

Uniform Law Commission Federalism and State Law Committee Meeting
Washington Plaza Hotel
Washington, D.C.
24 October 2009
Minutes

Attendees

Uniform Law Commission: Bob Stein, John Sebert, Ray Pepe, Bart Davis, Tom Hemmendinger, John Kellam, Harriet Lansing, David McBride, Connie Ring, Fred Stamp, Michael Wilkins, Kathy Patchel, Barry Hawkins, Eric Fish

National Assoc. of Attorneys General: Jim McPherson, Blair Tinkle, Sarah Bertozzi

National Center for State Courts: Kay Farley and Gregory Mize

National Conference of State Legislatures: Susan Frederick

National Governors Association: David Quam, David Parkhurst

Council of State Governments: Bart Davis

American Law Institute: Alan Morrison

Nelson Mullins Public Strategies: Jennifer Pharaoh, Chris Cushing

Introductory Comments and Discussion

Chairman Ray Pepe welcomed the attendees and thanked all for accepting the invitation to participate in the meeting. Chairman Pepe asked each organization to discuss their interests in the project and describe the extent of their recent experience with federalism issues. He stressed that the Committee has been charged with the objective of offering specific and practical recommendations about how to better define the role of state law in our federal system and to improve cooperation among Congress, federal regulatory agencies, state and local governments, and organizations representing the interests of state and local governments in a non-partisan and independent manner.

Introductory Comments from the Uniform Law Commission

Executive Director John Sebert provided a report on the relations between the Uniform Law Commission and the Federal government, focusing on areas where cooperation was beneficial, areas where the benefit was diffuse, and areas where the relationship was ineffective. Examples included UCC revisions, the E-Sign legislation, UIFSA amendments, and the treaty implementation projects.

Introductory Comments from National Association of Attorney Generals

NAAG representatives noted a growth in the influence of federal regulations. The regulations are often vague, empowering regulators to act in a manner that they believe fulfills the intent of the regulation. Inconsistency and overexpansion of power is becoming a more salient issue. Among the issues most important to NAAG involve financial practices, specifically mortgage fraud and the SAFE Act. Regarding mortgage fraud, in the view of many state attorneys general, the experience in many states showed disconnect between federal and state law. Often times, many state attorneys general felt that state law was stronger than the federal law and allowed state regulators to serve as whistleblowers identifying problems not in their view effectively addressed by federal regulators.

Introductory Comments from the National Governors Association

The experiences of the NGA illustrate a lack of understanding on behalf of the Federal government on what state and local governments do and how their activities relate to the power balance in a system of federalism. NGA representatives cited the drafting of the Levin Bill (SB569) as an example of federal legislation drafted with an ill-informed understanding of state/federal relations. Funding provided as part of the recovery legislation exposed a lack of productive cooperation with state governments. At times, legislation is written setting a minimum level of state activity, while similar legislation is drafted establishing a ceiling. This, in the view of NGA, has left many states in a conundrum regarding budgeting and policy development. It was noted that 1/3 of state budgets are rendered inflexible by federally imposed levels of minimum expenditures.

A broader area of concern is the expansion of unfunded mandates and use of the commerce clause to occupy areas of traditional state regulation. Specific issues of concern include financial services regulatory reform (CFRA and the reform of risk regulation), the SAFE Act, and regulation of payment systems.

One expressed goal of the NGA is the development of a framework to teach Federal officials and staffs about state law, one that would reduce the confusion regarding the roles of state government.

Introductory Comments from the National Conference of State Legislatures

The representatives from NCSL affirmed the importance of educating Federal legislators, agencies, and staffs about the role of the states within the federal system. Susan Frederick provided examples that highlighted the current misunderstanding of the concept of preemption. She cited the No Child Left Behind Act and Real ID Act. It was also explained that HR3332, the legislation re-establishing the Advisory Commission on Intergovernmental Relations, which may foster improved relations between federal and state government, was not a NCSL initiative, but came from National Association of Counties. Ms. Frederick expressed a preference for an improved articulation of principles that would serve as a framework for state and federal relations.

Introductory Comments from National Center for State Courts

It was noted that many of the arguments for or against federalism fail to include the importance of the judiciary branch in protecting the balance of state and federal power. Historically, issues related to healthcare and tort litigation have forced judges to examine the balance of power in the federal system.

Gregory Mize noted that the American Bar Association established a task force to address federalism in response to the *Medtronic* case. Professor Ed Sherman of Tulane University chaired the meeting.

Introductory Comments from the American Law Institute

Alan Morrison indicated that the ALI is in the early stages of considering a project to articulate principles regarding the preemption of state law. He also expressed the need to better educate all levels of government on the practical problems created by the preemption of state law.

Introductory Comments of the Council on State Governments

Commissioner Bart Davis, speaking from his experience as Chair of the CSG, noted a growing resentment of the expansion of federal power into traditional areas of state law over the past 5 years. Many of the less populous states are looking at 10th Amendment challenges as a means to secure state autonomy over areas of law that have traditionally been within state jurisdiction. He also noted that many in the press are ignorant of the implication of federal action on the 10th Amendment rights of the states. CSG is also dealing with the impact of federalism on the system of interstate compacts that has proved useful to address areas of national concern through mechanisms that respect the traditional limits of federal power.

