

## **LECTURE #12 – FEDERALISM IN ADMINISTRATIVE LAW**

Today I have a short topic, but important in the US, and that is Federalism in Administrative Law. We touched on it and talked about it once before. We talked about federalism in the first week of class in which we talked about the fact that America has 50 states and 1 central federal government. And that the 50 states can do many things differently, one from another, that they want. And yet the federal government wants to sometimes impose through federal supremacy its will on those 50 states. It does that in 2 ways – 1.) Inducement by budget and money power, and 2.) Preemption. Let me give you an example of how they accomplish it: 1.) BUDGETARY POWER - money or budgetary power that the federal government has. The US Congress has great budgetary power. It collects approximately 5 cents a gallon on every gallon of gas pumped in the US for automobiles and that is an enormous amount of money. It collects income taxes on everyone's income in the US. That's an enormous amount of money. As a result, this money will not get sent to the states, unless they do things the federal government wants. So when Congress passed a law saying that each state had to take the nuclear waste from its power company plants that generated nuclear waste, the states went to court and said they weren't equipped as states to deal with nuclear waste, only the federal government is. And the states were successful in proving it was a federal concern and saying it was something that the federal government must handle. However, the US Congress came back after this court decision and said any state that does not set up an administrative agency to regulate, and deal with, and dispose of nuclear waste is not going to receive certain federal highway money. And that is the way the Congress was able to get the states to go along with establishing nuclear waste cleanup facilities. They could not order the states to do it, but they could do it through the budgetary power that Congress has. And that is one of the ways the federal government has increased its power over the states and been able to make many uniform laws throughout the US. A couple of small examples will give you a better idea – every state is able to pass its own speed limits on a highway – if one state wants to have 55 miles per hour they can have 55 miles per hour, if another state wants to have 70 miles per hour they can have 70 miles per hour, which is about 120 kilometers per hour. The federal government decided back when there was shortage of gasoline, and when it was decided it was much safer to drive slow, that it would not give a state federal highway money to build more federal highways unless the state adopted a law that its maximum speed limit was 55 MPH – about 80 kilometers per hour. This was upheld as being legal and that way the federal government in Washington DC was able to reach out across the entire US and make the speed limits in the entire US uniform, something that had never been done before and something that surprised a lot of people. Another example that may hit close to home – I'm not sure if there are laws in Russia prohibiting minors, persons under a certain age, from drinking alcoholic beverages, but in the US, one may not drink alcoholic beverages until you reach

adult age. It used to be in most states that that age was 18, but the US Congress decided they wanted the states to change the age to 21. So they said they would not give the states federal highway money because it is dangerous on the federal highways to have drinkers at age 19 and 20 and they didn't want anyone drinking alcohol until age 21. They said they would not give the states federal highway money until they changed their law. All of the states except 1 changed their laws. One state went to court and said, "We want the minimum age to be 18. We think adults at age 18, 19, and 20 should be able to drink alcoholic beverages. This was in a state that was a large beer manufacturing state, the state that produces the largest amount of beer in the US, the state of Wisconsin, which is up in the northern part of the US, not heavily populated, very cold, very pretty, a state very similar to Karelia, and used for many summer vacations in the US. They said they were not going to change their laws and went to court to try to stop Congress from doing that, on the basis that the age of drinking was something that was a just a state and local concern and should not be something the federal government should impose on everyone from Washington. The state of Wisconsin lost. It was determined that the budgetary power of Congress to withhold money for highway purposes was enough of a power and they could withhold that money unless the state changed its laws. So we've found, in big and little examples, that states have been forced to adopt federal standards. Let me give you a more important example – that is the Clean Air Standards of the federal government that many states did not want to adopt. The Environmental Protection Agency, a federal administrative agency, said that states that do not adopt the federal clean air standards for smoke being emitted into the air will not receive federal highway funds. And that law was upheld in the courts and any state that does not enforce and adopt federal clean air act standards will no longer receive federal highway funds. This is why we have many old steel factories in the US which have had to close down or totally be reconstructed to have their smokestacks and furnaces comply with current clean air act standards because all 50 states adopted the federal clean air standard..

2.) PREEMPTION - The other doctrine used by the federal government to get its way over states is the Doctrine of Preemption, now also, Administrative Preemption. In other words, how does the federal government force a state to do what it wants or to change the 50 different states to be uniform - through preemption. Normal preemption is where the federal government has acted to pass laws as in maritime, and ocean and admiralty matters, states may not adopt any laws in the field. Now federal administrative agencies are starting to adopt administrative regulations that preempt state tort/injury laws. Very surprising to Americans is this expansion of federal administrative power over states because every state is allowed to regulate tort actions against drug companies for unsafe drugs and medicines, and this could be a little bit different from state to state, until the Federal Food and Drug agency came along and said the states may not allow lawsuits against federal drug companies in a case where the FDA, the administrative agency, has approved the drug. If the agency has approved the drug, then the state may not allow tort injury lawsuits against the drug

manufacturer for failure to warn of dangers. For instance, there was a pain killer drug called Vioxx that hundreds of thousands of people took to kill pain. All of a sudden they came out about a year ago and said after about 10 years of distributing this painkiller drug, this major company called Merck announced and the FDA announced that this company could no longer sell it because it was dangerous to the heart and there were people who had certain heart conditions that this drug made more dangerous and it could cause heart attacks. This is a major surprise to that drug company because the FDA, the administrative agency, had approved this for 10 years until they turned around and withdrew that approval approximately 1 or 2 years ago. If all the people who had heart conditions can proceed with tort lawsuits, then there's a lot of money that's going to be made by the plaintiffs in those lawsuits, and the lawyers in the lawsuits, and a lot of money lost by the drug manufacturer. However, if it can be asserted by the drug manufacturer that the FDA's approval of sale of that drug was enough, then it didn't matter whether the drug company failed to warn people, and the majority of the lawsuits pending against the company will be prohibited and lost. So this is a major issue whether or not the federal government through an administrative agency can issue an administrative rule that says any drug that is approved by the FDA may not be the subject of a lawsuit for failure to warn of its dangers. It's a major new inroad into the state's power to allow tort actions and a major type of tort reform that limits the ability of people to go to court and sue drug companies and of lawyers to bring large personal injury lawsuits. Normally Tort Reform is done by state legislators and federal tort reform by Congress, but this is the first instance in America of federal tort reform by administrative agency regulation – non-elected government officials - and is an example of how powerful and important administrative law has become in America.

That's really all I have to say about Administrative Preemption. Again, we've talked about preemption before –it has to do with federal supremacy and the fact that the Constitution of the US government and the federal laws of Congress are the supreme law of the land. Whenever a state law conflicts with it or interferes with it, then that state law is preempted or prohibited and removed.