the political, regulatory and interpretive process in a manner that one Congress may want, but that future Congresses may not, and it encumbers the national decisionmaking process with complex procedures that the Constitution itself was wise enough to avoid.

Chairman STEVENS. Dr. Rubin, at the present time, we are engaged in trying to break a series of filibusters on the floor. They come from a legislated requirement of 60 votes to overcome the opposition of a minority. Where do you get off telling me I am changing the rule of law in this bill requiring a supermajority? Are you familiar with the Budget Act? It was passed 10 years ago or more. It requires a supermajority to overcome a point of order, based on the law, exactly the same thing as in this bill.

As a professor at the University, surely you are familiar with those. I take sort of offense at you, each of you somehow or other thinking that I have invented some evil genius of an idea, the supermajority. It runs through our laws. As a matter of fact, there are several others that have supermajority requirements. What is the distinction between those laws and this law? Can you draw a distinction to justify your statement about my bill?

Mr. RUBIN. I do not think a lot of those provisions are particularly beneficial. I am not sure that, for example, it is such a good thing that a minority in this body——

Chairman STEVENS. It may not be a good thing, but you said I have done something brand new. I am going to destroy the Constitutional balance of the United States by trying to get this bill

enacted. This provision of a supermajority must be in a dozen bills, at least, that are significant bills that affect our lives.

Mr. RUBIN. I did not say destroy it. I think it will disrupt it, because this is going to affect every single piece of legislation and what it is going to do——

Chairman STEVENS. How does it affect it? It only requires that majority agree that we have the authority that we have. By the way, we are not going to argue about this because I have decided that the existing laws that provide for the right of a minority to stop a bill, as we have seen going on in this Congress now for 2 years, will protect this legislation just like any other. I do not see any reason for a supermajority in here anymore. It will take 60 votes to shut off a filibuster if Congress tries to pass an act which does not state precisely its Constitutional authority. We do not need it in this bill. So let me put this back behind us.

Mr. RUBIN. I think——

Chairman STEVENS. I am very limited now, because I have agreed to be with the leader at 4 o'clock, and if you will just let me ask you a couple of questions here, Professor, and then I will yield to my friend and he can conduct the hearing as long as he wants.

In 1994, you wrote this: "Federalism is a neurosis, a dysfunctional belief to which we cling despite its irrelevance to present circumstance." That was in the UCLA Law Review. I am a graduate of UCLA, and it is nice to see you writing in that Law Review.

Since then, the *Lopez* decision has affirmed the relevance of the Tenth Amendment in the *Seminole Tribe* decision. Governors from both parties and State legislators from throughout the country have asked the Congress to give them their power back. You just heard a representative of the National Conference of State Legislatures. The President declared that the era of big government is over. Do you still think federalism is irrelevant to our system?

Mr. RUBIN. What I was concerned about in my article——

Chairman STEVENS. Let me be like Senator Glenn. Answer my question. Is it irrelevant to our system?

Mr. RUBIN. I think the whole system is structured around federalism. What I was referring to there is that the way federalism is used to overrule majoritarian decisions by this branch of government, because I was writing there about judicial decisions, that is, I think, irrelevant, and the reason it is irrelevant is for just the reasons I mentioned. That is to say, we do not need the courts to interfere with the decision that the majority of the people want as are expressed through their representatives.

Again, I would say with respect to federalism, if this Congress wishes to use the principle of federalism to reform Federal environmental statutes, then that would be completely unobjectionable on Constitutional grounds as far as I can see. The thing that is troublesome——

Chairman STEVENS. But you wrote federalism is a neurosis, a dysfunctional belief. I find that hard to swallow.