Introductory Comments of the Judiciary Conference

There is discussion within the Judiciary Conference regarding the impact of recent Congressional actions on the judiciary. Both federal and state courts share these concerns and are looking to work in concert to secure an independent and functional judiciary.

Comments from Nelson Mullins regarding Federal/State interaction

Jennifer Pharaoh of Nelson Mullins informed the committee of the issues currently in Congress that will have an impact on state legislatures and state power. She noted that in both the health care reform and CPFA legislation under consideration, an effort is being made to preserve state law, especially with respect to consumer protection, but that significantly expanded federal regulatory authority may also further expressly and impliedly preempt state laws in many areas.

Chris Cushing stated that Congressional committee staff and legislative drafting staff may be unaware of the impact legislation may have on various aspects of federalism that were discussed by the group. In his opinion it may be beneficial to have document that gives background on the roles of states in the federal system. The document should be addressed to key audiences such as committee counsel, the GAO, and the staff at the Congressional Research Service.

The goal of the Uniform Law Commission and Federalism

Chairman Pepe and ULC President Bob Stein initiated a discussion on light of the shared experiences with federalism and discussed the practical consequences of the Committee's work. The ability of the ULC to buffer partisan politics and work nation-wide towards enumerated goals was discussed. It was explained that the ULC has been able to successfully offer a third approach to the state only/federal only dichotomy that weaved through many of the experiences. Additionally, the ULC drafting process was discussed in the context of drafting policy principles.

Recommendations and Deliverables

Due to other commitments, Morrison and McBride had to be excused at the lunch break. However, before they departed, they shared their recommendations for going forward. The recommendations were:

1. Articulate federalism in a way that illustrates why it is practical for states to remain the primary regulator of certain aspects of society. Focus should be given on maintaining a diffuse power structure.
2. Create an umbrella organization for all organizations that are impacted by federalism in order to better coordinate responses and strategies.
3. Create constituencies to raise concern about federalism in each state

The committee agreed that these recommendations were a fair representation of what the committee should do. Various participants described interactions they have had with the Obama Administration that indicate that the Administration is cognizant of issues involving, and interested in exploring, federalism issues. To that end, the committee discussed the possibility of a symposium, expansion of the committee, and drafting principles to discuss with the Administration.

Symposium

The committee agreed that an educational symposium may be beneficial to educate legislators, staff members, and policy makers on the issues of preemption and federal/state relations, and to help better articulate principles that govern the role of state law in our federal system and the importance of cooperative federalism in achieving uniformity of law.

The timing of the symposium was discussed. Eric Fish, Sarah Bertozzi, and John Sebert were in agreement that a Spring 2010 symposium would not be feasible due to the planning involved. Many participants also stated that a Fall 2010 date might not attract the desired audience because of the midterm elections. The consensus was to seek to hold the symposium in Fall of 2010 if possible, recognizing that it may be necessary to postpone the symposium until spring 2011.

A list of professors with potential interest in the area was prepared as part of preliminary planning. The list included:

David Vladeck- Georgetown
Caleb Nelson- UVa Law
Tom McGarity- UT-Austin Law
William Funk- Lewis and Clark Law School
Sidney Shapiro – Wake Forest Law School
David Barron- Harvard Law School

Other scholars whose names had previously been recommended to the committee chair include:

Ernie Young, Duke
Bill Buzbee, Emory
Michael McConnell, Stanford
James Pfander, Northwestern
Erwin Chemerensky, UC Irvine
David Levi, Duke
Edwin Rubin, Vanderbilt

Expansion of the Committee

Attention was given to identifying other groups that should be invited to the next meeting of the committee. Invitations will be sent asking the following additional organizations to participate in our efforts: Conference of Mayors, National League of Cities, National Association of Counties, International City Managers Association, and the National Association of Secretaries of State.

It was decided that the federal government should not be involved during the committee phase. The goal of the committee will be to develop a set of principles to discuss with all three branches of the federal government. It was also agreed that until a first draft of set of federalism principles could be developed and the work plan of the Committee better articulated, it may be preferable to keep the initial working group relatively small and not at this stage seek participation by a broader and more representative group of stakeholders.

Next Meeting and Material Production

There was agreement that the next meeting should be held in the Spring 2010.

In anticipation of the meeting, Susan Frederick volunteered to assist in the drafting of a statement of Federalism/Preemption principles to be reviewed by a working group in advance of the next meeting.

The working group will also include Ray Pepe, the Chair of the Committee, Commissioner Michael Wilkins, Executive Director John Sebert, Legislative Counsel Eric Fish, and Jennifer Pharaoh of Nelson Mullins.

The Committee also agreed before developing plans for the Spring 2010 meeting to convene a telephone conference of its Advisory Committee to obtain additional comments and recommendations.