



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Regulation

Minutes

October 19, 2010

Members Attending

Susan Dudley	Neil Eisner	Daniel Elliot
Cheryl Falvey (by phone)	Russell Frisby (Chair)	Peter Keisler
Edward Lazarus	Nadine Mancini	Nina Mendelson (by phone)
Gillian Metzger (by phone)	Allison Zieve	

ACUS Staff Attending

Shawne McGibbon (General Counsel)	David Pritzker (Deputy General Counsel)	Bill Richardson (Senior Counsel)
Emily Schleicher (Attorney Advisor, DFO)	Jonathan Siegel (Director of Research & Policy)	Paul Verkuil (Chairman)

Invited Guests Attending

Jeff Lubbers	Catherine Sharkey (Consultant)	Jim Tozzi
Steve Wood		

The meeting commenced at 2:00 pm in the conference room of the Administrative Conference. Mr. Siegel welcomed everyone and thanked those who had made the meeting possible.

Chairman Verkuil offered an introduction to the Conference and observed that this first committee meeting is very significant. The full Conference meets in plenary session twice a year to consider recommendations that come out of the committees. The next plenary session will be held December 9-10, 2010.

Mr. Siegel addressed administrative matters. He provided a more detailed explanation of how committees operate. He explained that members of the committee have been asked to disclose, in advance of each meeting, any financial conflicts that would require recusal. He then explained how the committee must conduct its affairs to comply with the Federal Advisory Committee Act ("FACA"). Mr. Siegel concluded his remarks with some guidelines for the conduct of the meeting, to be chaired by Mr. Frisby.

Mr. Frisby conveyed that the committee's goal is to present a recommendation to the full Conference at the plenary session in December, and that the committee has a second public meeting scheduled for November 2. Mr. Frisby expressed the view that the committee should move forward on a consensus, non-partisan basis, explaining that the draft recommendation was



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provided solely to facilitate the committee's discussion. He asked if any of the committee members had objections to public participation, and no objections were registered.

Professor Sharkey provided an overview of her report, explaining that the role of agencies is extremely important in preemption. When the Conference addressed this subject in its 1984 Recommendation, preemption of state regulatory and statutory law was the focus, but preemption of state tort law has more recently emerged as the key issue. Professor Sharkey's report was aimed at empirically assessing federal agency compliance with President Obama's May 20, 2009 preemption memorandum and the Executive Order on federalism (EO 13132). This assessment was based on in-person and telephone interviews with officials from seven executive branch and independent agencies, and a comprehensive review of the agencies' rulemaking documents and intervention in litigation. Professor Sharkey explained that the recommendations proposed in her report serve two aims: (1) creating a "home" in each agency for systemic consideration of federalism values; and (2) establishing publicly-available internal agency policies to ensure supervision or policing of preemption determinations.

Mr. Frisby initiated the discussion of Professor Sharkey's report. Mr. Siegel asked whether Professor Sharkey has discussed with NAAG whether they would be able or willing to take on the role suggested by the report's proposed NAAG notification process. Professor Sharkey responded that she is in the process of conferring with NAAG. Her understanding is that NAAG was not enthusiastic about the similar process created in the class action context, but did view it as important. Some believe that individual AGs should be notified as well, because there are questions as to whether NAAG is the most effective conduit for disseminating information to AGs. Mr. Eisner asked if Professor Sharkey asked the Big Seven for their view regarding the NAAG notification proposal. Professor Sharkey said yes. The Big Seven were disappointed about instances where federal agencies did not consult them before adopted preemptive regulations. While they would prefer agencies focus consulting efforts on the Big Seven, they did not object to agencies consulting other representatives of state interests as well.

Professor Metzger asked whether Professor Sharkey envisioned the report's recommendations as applying only to notice and comment rulemaking or to other agency processes as well. Professor Sharkey said that her focus was just on notice and comment rulemaking, explaining that other processes such as adjudication raise different issues. Professor Mendelson inquired whether the recommendations could apply to guidance documents, which are already subject to OMB review. Professor Sharkey agreed that approach could be considered. Mr. Eisner questioned the need for similar recommendations related to guidance documents, and Mr. Frisby explained that he has heard anecdotal evidence of agencies failing to consult with states in crafting regulatory guidance.

