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Tenth Amendment Bill

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DEADLINE: 10:00 Wednesday, July 24,1996

SUBJECT: JUSTICE Proposed Report RE: S1629, Tenth Amendment Enforcement Act of 1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The Senate Governmental Affairs Committee will markup S. 1629 on Thursday, July 25th.

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July 23, 1996 DRAFT DRAFT

This letter presents the views of the Department of Justice with respect to S. 1629, the "Tenth Amendment Enforcement Act of 1996."

Mr. Chairman, this Administration shares the concern for improving cooperation and coordination among all levels of government, through a variety of means: through the issuance of Executive Order 12875 regarding avoidance of unfunded mandates on state, local, and tribal governments; by supporting enactment of the Unfunded Mandates Reform Act of 1995; through aggressive use of waivers of federal requirements to grant additional flexibility; and through a top-to-bottom review of existing regulatory requirements.

Unfortunately, this bill would not help achieve that goal. Some of the witnesses before this Committee have portrayed this bill as one that simply requires Congress to articulate the constitutional basis for new legislation, and to make its intent plain before preempting state laws. No one could argue with the notion that Congress should think carefully before it acts to displace state or local law, and we would have no disagreement with the bill if that was what it provided.

But the scope of this legislation is far more sweeping. The bill raises serious constitutional questions under the Supremacy Clause, and may effectively thwart the enactment of important federal legislation that is within Congress's authority and that is fully consistent with constitutional principles and tradition.

The bill would also impose extraordinary and, we believe, devastating limits on the authority of federal agencies to promulgate rules to implement federal programs, including <u>existing</u> federal laws. As set forth more fully below, the bill could have serious, probably unintended consequences:

- restricting agencies' ability to implement <u>existing</u> laws passed by Congress to protect public health and safety;
- disrupting or making meaningless the national standards that ensure a level playing field and consistency for businesses operating in a national market; and

- entangling new regulations in wasteful, counterproductive litigation.

In short, this bill does not simply require Congress to make plain its intent before preempting state laws. This bill undermines the ability of the Federal Government to create a stable business climate and to protect the public, in important areas such as health, safety, civil rights, and the environment.

If Congress has concerns with the balance between federal and state authority struck by particular statutes, Congress should amend those statutes. This bill seeks to impose a one-size-fits-all fix with possibly vast unintended consequences. To be frank, parts of this bill are too ambiguous to say definitely what they mean. That will takes years of litigation to decide. What we can tell you is how many lawyers -- and judges -- will try to construe it.

SUMMARY OF THE PROVISIONS OF S. 1629

S. 1629, the Tenth Amendment Enforcement Act of 1996, includes provisions directed at Congress, the federal agencies, and the federal courts. The Department's comments only address the provisions of S. 1629 relating to agency regulatory authority and the judicial and administrative interpretation of federal statutes and implementing agency rules.

Section 3 would require that bills enacted on or after January 1, 1997, must include certain declarations regarding congressional authority, competence, and intent, as well as specific factual findings in support of those declarations. Section 4 provides a point of order procedure to prevent the House or Senate from considering any bill, joint resolution, or amendment that fails to include such declarations, subject to a waiver of the point of order by a three-fifths vote of the membership.

Section 5(a) of the bill would add a new § 560 to chapter 5 of Title 5, United States Code (the Administrative Procedure Act). Some of the requirements of the section are procedural: to give notice of proposed rules that would preempt state law by sending copies of the proposed rule to the Governor, Attorney General, and legislative leaders of the affected States; to establish a separate list of preemptive rules in each issue of the Federal Register; and to require periodic agency review of existing rules that preempt state law.

However, other provisions of proposed § 560 would impose significant restrictions upon the adoption of federal regulations that preempt state law. Subsection (a) provides that each federal executive department, agency, and independent agency would be prohibited from construing any statute to grant the agency authority to issue rules that preempt state law unless the intent to grant preemptive regulatory authority is explicitly stated <u>and</u> the agency determines that there is a direct and

irreconcilable conflict between the rule and the state law. Subsection (b) provides that any regulatory preemption of state law shall be narrowly tailored and shall explicitly describe the scope of preemption.

In addition, sections 6 and 5(d) of the bill would establish two new rules of construction -- one applying to judicial or other "adjudicative" interpretations of future statutes and the other to administrative interpretations of rules implementing both future and present statutes -- against the preemption of state or local law in the absence of an express declaration of intention to preempt or a direct conflict with the federal requirements.

ONGOING EFFORTS TO RESPECT STATE INTERESTS AND PREROGATIVES

Although the specific provisions of this bill are novel, even radical, the generalized concerns that gave rise to the bill are clear enough. This Administration is very attentive to the burdens placed on state and local governments under federal laws and regulatory programs, and is determined to avoid unnecessary impositions. Achieving that goal, however, does not require enactment of legislation that would turn existing principles of federalism upside down.