Mr. RUBIN. Judicially enforced federalism doctrine is a neurosis. That is what the article talks about. And let us be clear. What it means to have judicially enforced federalism is the courts will say that legislation passed by Congress is invalid on federalism

grounds. The Low-Level Radioactive Waste Act of 1980, which not only this Congress but the National Governors Association favored, was invalidated by the Supreme Court based on some concocted history of federalism that is not even particularly good history, as Professor McManamon was describing, and on that basis——

Chairman STEVENS. As Professor McManamon so rightly put it, the Supreme Court is the final arbiter of what is Constitutional, and I take it that—but let me say one other thing to you and that is in our reading of your notes about the national neurosis in the UCLA Law Review, you also said that, "States fulfill the important government function of facilitating decentralization, but most of our States are mere administrative units, rectangular swatches of prairie with nothing but their legal definitions to distinguish them from one another." I take it you were sincere in that. I find it hard for someone in your position, however, to be so cavalier about the units of government that are guaranteed by our Constitution.

Mr. RUBIN. Let me explain the context of that. What I was saying is that we have one country and that on basic normative issues, these are, indeed, administrative units that should not be allowed to override normative values that the country as a whole wants. Clean air and clean water would be one example. The example I was thinking of——

Chairman STEVENS. They are administrative units of Federal law is what you are implying, right? That is what you are implying.

Mr. RUBIN. For example, let me just——

Chairman STEVENS. Our States are mere administrative units that carry out Federal law.

Mr. RUBIN. They are administrative units in the sense that they would be regarded by anyone outside the country as administrative units.

Chairman STEVENS. Let us just stay within this country, Professor Rubin.

Mr. RUBIN. Well, but——

Chairman STEVENS. I do believe that is a very broad statement for you to make about our States. We fought like hell to become a State. I am sure if we thought the way you do, we would not have bothered. We would have decided to go with the commonwealth route or some other way. You have to come from a new State to understand States, I think.

Mr. RUBIN. I think it was the membership in the United States that was the great virtue of Statehood for Alaska, but——

Chairman STEVENS. No. We were part of the United States.

Mr. RUBIN. Let me just point out that what I was talking about is the fact that when it comes to basic normative issues, for example, segregation, that the ability of certain States to have their own norms, their own values, is something that has been rejected by every branch of this government and that is what I was talking about. That is the sort of strong notion of States' rights federalism.

That is to say that States should be able to follow their own norms, that they should be able to do things that most people in this country would regard as wrong, and that is something that I do not think we accept. By giving the States the power, or interest groups in the States the power to block Federal legislation in this way, that is what we are doing. Ultimately, I think this legislation

will be overturned when we get to the point that a State is doing something that most people in this country and most States regard as truly anathema, and that is where you have always had——

Chairman STEVENS. I tell you, you would be an anathema in my State if you call our State a mere administrative unit of the Federal Government. I will tell you that right now. Believe me.

Mr. RUBIN. I did not mean it specifically with respect to Alaska.

Chairman STEVENS. I understand that, but we sort of still think we are a State and not an administrative unit of the Federal Government.

Ms. McManamon, I am sad that you and I disagree because I think we basically do agree about the Constitution. You are familiar, I assume, with Sandra Day O'Connor's opinion in *Gregory v. Ashcroft.* This is what stimulated us. She said, if Congress intends to alter the usual Constitutional balance between the States and Federal Government, it must make its intention to do so unmistakably clear in the language of the statute, not in a report, not anywhere else, but in the language of the statute, Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States. In traditionally sensitive areas such as legislation affecting the Federal balance, the requirement of a clear statement assures that the legislature has, in fact, faced and intended to bring into issue the critical matters involved in this judicial decision. That is what my bill tries to do.

I do not disagree with you that the Court is the ultimate place where we are going to have a determination of whether what we suggest is Constitutional, but I do think that what we are dealing with is somehow or other requiring people in Congress to determine whether or not we have inherent powers. Do you believe we have inherent powers in the Congress?

Ms. MCMANAMON. The word I would use is implied power, Senator.