Mr. Frisby turned the committee's attention to "global" issues, beginning with the question of whether agencies need more formal processes for considering federalism issues. Mr. Eisner expressed concern that the recommendations may contribute to the ossification of the



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administrative process, a phenomenon the Conference sought to combat in one of its last recommendations in 1995. Mr. Eisner does not believe there is a problem that requires a recommendation that agencies create lengthy guidance documents. He expressed concern that agencies don't have the resources to comply with the report's recommendations. Mr. Frisby queried whether Mr. Eisner's concerns were generally applicable or aimed at specific recommendations, and Mr. Eisner replied that his main concern is the recommendation that agencies take on the burdensome task of creating a guidance document that seems unnecessary. He also questioned whether states should be expected to take on a more proactive role, and suggested that the Conference recommend that Congress and the Courts be more straightforward about agency preemption standards.

Chairman Verkuil noted that there is already a recommendation to Congress on this subject, from 1984. He also asked whether DOT's practices could form the basis of a constructive recommendation. Mr. Eisner stated that federal-state consultation happens all the time at DOT and that a centralized source of agency guidance and practices would be better than directing each agency to create yet another guidance document. Mr. Lubbers suggested that some of Mr. Eisner's concerns may be allayed by reiterating previous Administrative Congress recommendations to Congress on this subject. He further suggested that providing a list of appropriate state contacts is a good idea, and is not inconsistent with Professor Sharkey's report. Mr. Eisner agreed that Congress needs to be more explicit on preemption, but acknowledged that there are often political limits preventing that.

Ms. Dudley noted her concern that it is difficult for agencies to identify the best representatives of state interests, observing that states can search www.regulations.gov to identify preemptive rulemakings of interest. She shared Mr. Eisner's concerns because OMB lacks sufficient resources to implement the proposed recommendations. Ms. Zieve objected, noting that an executive order already requires agencies to consider federalism impacts and proactively consult with states. Ms. Zieve expressed concern, however, that a highly formal process might encourage agencies to preempt. Ms. Zieve expressed the view that agencies should explain clearly whether their regulations preempt state regulatory law, and further stated that agencies do not have the expertise to determine whether tort law is preempted. Mr. Siegel asked Ms. Zieve if it would be superior to have agencies make rules and leave it to other processes to determine whether those rules preempt state tort claims. Ms. Zieve responded that in her view, yes. Conflict between federal law and state tort claims is a factual question that is best determined by a judicial evaluation of whether a particular state law tort claim would interfere with federal regulatory goals.

Mr. Tozzi observed that while there is disagreement as to means, all appear to agree that transparency regarding regulatory preemption is important. Perhaps the recommendation should be aimed at increasing transparency and facilitating existing OMB review processes.



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Professor Sharkey noted that guidance documents, even if costly, can increase transparency and efficiency. She also observed that while agencies have developed useful websites that provide good notification to the public, consultation with states often requires more. And without a guidance document, it's difficult to tell what an agency is failing to do. On the other hand, ossification is a serious concern. Ms. Zieve queried whether EPA's guidance is too long or might otherwise be inappropriate for other agencies. Professor Sharkey agreed that one size does not fit all, but believes EPA's document can serve as a model. Mr. Wood suggested that insulated review of factual predicates may be a good thing, but that assertion of preemption is often a political or policy judgment.

Mr. Keisler asked how formal federal-state consultations should be. He observed that consultation early in the process can be good, but can also make the output less transparent because decisions on consultation may not end up in the record. Mr. Frisby suggested that an ex parte process can be transparent, and that the FCC may be an example. Mr. Lazarus suggested that whether that's true may depend on the culture of the particular agency. He believes FCC's process has both pros and cons, and noted that the FCC is considering whether to revise its rules to increase transparency. Professor Mendelson suggested that there may be an incentive for parties who meet with agency to file transparent comments as a means of pressuring the agency to take action.

Professor Mendelson noted that agencies are likely to opine on implied preemption eventually, such as in briefs before courts. She would rather see the use of a systematic, open process to encourage agencies to explore the reasons for preempting state law at the time a regulation is adopted. Perhaps the recommendation could include a provision that requires an agency to be more explicit about the factual predicates that determine the preemptive scope of a regulation? Professor Sharkey stated that it was her intention to include that element in the recommendation and suggested that the point may need to be emphasized.