Early in his tenure, President Clinton issued Executive Order 12875, "Enhancing the Intergovernmental Partnership," to reduce the imposition of unfunded mandates upon state, local, and tribal governments. The Order directs federal agencies not to impose such mandates by regulation unless they either (1) assure that funds for the necessary costs of compliance are provided by the federal government; or (2) describe in detail the extent of the agency's prior consultations with affected units of government, the nature of their concerns, any written submissions from them, and the agency's position supporting the need to issue the regulatory mandate, and obtain prior approval by OMB. The Administration has recognized that unfunded mandates can also be imposed through grant, contract and entitlement programs and their implementing requirements, and agencies were also advised to follow the procedures of the Executive Order in developing such administrative guidance and instructions.

The President also supported enactment of the Unfunded Mandates Reform Act of 1995, which for the first time limits the ability of Congress to pass laws imposing unfunded mandates on state, local, and tribal governments. The Act also requires greater intergovernmental consultations in the agency rulemaking process, and allowance for the least expensive means of complying with federal regulations.

The Administration has also aggressively sought to change the role of the federal government in dealing with states and localities, through a variety of means to reduce federal red tape

and provide increased flexibility to state, local and tribal governments to achieve results:

- by widespread use of waiver authority in areas such as welfare, education, health care and the environment to achieve effective reforms;
- by imposing a results-oriented standard for federal programs through means such as the Government Performance and Results Act and intensive reinvention and elimination of existing federal regulatory requirements;
- by promoting performance partnerships for federal grant programs; and
- by empowering communities to achieve bottom-up reforms through programs such as Empowerment Zones and Enterprise Communities.

THE BILL MISPERCEIVES THE HISTORICAL PURPOSE OF THE 10TH AMENDMENT AND THE PRINCIPLES OF FEDERALISM

S. 1629 would not, as its title claims, operate to enforce the Tenth Amendment. The Tenth Amendment sets out a core principle of our federal structure of government, that the national government is a government of limited powers and that Congress has only those powers given it by the Constitution -- a principle with which we fully agree.

However, a related and equally fundamental principle of federalism as established by the Framers is that, in those areas where the Constitution has given the federal government authority to legislate, this authority is complete and subject to no limitations other than those imposed by the Constitution itself. In other words, the Tenth Amendment was designed to preserve state authority over matters not delegated to the federal government by the Constitution; it does not curb the extent of federal power -- including power to preempt -- on those issues as to which Congress does have authority to legislate. As the Supreme Court has explained, "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . ." New York v. United States, 505 U.S. 144, 156 (1992).

Moreover, existing Supreme Court doctrine already implements much of what S. 1629 is designed to accomplish. In Gregory v. Ashcroft, 501 U.S. 452 (1991), the Court ruled that, where federal law would operate to preempt a core state governmental function, Congress must make its intention to preempt unmistakably clear. Indeed, there is a presumption against preemption in areas traditionally regulated by the States that must be overcome by a statement of congressional intent. See California v. ARC America Corp., 490 U.S. 93, 101 (1989). In

addition, the Court has held that Congress may not "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." New York v. United States, 505 U.S. 144, 161 (1992), quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981). Finally, the Court has ruled that the Eleventh Amendment prevents Congress from abrogating state sovereign immunity when legislating pursuant to the Commerce Clause. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996).

Thus, as discussed below, S. 1629 misunderstands the historical purpose of the Tenth Amendment as well as the system of federalism that the Tenth Amendment and other provisions of the Constitution ordain.

Preemption Should Not be Dependent on a Congressional Declaration of "Competence"

One of the declarations required by S. 1629 reflects this fundamental misconception of federalism. Section 3(a)(2) would require every bill to declare "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 to include specific factual findings that support the declaration. This provision appears to be bottomed on the erroneous view that federal legislation is to be permitted only where the states are less competent to act than the federal government.

The Constitution does not create the federal and state governments as adjacent sovereigns, disabled from acting within the same sphere. Instead, as Justice O'Connor has stated, "our Constitution establishes a system of dual sovereignty between the States and the Federal Government, . . . 'the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.'" Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (quoting Tafflin v. Levitt, 493 U.S. 455 (1990)). The Tenth Amendment does not limit the federal government to acting only where it can claim greater competence than the states. As Chief Justice Rehnquist recently reiterated, quoting Chief Justice Marshall, every power "vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." United States v. Lopez, 115 S. Ct. 1624, 1627 (1995) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

Throughout our history, Congress has enacted vital laws in areas where no one would seriously contend that the states are not "competent" to act. For example, criminal law is traditionally committed to the competence of the states. See, e.g., Lopez, 115 S. Ct. 1624 (1995). Yet the federal government has supplemented state laws combatting drug possession and distribution, incarcerating armed career criminals, and prohibiting the

possession of assault weapons. In the area of environmental law, Congress has enacted landmark legislation in the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and Superfund. In addition, the federal government properly has funded student loan, school lunch, and head start programs, all in an area -- education -- that has been traditionally committed to the competence of the states. In each of these areas and many others -- such as laws prohibiting child labor, protecting the safety of food, and providing for our elderly -- the states were competent to act. But for a variety of reasons, Congress -- representing the will of the people -- concluded that federal legislation was needed. Whether the federal effort was appropriate because the states had declined to act, because of the need for a uniform national rule, or for any other reason, it is clear that Congress had constitutional authority to act -- and properly acted -- despite the competence of the states to act as well.

