

From: VacationLaneGrp@aol.com
To: Comments@acus.gov
Cc: disaster_law@lists.berkeley.edu
Subject: PREEMPTION

Sent: Thu 10/14/2010 10:45 AM

Dear Mr Chairman (Paul):

I was in your law class of 1967 and followed your career with great interest even during your law school years. So first thanks so very much for your continuing contributions to the public dialogue and the public interest. Preemption is a wonderful topic to tackle by the ACUS.

I have read with great interest the proposed draft by Ms. Sharkey. I understand your necessary focus on regulatory aspects. On that score the SCOTUS has not been of assistance because of their constant wandering all over the place on preemption. It does appear that a review of SCOTUS decisions could reach the conclusion that implied preemption of any sort in the regulating and rulemaking context is out and preemption even by agencies with great expertise and discretion unless Congress specifically addresses preemption no such implied preemption can occur. I think the paper and ACUS should address this point and can either agree or disagree with my conclusion.

But I am also very interested in the status of federalism generally especially during the current fiscal crisis of the STATE's and their local governments. So I suggest a disclaimer that your paper and concerns for now include only Commerce Clause regulation and not anything else. But it should also note that much federal preemption including that of the National Security State is eroding the federal system. Adoption for example of federal criminal laws or national security positions that fail to recognize that much activity under especially Article I Section 8 [the so-called Tax and Spend clause] of the Constitution is de facto preemption and in fact often implied preemption. These areas are significant in eroding the underpinnings of the founders judgements in my opinion and perhaps such a disclaimer would be indication that you believe these areas of preemption [all arenas of preemption other than the Commerce Clause] may deserve future study.

I cite as one example the National Flood Insurance Program (42 USC 4001 and following) for which ACUS did a short study on that programs usage of scientific and technical information in the 1970's. That program's regulations at 44 CFR Part 59 and following particularly in the land use arena but also the insurance arena impliedly pre-empt state law. I have tried to get the expert committees in Congress to look at that situation without result. Perhaps a topic for ACUS further research.

In addition to non-Commerce clause preemption which I think should be flat out tied into the Supremacy Clause in the final ACUS paper I think a review of how STATE Supreme Courts have handled federalism issues might be quite constructive.

I have high hopes for your time as Chairman and you have always delivered in the past to my expectations. So thanks again for all your hard work.

Request that this e-mail be included in your Preemption Docket and Review Files. I again emphasize that despite this issue largely falling to the realization that the President is Chief Executive, the shadowy preemption of state authority by the role of the President as Commander-In-Chief is a worry issues of comity in the world of preemption are not well explored by legal or other academic scholars. So looking forward to this challenge.

I also am convinced that if the federal scheme adopted by the founders is to thrive preemption is the cutting edge. Whether we have a federal system in name only or more substantively may in fact rest on the outcome of this discussion and analysis.

Thanks again to you and your staff for taking on this important very important issue. SCOTUS and the Congress and the Executive Branch has not been very helpful with consistent positions on even Commerce Clause Preemption.

Regards Bill

"We are members of one great body, planted by nature in a mutual love, and fitted for a social life. We must consider that we were born for the good of the whole"---Seneca

William R. Cumming
President
The Vacation Lane Group
P.O. Box 327
338 Smith Point Road
Reedville, VA 22539
804-453-3410
vacationlanegrp@aol.com
vlg338@yahoo.com

www.vacationlanegrp.com
blogging at <http://vlg338.blogspot.com>