Chairman STEVENS. I think there may be implied powers from provisions in the Constitution, but there had better be a clear implication. There is, however, and I was the Solicitor of the Interior Department at one time and at that time we had a group in our Department who believed in the inherent power of the U.S. Federal Government to control all waters of the West because there is hardly an acre in the West where the waters of the West do not flow through Federal land. They argued that because the Federal Government was both the government and the owner of the land, it had the inherent power to regulate all the water that flowed through Federal land. Did you ever hear about that?

Ms. MCMANAMON. No, I am not familiar with that, Senator.

Chairman STEVENS. It is the *Santa Margarita* case. It was one that was reviewed in the Supreme Court and a few others. But that is the doctrine of inherent powers, not implied powers but really inherent powers, that the government has powers in and of itself without regard to the Constitution. You do not believe that, do you?

Ms. MCMANAMON. I would not say that the government has powers outside the Constitution.

Chairman STEVENS. Neither would I, but that is all we are saying in this bill, is for Congress to articulate, as Sandra Day O'Con-

nor asked, what is the source of its power to enact a bill. If it fails to do so, it has a point of order. We do not need that, as I said, because a minority could hold up such a bill under our current procedures without a point of order, so we will drop that. Let us just drop that from the discussion. Drop the point of order problem, the supermajority problem in this bill, because it exists under existing law anyway. Just drop that. What do you find offensive about my bill?

Ms. MCMANAMON. If we are just focusing on what Congress would have to put in legislation, it is not in itself offensive. The thing that troubles me is that you have implied in the findings, as well as in the testimony of Senators Dole, Hatch, and Nickles, that the Federal Government is acting illegally and that this Act is meant to change that illegal behavior. That is what concerns me, Senator.

Chairman STEVENS. You do not believe that?

Ms. MCMANAMON. No, I do not.

Chairman STEVENS. Did you live very long in the West? Have you ever lived in the West?

Ms. MCMANAMON. The Supreme Court will declare when the Federal Government is acting illegally, and as we saw——

Chairman STEVENS. It has recently in very many instances. In the *Lopez* case, in the *Ashcroft* case, in all series of cases, it ruled the Federal Government is acting illegally. We are trying to prevent that and make Congress think first before it does it and it caused our States all of these problems of filing suit and going through all the litigation if we had just looked at the Constitution to begin with.

But beyond that, I would go to you and ask, we also have a version here about restricting the courts' interpretation. Do you find that offensive?

Ms. MCMANAMON. In itself, Congress may always say this Congress is something that should be strictly construed. That is not in itself offensive. However, the language that introduces that provision talks about the fact that the courts have acted in contravention of the Constitution, and if your intent is somehow to tie the hands of the Court with regard to more than strict construction of a law, then that is problematic.

Chairman STEVENS. I think really what we are looking at is that more and more Federal courts are inclined to go much further than the lower courts, than the Supreme Court has articulated, and what it really does is to say, stay within the power of the courts as articulated by the Supreme Court previous to your tenure. It really is a concept of trying to tell the courts to narrowly construe the powers of the Federal Government and to broadly construe the powers of the people. Do you find that offensive?

Ms. MCMANAMON. That is different from what I thought the legislation was doing. That, I do find very problematic. You are telling the Federal Judiciary how to construe the Constitution and——

Chairman STEVENS. No. Not the Constitution, the statute.

Ms. MCMANAMON. I am sorry. I misheard, then. I thought you said "Construe the powers of the States and the Federal Government." You mean construe the language of a statute? That is different.

Chairman STEVENS. Yes. It is to construe the language of the statute so that they would narrowly interpret the powers of the Federal Government and broadly interpret the powers reserved to the people.

Ms. MCMANAMON. Under the statute?

Chairman STEVENS. Yes.

Ms. MCMANAMON. Yes.

Chairman STEVENS. I thought we agreed more than it sounded at first. I thank you very much.

Senator Glenn, it is yours. I do have an appointment at 4 o'clock.

Senator GLENN. Thank you, Mr. Chairman.

Chairman STEVENS. I hope you will excuse me and finish up the hearing.

Senator GLENN. We have some questions here and the record will be open for anybody else to submit questions.