The declaration regarding relative competence also ignores the well-established tradition of cooperative federalism. The federal and state governments have long recognized and respected the competence of the other even in areas of concurrent jurisdiction. In keeping with this long-standing comity, federal and state governments have jointly regulated and administered vitally important programs, including Social Security, Medicare and Medicaid, and environmental protection programs such as the Clean Water Act.

As these examples illustrate, one likely result of requiring the declaration of superior federal competence would be to prevent the enactment of important legislation that is within Congress' authority and that is fully consistent with constitutional principles and tradition. Legislation that unduly restricts the exercise of federal authority threatens our constitutional system of federalism just as surely as legislation that unduly encroaches upon state authority.

Alternatively, the term "competence" might be given an expansive construction that encompasses any situation where Congress believes that federal legislation is appropriate for any reason. If so, the declaration requirement would cause Congress frequently and unnecessarily to denigrate the relative competence of the states. This would seriously undermine the comity that has been an essential hallmark of our system of concurrent sovereignty.

The Bill Overlooks the Importance of a
<u>Federal Role in Establishing National Standards</u>

The presumption that Congress should not legislate unless it determines that Congress is more competent than states to govern in the area addressed by the legislation also runs contrary to the important federal role in establishing national standards. Congress provides for federal protection of human health, public

safety, the environment, non-discrimination, and other important interests only where state law does not achieve the task, or where uniform federal standards are necessary for some other reason, such as creating a level competitive playing field among states and industries. The need for a single national standard often has nothing to do with the relative competence of states. For example:

- Industry often supports uniform product safety standards because of the benefits of a single standard. These standards often preempt conflicting state laws that might make production and distribution of consumer products in a national market far more difficult and expensive. For example, in 1993, the Consumer Product Safety Commission issued a safety standard requiring that disposable cigarette lighters be child-resistant. The Commission estimated that the rule could have annual net benefits of approximately $115 million and 80 to 105 lives saved. The lighter industry advocated the rule because it wanted a uniform mandatory standard rather than varying state laws or a voluntary standard that would place reputable manufacturers at a competitive disadvantage. Such a uniform standard would have been far more difficult to establish had this bill been in effect.

- The Resource Conservation and Recovery Act ("RCRA") requires the Environmental Protection Agency to establish a manifest system to track the transportation of hazardous wastes and to assure that hazardous wastes are delivered to a permitted hazardous waste facility. In 1984, EPA and the Department of Transportation issued a joint regulation requiring all hazardous waste handlers to use a uniform manifest form for the transportation of hazardous waste, thereby preempting a number of different state manifest form requirements. (DOT relied on its authorities under the Hazardous Materials Transportation Act.) EPA and DOT issued the regulation in response to the problems created when states developed their own manifest forms and required persons transporting hazardous wastes through their states to use their state forms. Interstate transporters had to fill out multiple forms; multi-state generators were prevented from developing company-wide manifesting procedures; and enforcement was more difficult, since inspectors had to be familiar with many forms.

  RCRA provides that states may not impose less stringent requirements than those authorized under the federal statute. 42 U.S.C. § 6929. Here, however, the state manifest forms were not less stringent than federal law -- they were just different. Nor, arguably, was there a direct, irreconcilable conflict between the RCRA and the state law. Had S. 1629 been in force, EPA arguably could not have relied on RCRA to provide a single, uniform

manifesting form. (DOT's statute, though, does provide independent preemption authority.)

As a practical matter, S. 1629 could substantially interfere with Congress' ability to enact national legislation in the public interest -- especially if S. 1629 were interpreted to require that Congress specifically find that certain states are not equally competent to govern in a particular area. The need for a federal role may arise, not because states are unable or unwilling to adequately protect their citizens, but because states' perspectives may not take into account effects on other states. For example, air pollution from one state may cross state lines and impact the citizens of another state. The federal government alone has the ability to react to such spillover effects.

This bill's disruptive effect on implementation of federal law could create considerable disagreement over whether federal law or state law applies on a particular issue and in a particular state. Under some constructions of this bill, the answer could vary from state to state, depending on whether a particular state's law directly conflicts with federal law, or on whether the federal agency has identified a particular state law as preempted. Well-established national standards could be thrown into question, creating confusion both for businesses seeking to comply with the law, and for officials seeking to enforce it.