Professor Metzger observed it is necessary to separate out the need for an internal agency preemption process with the question of what such internal process should look like. The burden of creating an appropriate process will vary with agency and its regulatory goals.

Mr. Frisby asked Mr. Eisner whether he thinks agencies should have internal guidance on federalism and preemption, and Mr. Eisner replied that it depends on how "guidance" is defined. At DOT, there is often a lot of internal advice and guidance available in a variety of forms, so a formal guidance document seems unnecessary. Mr. Frisby wondered whether other agencies that lack DOT's procedures could benefit from the recommendations.

Professor Mendelson observed that the recommendation that agencies create a guidance document is motivated by the understanding that compliance with Executive Order 13,132 has been neither consistent nor widespread. She asked if there is a better solution available to increase compliance. Mr. Eisner suggested that the Conference used to provide model guidance



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itself, and the recommendation could ask it to do so in this instance. Mr. Siegel suggested that approach might impose costs on agencies while simultaneously reducing their flexibility. Mr. Eisner disagreed, explaining that while DOT has good procedures, it does not have the resources to draft or update guidance documents.

Mr. Frisby turned the committee's attention to the question of whether the Conference should address the circumstances under which preemption is appropriate. Ms. Dudley expressed concern that the recommendation focused too heavily on consultation, which might not be the only problem. Professor Sharkey did not agree that consultation is the main focus, and reiterated that internal review of preemption procedures and decision making is also an important component. Professor Sharkey does not think the recommendation should comment on substantive preemption principles. Chairman Verkuil concurred, noting that this is a sensitive issue for the Conference, which must take care not to cross the line between process and substance.

Mr. Siegel asked whether EPA had discussed with Professor Sharkey the costs it incurs to comply with its own guidance. Professor Sharkey explained that EPA had not suggested the monetary cost for its own processes. She further explained that it is difficult to quantify costs, especially with respect to the costs of ossification. Mr. Eisner observed that such analysis should vary depending on the subject, *e.g.*, producing economic analysis can be expensive and time consuming, while federalism analysis is simpler and less costly. He further explained, however, that while it does not take much time to engage in federal-state consultation, developing guidance would be very time consuming.

Chairman Verkuil emphasized that the Conferences does not want to contribute to ossification, but observed that Mr. Eisner seemed to be saying that DOT has a process, but is resistant to making it publicly available. He asked whether the committee can reach agreement if costs were contained by simply recommending that agencies make existing processes transparent.

Mr. Lubbers observed that the two positions were not far apart, suggesting that consensus could be achieved by taking out the recommendation that agencies emulate the substance of EPA's guidelines. Mr. Eisner did not fully concur, observing that any recommendation for the production of additional guidance would contribute to ossification. Chairman Verkuil observed that the recommendation would not be contributing to ossification because the requirements are already imposed by Executive Order.

Addressing Mr. Lazarus, Mr. Frisby inquired whether the committee, like the ABA, should recommend that independent agencies follow the principles of Executive Order 13,132. Professor Sharkey noted that the Order already encourages voluntary compliance by independent agencies. Mr. Lazarus suggested the committee could recommend independent agencies



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formulate internal procedures for compliance, but that the external review recommendations would be problematic.

Mr. Elliot explained that he had not known much about Executive Order 13,132, and found that the General Counsel of STB did not either. He expressed his view that there is a need for independent agencies to be made more aware of these issues, even if they are not required to follow the Executive Order. He agreed that cost is always an issue.

Mr. Elliot suggested that creating a guidance document could prevent litigation against the agencies, but could also have the effect of provoking more litigation. Mr. Lazarus asked whether a private litigant could have a claim that an agency did not adhere to a guidance document. Mr. Keisler opined that anything an agency says it will do and then does not do reduces the agency's stock with the courts. Mr. Eisner noted that there could be public perception costs, too. Mr. Siegel and Ms. Zieve agreed that procedural noncompliance would be one piece of evidence considered in addressing a claim that an agency acted arbitrarily and capriciously, but that it would not go to the substantive validity of a rule.