Chairman STEVENS. Yes.

Senator GLENN. [Presiding.] The last part that the Chairman brought up here bothers me, I will tell you. I am the only non-lawyer in the room, I guess, but it bothers me anytime we start passing legislation that says the courts cannot get into interpretation and cannot take on some of these things, and you cannot have litigation filed if you have a serious problem with it. That bothers me.

I was going to ask a question on that if the Chairman had not brought that up, but I think if you start prohibiting the courts and Federal agencies from interpreting Federal statutes without some congressional declaration, I think that bothers me. Does that bother you, Professor Rubin?

Mr. RUBIN. Yes, it does. I think it is very problematic. There have been a number of efforts to interfere with the decision making process of the courts, but they tend to be defeated for much the same reason. I think that this legislation is problematical. That is to say, it interferes with the exercise of judgment by people who are so placed that they are assigned by the Constitution with exercising judgment, just as the future Congress will be assigned by the Constitution to exercise its judgment with respect to legislation and should not have its hands tied by the current Congress, I think the courts have a judgment function to exercise that should not be interfered with.

Congress is certainly within its power and always has the power to instruct the courts how to interpret a particular statute that is passed. But once the legislature has spoken to the courts in that way through the legislation, I think it then should be up to the courts to use their own best judgment.

Ms. MCMANAMON. If I may clarify, Senator, I simply meant that if there is a rule of construction, that you should be looking at this statute strictly, I do not think that is terribly problematic. But the implications of the bill which you were talking about when you began your question are what I find problematic. I think it is trying to do more than merely say statutes should be strictly construed.

Senator GLENN. The title of this and the thrust of it is supposedly Tenth Amendment Enforcement Act of 1996. Professor McManamon, would it be fair to say that you believe the thrust of this legislation is more appropriately suited as a Constitutional

amendment itself rather than as a back-door effort to amend the Constitution without going through the Constitutional process?

Ms. MCMANAMON. Yes, Senator, I do. I think there are several very important ramifications for the structure of our government, which is our Constitution. The change in the relationship between Nation and States is one and the change in the relationship between the judiciary and the Congress is another. When we start to alter our structure of government, we are altering our Constitution and that is really what we ought to be debating here.

Senator GLENN. Had the Tenth Amendment Enforcement Act been enacted, let us say, 10, 20, 50, 100 years ago, I am not sure what might have happened along the way here, what we would have eliminated in the process or not been able to do, or what national policies might have suffered or even been impossible to realize. I was sitting here just thinking, clean air, clean water, nuclear regulation, product liability, motor-voter, gun registration, NAFTA, Uruguay Round—would we have had such a thing as national parks?

Mr. RUBIN. We might not have had such a thing as national highways, either. In other words——

Senator GLENN. I suppose under commerce and all we might have had that, but——

Mr. RUBIN. It is actually under the Defense Department.

Senator GLENN. Giving Wyoming its druthers, I am not sure they would have wanted to set aside Yellowstone if we just left it up to the State.

Mr. RUBIN. I think the problem is that it is not just empowering individual States but it is really empowering special interests within States. It occurred to me, for example, that after Congress had passed a law, there is nothing in this legislation that would stop a State from enacting an innocuous-looking law that had the effect of retroactively invalidating the congressional action because it did not contain the requisite declaration.

You know, if you think about it, State legislatures meet, very often, every other year for a relatively short period of time and they do not have a lot of staff. It is pretty easy to get innocuous-looking legislation through a State legislature. Very often, if there is no opposition, it goes through on a consent calendar.

So I can imagine an interest group getting a State to pass an innocuous-looking law which then empowered that same interest group to tie up the operation of the Federal law in an enormous amount of litigation and possibly invalidate the Federal law for lack of declarations that interfere with a subsequently enacted statute. So it seems to me there is an enormous capacity for mischief on behalf of any group that feels disadvantaged by a Federal law.

Senator GLENN. Ms. McManamon, do you think just that little list that I read off there, just things that came to mind here, would those have been possible to get through had this been in effect?