A federal role is important, not only to provide consistency for interstate business, but also to help avert a "race-to-the-bottom," in which some states are under pressure to undercut others' regulations in order to attract industry.[1] Federal standards can provide a level playing field for industry across state lines, so that responsible companies are not undercut by less-responsible competitors.

The globalization of the economy also has increased the need for a federal role on many issues. For example, NAFTA's side agreement on the environment requires collaboration between Canada, Mexico and the United States on environmental issues. The federal government needs to have the discretion to alter regulatory schemes, especially where 50 different state schemes would present a barrier to implementation of an international agreement.

THE RULES OF CONSTRUCTION CONFLICT WITH THE SUPREMACY CLAUSE

Section 6 of the bill would prohibit "courts or other adjudicative entities" from construing any statute enacted after

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[1] See Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1212 (1977).

the date of enactment of S. 1629 to preempt state law, unless the statute explicitly declares Congress's intent to preempt state law or there is a direct conflict between the federal statute and state law "such that the two cannot be reconciled or consistently stand together."

Depending on how this language is construed, section 6 could raise serious constitutional concerns under the Supremacy Clause, which states that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2. The Supreme Court has interpreted the preemption principles stemming from the Supremacy Clause:

> It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 712-13 (1985) (citations and quotation marks omitted).

The Court has thus identified three basic forms of preemption: (1) express preemption; (2) implied preemption (often referred to as occupation of the field preemption); and

(3) conflict preemption (which includes what is commonly referred to as "physical impossibility" conflict and "frustration of federal purpose").

To the extent that § 6 is construed to constrain the means by which future Congresses may express their intent to preempt state law, it would either be unconstitutional or ineffective. As the Supreme Court has observed, one Congress cannot bind future Congresses:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. . . . The framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

United States Trust Co. v. New Jersey, 431 U.S. 1, 45 (1977); see also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) ("one legislature cannot abridge the powers of a succeeding legislature"). Therefore, "Congress is not bound by the intent of an earlier body." Community-Serv. Broadcasting v. FCC, 593 F.2d 1102, 1113 (D.C. Cir. 1978).

Congress may not legislate to prohibit a future Congress from expressing its intent regarding preemption by any appropriate means. The plain meaning of a statute "depends on [its] context." Bailey v. United States, 116 S. Ct. 501, 506 (1995) (quoting Brown v. Gardner, 115 S. Ct. 552, 555 (1994)). This context includes the language and structure of the entire statute taken as a whole. Accordingly, if the language and structure of a statute enacted after S. 1629 clearly conveyed that Congress intended, for example, to occupy the field, that statute would preempt state law within that field, even though the requirements of section 6 were not satisfied.

Saying they can't create a default rule??? Won't binding on future Congs — they can change the default prior?

THE BILL WOULD ESTABLISH EXTRAORDINARY, DEVASTATING LIMITS ON AGENCY RULEMAKING AUTHORITY

In a number of ways, S. 1629 would impose novel, substantive restrictions upon agency authority to adopt new regulatory requirements affecting state and local governments. The consequences of section 5 would be staggering -- and many of them surely unintended. Simply put, these limits would substantially disrupt the ongoing implementation of critical federal programs and create numerous new opportunities for the litigious to thwart their implamentation.

The Requirement for Express Authority to Promulgate Preemptive Rules Would Undermine Enforcement of Existing Federal Programs

Proposed § 560(a) provides that each federal executive department, agency, and independent agency would be prohibited from construing a statute to grant the agency authority to issue rules that preempt state law unless the intent to grant such authority is explicitly stated and there is a direct conflict such that the rule and the state law cannot be reconciled or consistently stand together.

Because it would not be completely prospective in application, § 560(a)(1) could bring any number of important existing regulatory regimes to a grinding halt. The declarations required by § 3 (governing Congress) are only required for statutes enacted on or after January 1, 1997, and the rules of construction adopted by § 6(a) (governing the courts) only apply with respect to statutes enacted after S. 1629 is enacted. In contrast, the limitations on agency authority to issue preemptive regulations apparently would apply with respect to all regulations adopted after January a, 1997, even if they implement statutes currently on the books. In order for an agency to promulgate rules that would preempt state law, the governing statute -- whether enacted before or after the passage of S. 1629 -- must expressly authorize the agency to issue preemptive regulations. Thus, any rule adopted after January 1, 1997, pursuant to a statute that does not expressly contain language authorizing preemptive regulations would not be binding on any state or local entity or preempt any state or local law.