Ms. Falvey stated that CPSC follows Executive Order 13,132 voluntarily and explained that the agency's anti-preemption statute has had a more significant effect on the agency than President Obama's preemption memo. Chairman Verkuil agreed that it would be best to encourage Congress to be explicit about preemption, but observed that CPSC's statute is an example of a unique instance in which that was politically feasible. Ms. Falvey stated that while CPSC would look to other agency's practices on preemption, it would need flexibility to account for its statutory difference.

Mr. Frisby turned the committee's attention to particular recommendations, beginning with those addressing OIRA/OMB's role in the enforcement of Executive Order 13,132. Mr. Eisner and Ms. Dudley expressed concern that OMB doesn't have the resources to implement recommendation number eight, and that there is in any event no clearly identified problem warranting the recommendation. Ms. Dudley explained that OMB does not have the resources to publish agencies' ten-year retrospective preemption reports. Mr. Eisner suggested that agencies could publish their reports themselves, and that OMB could simply spot check. Ms. Zieve objected that it would be much better to have all the reports available in one place.

Mr. Tozzi observed that transparency seems to be the biggest problem uncovered by the report and that it is more achievable problem to address. Mr. Frisby observed that it should be simple for agencies to file their reports with OMB and have OMB automatically post the reports online. He asked Ms. Dudley why that would be burdensome. Ms. Dudley agreed that method would not be too costly. Mr. Siegel suggested that cost is significantly reduced if "publish" is understood to mean "post online."



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Mr. Frisby turned to draft recommendation number nine, which would require OMB to update its federalism and preemption guidelines. Ms. Dudley said that she did not have a problem with posting the list of designated federalism officers, but that updating the guidance seems less useful. Ms. Mancini asked how detailed the OMB guidance is and what updating it would entail. Professor Sharkey replied that the benefit of the document is that it is general enough to be useful across agencies. She opined that updating the document should not be difficult.

Mr. Frisby observed that there appears to be a consensus that something should be done, though the substance of the recommendation is still in question. On the subject of federal-state consultation, Mr. Frisby noted that the recommendations emphasize the Big Seven and the Big Ten, and asked whether it should be less specific. Mr. Lubbers suggested that the committee could drop a footnote identifying those groups in the preamble, but speak more generally in the recommendation to allow flexibility for the identification of other state representatives. Mr. Frisby agreed with this approach.

Mr. Frisby inquired whether the recommendation for a NAAG notification policy should also be more general. Professor Sharkey noted that the Council of Chief Justices may be another option, but observed that Executive Order 13,132 explicitly identifies the Big Seven and the Big Ten. Mr. Keisler expressed the view that judges don't have a role in crafting state policy and may not be good targets for federal-state preemption consultation. Professor Sharkey suggested that the recommendation should at least identify some potential groups to serve as defaults for federal-state consultation.

Ms. Dudley noted that states can use the online version of the Unified Agenda to see whether there are rulemakings that might impinge on state interests. Mr. Frisby explained that state agencies are also short on resources, and federal agencies may not always be able to depend on state officials identifying the right proceedings. Ms. Zieve added that the Unified Agenda is extremely long and does not explain the substance of the federalism or preemption concerns in a given proceeding. She further noted that a rule may not be adopted for years after it appears in the Unified Agenda. Ms. Dudley objected that the Unified Agenda only comes out twice a year and is electronically searchable, so the burden on state officials should be minor. Mr. Frisby expressed his concern that relying on state officials to find out about potentially preemptive rulemakings by searching the Unified Agenda is a disaster waiting to happen.

Mr. Siegel suggested that the committee could recommend that state officials remain engaged in federal regulatory proceedings and check the Unified Agenda as an additional measure to promote federal-state consultation. Mr. Lubbers reminded the committee that the Conference is not authorized to make recommendations to the states, but noted that the preamble could emphasize the availability of such options.



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Mr. Frisby then asked for comments from members of the public attending the meeting. Martin Sussman from the SSA was recognized. He urged the committee to consider the effect of the proposed recommendation on agencies that don't do much, if any, preemptive rulemaking. Mr. Sussman observed that the report focused on the "big hitters," and explained that the substance of the recommendation goes beyond some agencies' needs.

There being no further comments from the public, Mr. Frisby entertained a motion to adjourn the meeting, and the meeting was adjourned.