Ms. MCMANAMON. They would have been very difficult, I believe.

Senator GLENN. I would think so, too.

I referred before to the Unfunded Federal Mandates Reform Act that just went into effect the first of this year. I was coauthor of that. It requires a lot of this information gathering for the benefit

of Congress before we can pass things and sets certain restrictions on it. Have you looked at that, either one of you or both of you, and do you think it performs some of the function that would be provided under Senator Stevens' proposal here? Do you know anything about it? Have you followed our S. 1?

Mr. RUBIN. I think you are right. I think it does, and I think furthermore that the other point that you mentioned, which is that more work needs to be done on regulatory reform. Obviously, there are things about Federal regulation that bother a lot of people and there are certain defects in Federal regulation. It is still a fairly new process but it needs to be thought through and reformed in a variety of ways. This strikes me as an overreaction to the hard job of really looking at particular Federal programs and seeing how they can work better and what changes can be made to avoid some of the injustices that were being spoken about by the prior——

Senator GLENN. I agree with you on regulatory reform. We have had some monumental battles on that in the last year and a half or so here, as you are aware. Some of the toughest battles on Capitol Hill in that regard happened right here in this hearing room and at that witness table where you sit.

Proposals were made to do away with some of the good regulations, as I saw them, ones regulating e coli bacteria and cryptosporidium, things like that that kill people every year if we do not regulate them. Many of these rules were all passed through, ready to go into effect, and the new management around here decided at that time they were going to hold them up for a year and a half while we looked at regulatory reform. How many more deaths would have occurred? I do not know. We were able to stop some of those proposals. We were just trying to act in the interest of public health and safety, as I saw it at that time. I am not referring by new management to Senator Stevens on this issue, either. I am referring to some people that started most of these proposals over in the House.

Professor Rubin, you call them in your statement complex recitations required of Congress by this Act. How could they potentially tie up congressional statutes in lengthy litigation? Do you think that would be likely to occur?

Mr. RUBIN. I think it would be very likely to occur. In the first place, the interaction of State and Federal law is an extremely complex matter. Typically, that is considered, along with tax, to be the hardest subject in law school because of its abstract and technical and complex nature.

To know in advance what the particular effect of a Federal law will be on State law, on the State law of 50 States, is a virtual impossibility. It seems like an easy thing to simply compile a list. And, of course, with respect to basic preemption of law, for example, that says that from now on, Federal standards will control this rather than State standards, that is easy. But, in fact, what happens in individual cases is all sorts of complex interactions occur. That is precisely why we need a Federal judicial system, because individual cases involving complex connections between laws have to be resolved by the courts.

It is virtually impossible to know in advance the kinds of things that are going to occur, and if, in addition to resolving those com-

plex issues, the courts have to look at a set of recitations and procedural steps that Congress has gone through, then it is going to be much harder to pass legislation, much harder to sustain it, and the litigation will be extremely complicated.

In administrative law, which I teach, even the relatively general provisions of the Administration Procedure Act involving notice and comment on Federal regulations turn out to be extremely complicated and involve many thorny matters of interpretation and many Federal regulations have been held up by interest groups because of the complexity of complying with even those simple things. If Congress is required to comply with a much more complex set of requirements, I think it will have a very deleterious effect and create a substantial increase in the amount of litigation in the Federal courts.

Senator GLENN. Professor McManamon, how does this Act's provision enabling a minority of one house of the Congress to effectively determine the Constitutionality of legislation contradict the spirit of the Constitution?

Ms. MCMANAMON. In two ways, Senator. First, the legislature is the body that is the voice of the majority, that is, as opposed to the judiciary, which is set up to protect the rights of minorities. By making a minority of one house of Congress able to kill a piece of legislation, the Act changes completely the function of the Congress as the voice of the majority.