It is difficult to overstate the problems that this provision would create. It would prevent agencies from revising regulations under existing federal programs to respond to changing circumstances and increased knowledge -- critical in areas such as environmental and consumer safety law -- as well as such broad efforts as streamlining government. This interpretation could effectively rewrite large sections of the federal statute books, in one ill-considered swoop, and leave gaping holes in the ability of the federal government to carry out national responsibilities. In other words, laws now on the books would be interpreted in a manner not necessarily intended or anticipated by the Congress that enacted that law.

Depending on how the requirement that an agency could not promulgate preemptive regulations under an existing statute unless that statute "expressly authorized the issuance of preemptive regulations" were interpreted, the consequences could be staggering. Here are a few examples:

- The Americans with Disabilities Act of 1990 (ADA) -- which prohibits certain forms of discrimination on the basis of disability -- recognizes the continuing role of the States

in combatting discrimination by expressly providing that the Act does not invalidate any State law that provides greater or equal protection for the rights of individuals with disabilities. See 42 U.S.C. § 12201(b). The Department of Justice's regulations implementing certain aspects of the ADA incorporate this concept. See 28 C.F.R. §§ 35.103(b), 36.103(c). There are, however, situations where State laws provide lesser protections than the ADA and therefore, under existing law, are preempted. This bill could change that.

Under S. 1629, some persons undoubtedly would argue that, although the ADA requires agencies to promulgate regulations, it does not "expressly authorize[]" preemptive rules. Under this interpretation, the Department may be unable to issue new ADA regulations, such as those dealing with accessibility. The Department's future ADA regulations could effectively be preempted by divergent state laws, resulting in greatly diminished protections for disabled Americans.

- The Safe Drinking Water Act (SDWA) directs EPA to promulgate standards to protect our drinking water supplies from presently unregulated contaminants, such as cryptosporidium. The need for federal drinking water standards is plain. Before Congress enacted the SDWA in 1974, a Public Health Service study found that over one-third of tap water samples evidenced bacterial or chemical contamination exceeding the voluntary limits of the Public Health Service. Fifty-six percent of systems had physical deficiencies that could seriously affect safety. Sixty-nine percent of systems failed to test half the basic microbial samples recommended by Public Health Service. Congress passed and President Nixon signed the SDWA because, in part, states did not adequately protect the public from unsafe drinking water, when it was left to them.

  Under the Safe Drinking Water Act, EPA has issued numerous drinking water regulations to protect the public from microbiological and chemical contaminants. Some of those regulations may be more stringent than (and thus preempt) pre-existing state standards. The Act recognizes an important role for the states, which may enact their own drinking water laws, so long as the state laws do not relieve any person from any federal requirement. See 42 U.S.C. § 300g-3(e). Some persons might argue that S. 1629 would require a more explicit statement of authority for regulatory preemption. Thus, enactment of this bill could generate unnecessary litigation that would make it more difficult for EPA to set new standards for unregulated contaminants, or to revise existing drinking water rules.

- Section 161 of the Atomic Energy Act authorizes the Secretary of Energy to issue rules and orders to protect

property, health, and safety at DOE nuclear facilities. That section includes the statutory authorization to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act." 42 U.S.C. § 2201(p). It may be argued that the statutory authorizations for rulemaking in § 161 do not "expressly" authorize issuance of DOE regulations that preempt state or local laws. That construction could interfere with DOE's power to ensure the nation's nuclear safety.

- Federal protections for tribal sovereignty could be severely weakened. For example, the U.S. Supreme Court has held that state taxes imposed upon a non-Indian company that contracted to build a school on a Navajo Reservation using federal funds were preempted by federal law. See Ramah Navajo School Board Inc. v. Bureau of Revenue, 458 U.S. 832 (1982). The Ramah Court reasoned that the state taxes interfered with tribal self-government and the express federal policy of encouraging tribal self-government, and that federal regulation of the construction and financing of Indian educational institutions was comprehensive and pervasive. Id. at 839. Under S. 1629, because the relevant federal laws did not expressly preempt state taxes, the outcome likely would have been different -- with detrimental consequences for tribal sovereignty.

  Many federal laws relating to Tribes arguably do not contain explicit authorization to issue preemptive regulations. For example, the Indian Health Care Improvement Act, 25 U.S.C. § 1601, et seq., and annual appropriations reflect congress' intent to provide health care services to Indians. They may not, however, specifically preempt burdensome state tax laws. Under this bill, such taxes might be allowed -- a result that would undermine tribal self government and reverse longstanding policies to provide education and health care to Indian tribes.

- In United States v. State of Utah, we filed suit on behalf of the Indian Health Service (IHS) to enjoin a state statute providing that the State of Utah was the payor of last resort for medical claims of indigent Native Americans. We argued that the state's law was preempted by an IHS regulation which provided just the opposite, i.e., that the IHS was the payor of last resort for such claims. The district court ruled that the state statute was preempted and enjoined its application. This was a case in which there was no express statement by Congress that it intended to preempt the state statute, but we argued, based on implied preemption, that Congress had intended to occupy the entire field of providing health services to Native Americans and that the state law conflicted with the federal regulation;

therefore the state statute was preempted. Such a result would not be possible under the proposed legislation.