Second, by allowing a minority of one house of Congress to determine unconstitutionality of legislation and kill it, the Act prevents Congress from being able to come up with creative solutions to whatever the problems are that are facing it, and it prevents the judiciary, which is the branch that is supposed to rule on Constitutionality or not, to have the final say in allowing Congress to do its job.

Senator GLENN. The point of order could lie in one house but not in the other, I would presume, under this.

Ms. MCMANAMON. It sounds as if one house could kill it, as I read the bill.

Senator GLENN. Just on a point of order, without even having a vote.

Mr. RUBIN. Also, if I may, there is a problem of interpretation. Who decides whether there has been a failure to make those recitations, and will a minority of the House be going to the Supreme Court to get rulings on whether or not, in fact, the recitation should have been in the bill? In that case, it seems to me it will involve some fairly serious separation of powers issues. But it seems to me it is going to create a great many unexpected complexities in this whole process.

Senator GLENN. Would not the Parliamentarian have powers now that are not even—they would be astronomical under this, would they not?

Ms. MCMANAMON. It seems to me that they would, because he or she would be making——

Senator GLENN. The point of order would be ruled on by the Parliamentarian. It would not be a vote, unless a vote was called then after the Parliamentarian made the ruling. So we are investing

huge responsibilities in the Parliamentarian, I would think. Would that be your interpretation?

Ms. MCMANAMON. I am not sure of House and Senate procedure, but I would imagine there is somebody that is going to make a ruling on this and you would be giving him or her an incredible amount of power.

Senator GLENN. One last question. Professor McManamon, could you elaborate upon the pre-Constitution historical context which necessitated a stronger central government than that established under the Articles of Confederation? Go ahead and talk about that.

Ms. MCMANAMON. Certainly, Senator. The Federal Government was not able to tax so that it could not pay off its huge debts. The Federal Government was not able to regulate interstate commerce and so you had incredible wars between the States—not wars as in military wars but as in fights over commerce. Currency was not uniform and so trade between one State and another was virtually impossible, as one State would not recognize the other's currency.

In addition, the States, being sovereigns themselves, did not give much respect to the Congress and frequently did not bother to show up, so that the Congress could not even get business done because a majority of the States would not show up, so that business could not go forward. So because of the need to be taxing, regulating commerce, and somehow getting business done for the Nation as a whole, they needed to have a national government with a lot more power.

Senator GLENN. Would you explain the significance of the absence of the word "expressly" in the Tenth Amendment as opposed to its inclusion in the Articles of Confederation?

Ms. MCMANAMON. Yes, sir. The Articles of Confederation created a national government that was very limited in power and they, the States, retained all powers except for those very, very few powers that were expressly given to the Federal Government. When the drafters of the Constitution then put together the Bill of Rights and put in the Tenth Amendment, they specifically omitted the word "expressly" because they wanted to make sure that the government had implied powers growing out of the document so that it could take care of business that they could not foresee in 1789.

I would like to refer to John Marshall's explanation of that in *McCulloch v. Maryland.* He very eloquently talks about the implied powers and why it was that the drafters needed to give the Congress implied powers. "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word," that is, "expressly", "in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. Only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." He then says his very famous line, "It is a Constitution we are expounding," that is, it is a document meant to set up a structure and not something else.

Senator GLENN. Thank you. How does the Supreme Court interpret this absence of that word, "expressly", in *McCulloch v. Maryland* and how has the Court interpreted the absence of that word since?

Ms. MCMANAMON. In *McCulloch,* which I was just mentioning, the Court specifically says because "expressly" is not in the Tenth Amendment as opposed to the Articles of Confederation, the Congress does indeed have implied powers. The Court has never repudiated that doctrine and, in fact, in the revolution of 1937, gave a much stronger reading to the necessary and proper clause, strengthening the Federal power to regulate.

Senator GLENN. Thank you. We have gone over our time here this afternoon. I appreciate your forbearance here. We have lost some of our crowd, that is for sure, but thank you for staying this afternoon.

The hearing will stand in recess, subject to the call of the chair.