- Many counties in the West recently have attempted to assert some degree of supremacy over the federal government, or over federal management of federally-owned lands. For example, one County Board adopted an Ordinance that imposed numerous requirements and constraints on federal management of federally-owned lands within the county: that "County concurrence shall be required" prior to "any proposed changes in wildlife habitat, wildlife recovery plans, timber sales volume projections, restricted access, road closures, and primitive or wilderness designation"; that "[n]o wilderness areas shall be designated in [the] County"; and that "Federally managed lands that are difficult to manage or which lie in isolated tracts shall be targeted for disposal." A violation of the Ordinance was a state misdemeanor subject to a fine of $300 or six months' imprisonment or both. About thirty-five other counties have adopted similar ordinances.

  The Ordinance's restrictions on the management of federally-owned lands and its directives requiring the federal government to obtain the concurrence of the County prior to initiating federal activities on federal lands directly conflicted with the existing requirements of federal law. See, e.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq.; National Forest Management Act, 16 U.S.C. § 1600 et seq. Not surprisingly, the Ordinance was struck down. As the Supreme Court has observed with respect to the federal land management process, the federal government must "listen to the States [or local governments], not obey them." California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 596-597 (1987).

  However, the federal laws with which this Ordinance conflicted generally do not contain an express statement on regulatory preemption. Absent such language, every locality in the country might be free to enact laws that would, in effect, override Congress' express directions for managing federal lands.

- In United States v. Town of Greenwich, we successfully sued on behalf of the U.S. Postal Service to enjoin the application of local building code and permit requirements to the construction of a post office in Greenwich, Connecticut on land leased to the USPS. Again, there was no express preemption anywhere in the legislation governing the Postal Service's construction of new facilities, but we argued that implicit in the statutory scheme was the congressional intent that the USPS should be free from such local requirements. This is an area that would become particularly troublesome if the bill is enacted. Absent express state-

ments of congressional intent to preempt local building, zoning, licensing or registration requirements, federal facilities and employees could become subject to all sorts of state or local requirements that would vary from state to state. [[OPD SUGGESTS DELETING THIS ¶]].

For those regulatory regimes authorized by statutes enacted prior to S. 1629, current agency preemptive rules and regulations presumably would remain in effect, under the existing statutory authority. Any revised or refined regulations that implemented such pre-existing statutes, however, would not be binding on the affected state or local governments unless the laws contain the requisite preemptive authorization. Thus, unless Congress acted to revise all those statutes, S. 1629 would effectively freeze in place numerous regulatory regimes where they were on the date of enactment of S. 1629.

The Requirements that Rules be "Narrowly Tailored" and "Explicitly Describe" the Scope of Preemption are an Open Invitation to Judicial Challenges to Federal Programs

Proposed § 560(b) would also prohibit a federal agency from issuing preemptive regulations unless the federal regulation was "narrowly tailored" to achieve the purposes of the underlying statute, and "explicitly describe[s]" the scope of preemption.

One can only speculate as to how these requirements might be interpreted. At the least, the terms are uncertain enough to guarantee opportunities for litigation to challenge a wide variety of federal regulations -- regulations that have already been determined to be specifically authorized by Congress and to conflict directly with state law.

Undoubtedly, some persons would seek to construe the "narrowly tailored" requirements as a stringent limitation on federal agency power, requiring the agency to give preemptive federal statutes the narrowest, least-preemptive construction possible, even where that construction does not best effectuate congressional intent. Supreme Court precedents establish that the agency with authority to administer a statute has broad discretion to interpret statutory ambiguities in a reasonable manner. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under this bill, however, that discretion could disappear, bogging down virtually every new regulation in lengthy litigation. For example:

- The Resource Conservation and Recovery Act -- the principal federal law that protects the public from improperly managed hazardous waste -- directs EPA to promulgate standards for hazardous waste management "as necessary to protect human health and the environment." That phrase -- "as necessary to protect human health and the environment -- is susceptible to various interpretations. Under this bill,

EPA arguably would have to construe that phrase in the manner that had the least preemptive effect on state law. If each state had different laws, EPA would have to try to find an interpretation compatible with those 50 different laws, while still assuring basic protections for the public and the environment. And regulated entities who disagreed with EPA's construction inevitably would sue, claiming that some other construction was more "narrowly tailored", or, alternatively, that EPA's narrowly tailored construction did not adequately protect human health and the environment.

Also, some persons undoubtedly would argue that the requirement for the agency to "explicitly" describe the "scope of preemption" requires an agency to identify every kind of state or local law or ordinance being preempted. Arguably, if the agency did not identify subsequently-enacted state or local laws as among those being preempted, then those subsequent laws would trump the new federal regulation. Such requirements would make agency rulemakings burdensome and unworkable at best, and impossible at worst. And they would result in more rounds of litigation. Let me illustrate:

- The Department of Justice plans to revise the ADA Standards for Accessible Design in order to take into account changes in accessibility requirements and to recognize emerging technologies. These new regulations could be stalled indefinitely if the Department were required to identify and analyze all of the differences between the federal standards and each of the accessibility laws in place in every locality throughout the country. If the Department failed to identify some conflicting local building code, for example, that local building code arguably would "preempt" federal law. Once the Department's new regulations were promulgated, they undoubtedly would be challenged by those who contend that the Department's description of the scope of preemption was inadequate, and therefore ineffective.

The Bill Contains Inconsistent Rules of Construction

In addition to the other uncertain obligations and opportunities for litigation created by the provisions of this bill, it would establish different rules of construction to determine when agency regulations preempt state or local laws.

Under § 6(a), the courts could find that a federal statute or rule preempts state or local law if either the statute or rule contains an explicit declaration of intent to preempt, or if the federal requirement conflicts directly and irreconcilably with state or local law. This rule of construction would apply only to statutes enacted after the enactment of S. 1629, or rules implementing such statutes.

However, under the terms of proposed § 560(a), an agency could issue new preemptive regulations only if (1) the underlying federal statute expressly authorizes issuance of preemptive regulations and (2) the agency made a finding that there is a direct and irreconcilable conflict. Section 560(d) also requires that the rule must explicitly declare the intent to preempt state or local government powers and explicitly state the extent and purpose of that preemption. These provisions would apply to all agency regulations adopted after January 1, 1997, regardless of when the underlying statute was enacted.

These divergent standards would certainly lead to lengthy litigation over the scope of this bill. Depending on how the bill is construed, the existence of two different rules of construction could also lead to an anomalous situation where a court found that the federal statute preempted state law, but the federal agency would determine that it had no authority to issue regulations implementing the preemptive provisions. Another issue would be how to treat Congressional amendments to a preexisting statute in order to determine whether the statutory requirements, or agency regulations pursuant to those requirements, are subject to the various provisions of this bill.

CONCLUSION

The federal government depends on partnerships with states in the administration and enforcement of important federal health, safety, civil rights, and environmental programs. This Administration is committed to enhancing that partnership in order to allow the states, localities and tribal government to achieve the most effective results.

The bill takes a very different approach, one that is at odds not only with established legal principles, but also the efforts to promote such cooperative results. S. 1629 would upset that partnership, and hamstring the implementation of federal programs. It would, in effect, allow state laws and ordinances to trump conflicting national standards where Congress has not explicitly authorized agencies to promulgate preemptive regulations, or where the preemption of state law is deemed by a court to be insufficiently "narrowly tailored" or inadequately "explicit." And it would certainly lead to years of litigation to determine how its provisions would affect a variety of federal programs.

Whatever one may think about the proper balance of power between the states and the federal government, a bill of such sweeping effect -- though understandably attractive in its simplicity -- is not a suitable way to address perceived problems. Rather than attempting to address the issue through a single statute, Congress should continue to determine the appropriate allocation of state-federal jurisdiction -- a complex issue by any reckoning -- on a case-by-case basis.

from Mike Fitzpatrick

II

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

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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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This act may be referred to as the "Tenth Amend-
3 ment Enforcement Act of 1996".

4 **SEC. 2. FINDINGS.**

5 The Congress finds that—

6 (a) in most areas of governmental concern, State gov-
7 ernments possess both the Constitutional authority and
8 the competence to discern the needs and the desires of
9 the People and to govern accordingly;

10 (b) Federal laws and agency regulations, which have
11 interfered with State powers in areas of State jurisdiction,
12 should be restricted to powers delegated to the Federal
13 Government by the Constitution;

14 (c) the framers of the Constitution intended to bestow
15 upon the Federal Government only limited authority over
16 the States and the People;

17 (d) under the Tenth Amendment to the Constitution,
18 the powers not delegated to the United States by the Con-
19 stitution, nor prohibited by it to the States, are reserved
20 to the States respectively, or to the people; and

21 (e) the courts, which have in general construed the
22 Tenth Amendment not to restrain the Federal Govern-
23 ment's power to act in areas of state jurisdiction, should
24 be directed to strictly construe Federal laws and regula-
25 tions which interfere with State powers with a presump-

1 tion in favor of State authority and against Federal pre-
2 emption.