[Whereupon, at 4:14 p.m., the Committee was adjourned.]

APPENDIX

104TH CONGRESS
2D SESSION

S. 1629

To protect the rights of the States and the people from abuse by the Federal Government; to strengthen the partnership and the intergovernmental relationship between State and Federal Governments; to restrain Federal agencies from exceeding their authority; to enforce the Tenth Amendment to the Constitution; and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 20, 1996

Mr. STEVENS (for himself, Mr. DOLE, Mr. ABRAHAM, Mr. BENNETT, Mr. BROWN, Mr. COATS, Mr. COCHRAN, Mr. COVERDELL, Mr. CRAIG, Mr. D'AMATO, Mr. FAIRCLOTH, Mr. GRAMS, Mr. GREGG, Mr. HATCH, Mr. HELMS, Mrs. HUTCHISON, Mr. INHOFE, Mr. INOUYE, Mr. KEMPTHORNE, Mr. KYL, Mr. NICKLES, Mr. SIMPSON, Mr. SMITH, and Mr. THOMPSON) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To protect the rights of the States and the people from abuse by the Federal Government; to strengthen the partnership and the intergovernmental relationship between State and Federal Governments; to restrain Federal agencies from exceeding their authority; to enforce the Tenth Amendment to the Constitution; 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 referred to as the "Tenth Amendment Enforcement Act of 1996".

SEC. 2. FINDINGS.

The Congress finds that—

(a) in most areas of governmental concern, State governments possess both the Constitutional authority and the competence to discern the needs and the desires of the People and to govern accordingly;

(b) Federal laws and agency regulations, which have interfered with State powers in areas of State jurisdiction, should be restricted to powers delegated to the Federal Government by the Constitution;

(c) the framers of the Constitution intended to bestow upon the Federal Government only limited authority over the States and the People;

(d) under the Tenth Amendment to the Constitution, the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people; and

(e) the courts, which have in general construed the Tenth Amendment not to restrain the Federal Government's power to act in areas of state jurisdiction, should be directed to strictly construe Federal laws and regulations which interfere with State powers with a presump-

tion in favor of State authority and against Federal preemption.

SEC. 3. CONGRESSIONAL DECLARATION.

(a) On or after January 1, 1997, any statute enacted by Congress shall include a declaration—

(1) that authority to govern in the area addressed by the statute is delegated to Congress by the Constitution, including a citation to the specific Constitutional authority relied upon;

(2) that Congress specifically finds that it has a greater degree of competence than the States to govern in the area addressed by the statute; and

(3) if the statute interferes with State powers or preempts any State or local government law, regulation or ordinance, that Congress specifically intends to interfere with State powers or preempt State or local government law, regulation, or ordinance, and that such preemption is necessary.

(b) Congress must make specific factual findings in support of the declarations described in this section.

SEC. 4. POINT OF ORDER.

(a) IN GENERAL.—

(1) INFORMATION REQUIRED.—It shall not be in order in either the Senate or House of Representatives to consider any bill, joint resolution, or

amendment that does not include a declaration of Congressional intent as required under section 3.

(2) SUPERMAJORITY REQUIRED.—The requirements of this subsection may be waived or suspended in the Senate or House of Representatives only by the affirmative vote of three-fifths of the Members of that House duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate or House of Representatives duly chosen and sworn shall be required to sustain an appeal of the ruling of the chair on a point of order raised under this subsection.

(b) RULE MAKING.—This section is enacted—

(1) as an exercise of the rule-making power of the Senate and House of Representatives, and as such, it is deemed a part of the rules of the Senate and House of Representatives, but is applicable only with respect to the matters described in sections 3 and 4 and supersedes other rules of the Senate or House of Representatives only to the extent that such sections are inconsistent with such rules; and

(2) with full recognition of the Constitutional right of the Senate or House of Representatives to change such rules at any time, in the same manner

as in the case of any rule of the Senate or House of Representatives.

SEC. 5. EXECUTIVE PREEMPTION OF STATE LAW.

(a) IN GENERAL.—Chapter 5 of title 5, United States Code, is amended by inserting after section 559 the following new section:

"SEC. 560. PREEMPTION OF STATE LAW.

"(a) No executive department or agency or independent agency shall construe any statutory authorization to issue regulations as authorizing preemption of State law or local ordinance by rule-making or other agency action unless—

"(1) the statute expressly authorizes issuance of preemptive regulations; and

"(2) the executive department, agency or independent agency concludes that the exercise of State power directly conflicts with the exercise of Federal power under the Federal statute, such that the State statutes and the Federal rule promulgated under the Federal statute cannot be reconciled or consistently stand together.

"(b) Any regulatory preemption of State law shall be narrowly tailored to achieve the objectives of the statute pursuant to which the regulations are promulgated and shall explicitly describe the scope of preemption.

"(c) When an executive branch department or agency or independent agency proposes to act through rule-making or other agency action to preempt State law, the department or agency shall provide all affected States notice and an opportunity for comment by duly elected or appointed State and local government officials or their designated representatives in the proceedings.

"(1) The notice of proposed rule-making must be forwarded to the Governor, the Attorney General and the presiding officer of each chamber of the Legislature of each State setting forth the extent and purpose of the preemption. In the table of contents of each Federal Register, there shall be a separate list of preemptive regulations contained within that Register.

"(d) Unless a final executive department or agency or independent agency rule or regulation contains an explicit provision declaring the Federal Government's intent to preempt State or local government powers and an explicit description of the extent and purpose of that preemption, the rule or regulation shall not be construed to preempt any State or local government law, ordinance or regulation.

"(e) Each executive department or agency or independent agency shall publish in the Federal Register a

plan for periodic review of the rules and regulations issued by the department or agency that preempt, in whole or in part, State or local government powers. This plan may be amended by the department or agency at any time by publishing a revision in the Federal Register.

"(1) The purpose of this review shall be to determine whether and to what extent such rules are to continue without change, consistent with the stated objectives of the applicable statutes, or are to be altered or repealed to minimize the effect of the rules on State or local government powers.".

(b) Any Federal rule or regulation promulgated after January 1, 1997, that is promulgated in a manner inconsistent with this section shall not be binding on any State or local government, and shall not preempt any State or local government law, ordinance, or regulation.

(c) CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by adding after the item for section 559 the following:

"560. Preemption of State Law.".

SEC. 6. CONSTRUCTION.

(a) No statute, or rule promulgated under such statute, enacted after the date of enactment of this Act, shall be construed by courts or other adjudicative entities to preempt, in whole or in part, any State or local govern-

ment law, ordinance or regulation unless the statute, or rule promulgated under such statute, contains an explicit declaration of intent to preempt, or unless there is a direct conflict between such statute and a State or local government law, ordinance, or regulation, such that the two cannot be reconciled or consistently stand together.

(b) Notwithstanding any other provisions of law, any ambiguities in this Act, or in any other law of the United States, shall be construed in favor of preserving the authority of the States and the People.

(c) If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

THE TENTH AMENDMENT

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

TENTH AMENDMENT ENFORCEMENT ACT OF 1996

- Congress finds that the Tenth Amendment means what it says: the Federal government has no powers not delegated by the Constitution, and the States may exercise all powers not withheld by the Constitution.

- Federal laws may not interfere with State or local powers unless Congress expressly declares its intent to do so, and Congress cites its specific Constitutional authority.

- Members of the House and the Senate have the ability to raise a point of order challenging a bill that lacks such a declaration or the cites insufficient Constitutional authority. Such a point of order would require a three-fifths majority to be defeated.

- Federal agency rules and regulations may not interfere with State or local powers without Constitutional authority cited by Congress. Agencies must allow States notice and opportunity to be heard in the regulatory process.

- Courts are instructed to strictly construe Federal laws and regulations that interfere with State powers, with a presumption in favor of State authority and against Federal preemption.

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