3 **SEC. 3. CONGRESSIONAL DECLARATION.**

4 (a) On or after January 1, 1997, any statute enacted
5 by Congress shall include a declaration—

6 (1) that authority to govern in the area ad-
7 dressed by the statute is delegated to Congress by
8 the Constitution, including a citation to the specific
9 Constitutional authority relied upon;

10 (2) that Congress specifically finds that it has
11 a greater degree of competence than the States to
12 govern in the area addressed by the statute; and

13 (3) if the statute interferes with State powers
14 or preempts any State or local government law, reg-
15 ulation or ordinance, that Congress specifically in-
16 tends to interfere with State powers or preempt
17 State or local government law, regulation, or ordi-
18 nance, and that such preemption is necessary.

19 (b) Congress must make specific factual findings in
20 support of the declarations described in this section.

21 **SEC. 4. POINT OF ORDER.**

22 (a) IN GENERAL.—

23 (1) INFORMATION REQUIRED.—It shall not be
24 in order in either the Senate or House of Represent-
25 atives to consider any bill, joint resolution, or

1 amendment that does not include a declaration of
2 Congressional intent as required under section 3.
3 (2) SUPERMAJORITY REQUIRED.—The require-
4 ments of this subsection may be waived or sus-
5 pended in the Senate or House of Representatives
6 only by the affirmative vote of three-fifths of the
7 Members of that House duly chosen and sworn. An
8 affirmative vote of three-fifths of the Members of the
9 Senate or House of Representatives duly chosen and
10 sworn shall be required to sustain an appeal of the
11 ruling of the chair on a point of order raised under
12 this subsection.
13 (b) RULE MAKING.—This section is enacted—
14 (1) as an exercise of the rule-making power of
15 the Senate and House of Representatives, and as
16 such, it is deemed a part of the rules of the Senate
17 and House of Representatives, but is applicable only
18 with respect to the matters described in sections 3
19 and 4 and supersedes other rules of the Senate or
20 House of Representatives only to the extent that
21 such sections are inconsistent with such rules; and
22 (2) with full recognition of the Constitutional
23 right of the Senate or House of Representatives to
24 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.

1 "(c) When an executive branch department or agency
2 or independent agency proposes to act through rule-mak-
3 ing or other agency action to preempt State law, the de-
4 partment or agency shall provide all affected States notice
5 and an opportunity for comment by duly elected or ap-
6 pointed State and local government officials or their des-
7 ignated representatives in the proceedings.

8 "(1) The notice of proposed rule-making must
9 be forwarded to the Governor, the Attorney General
10 and the presiding officer of each chamber of the
11 Legislature of each State setting forth the extent
12 and purpose of the preemption. In the table of con-
13 tents of each Federal Register, there shall be a sepa-
14 rate list of preemptive regulations contained within
15 that Register.

16 "(d) Unless a final executive department or agency
17 or independent agency rule or regulation contains an ex-
18 plicit provision declaring the Federal Government's intent
19 to preempt State or local government powers and an ex-
20 plicit description of the extent and purpose of that pre-
21 emption, the rule or regulation shall not be construed to
22 preempt any State or local government law, ordinance or
23 regulation.

24 "(e) Each executive department or agency or inde-
25 pendent agency shall publish in the Federal Register a

1 plan for periodic review of the rules and regulations issued
2 by the department or agency that preempt, in whole or
3 in part, State or local government powers. This plan may
4 be amended by the department or agency at any time by
5 publishing a revision in the Federal Register.

6 "(1) The purpose of this review shall be to de-
7 termine whether and to what extent such rules are
8 to continue without change, consistent with the stat-
9 ed objectives of the applicable statutes, or are to be
10 altered or repealed to minimize the effect of the
11 rules on State or local government powers.".

12 (b) Any Federal rule or regulation promulgated after
13 January 1, 1997, that is promulgated in a manner incon-
14 sistent with this section shall not be binding on any State
15 or local government, and shall not preempt any State or
16 local government law, ordinance, or regulation.

17 (c) CONFORMING AMENDMENT.—The table of sec-
18 tions for chapter 5 of title 5, United States Code, is
19 amended by adding after the item for section 559 the fol-
20 lowing:

"560. Preemption of State Law.".

21 **SEC. 6. CONSTRUCTION.**

22 (a) No statute, or rule promulgated under such stat-
23 ute, enacted after the date of enactment of this Act, shall
24 be construed by courts or other adjudicative entities to
25 preempt, in whole or in part, any State or local govern-

1 ment law, ordinance or regulation unless the statute, or
2 rule promulgated under such statute, contains an explicit
3 declaration of intent to preempt, or unless there is a direct
4 conflict between such statute and a State or local govern-
5 ment law, ordinance, or regulation, such that the two can-
6 not be reconciled or consistently stand together.
7 (b) Notwithstanding any other provisions of law, any
8 ambiguities in this Act, or in any other law of the United
9 States, shall be construed in favor of preserving the au-
10 thority of the States and the People.
11 (c) If any provision of this Act, or the application
12 thereof to any person or circumstance, is held invalid, the
13 validity of the remainder of the Act and the application
14 of such provision to other persons and circumstances shall
15 not be affected thereby.

O