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Testimony Before the Judiciary Subcommittee on Crime, Terrorism and Homeland Security

on H.R. 817

May 18, 2006

I. INTRODUCTION

Chairman Coble, Ranking Member Scott, members of the Subcommittee, my name is Mark Pollot and I am appearing on behalf of myself and more than 100,000 members of the United Gamefowl Breeders Association represented throughout 33 states. The United Gamefowl Breeders Association ("UGBA") was founded in 1975 to represent the interest of gamefowl breeders across the nation. The UGBA's primary mission is to exchange better methods and ideas toward the perpetuation and improvement of the various breeds of gamefowl, to improve marketing methods, to cooperate with Universities and other agencies in poultry disease control, and to further develop and enhance the general good health of gamefowl.

II. BACKGROUND

The bill before this committee (H.R. 817), denominated the "Animal Fighting Prohibition Enforcement Act of 2005", would be, if enacted, the successor to provisions of the Animal Welfare Act ("the Act"). The current provisions of the Act, enacted into law as a result of language which was inserted into the 2002 Farm Bill without ever receiving a Congressional mark-up in either the House or Senate Agriculture Committee, make it a

misdemeanor for a person to, among other things, transport game fowl in interstate or foreign commerce for the purposes of exhibiting game fowl in a fighting venture.[1] The principal supporter of the gamefowl provisions of the Act was the Humane Society of the United States ("HSUS"). The HSUS and a variety of other animal rights activists and groups, including some which are considered domestic terrorist organizations, have pressed for these prohibitions on philosophical grounds. These philosophical grounds include a shared belief that a wide variety of human uses of animals should be prohibited such as, among other things, hunting, fishing, trapping, rodeos, horse racing, and even the raising of animals for food and clothing purposes. These groups, either directly or through other organizations, have been successful in getting many state legislatures to enact prohibitions on some of these activities, but have been unsuccessful in getting the legislatures of other states to go along (e.g., Louisiana and New Mexico). It was for this reasons that the HSUS and other animal rights activists turned to Congress to get it to impose their views on those states in which they failed to succeed.

The animal rights activists succeeded in getting the federal government to insert itself into what is essential a state law enforcement issue (a matter that I will discuss in more detail below) to a degree in the 2002 Farm Bill by inserting language which was not debated and explored in the appropriate committees. They enlisted the help of other groups, including commercial agriculture interests and regulators, by convincing them that gamefowl activities posed threats to other commercial bird industries[2] and that those

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[1] These prohibitions apply even if the fighting venture takes place in states and foreign countries where such activities are perfectly legal. The significance of this fact will be discussed below.

[2] Note that I use the term "*other* commercial bird industries" in this discussion. The HSUS and other institutional supporters of the original Farm Bill amendments and H.R. 817 treat the gamefowl industry as being something other than a commercial industry when it suits them to create the impression that gamefowl activities and other related activities adversely affect legitimate commercial activities. However, while many involved in the gamefowl universe do not pursue these activities as a commercial venture (but as a hobby, a way of life, or a culturally bound pursuit), others do so as a commercial activity in whole or in part, an activity as deserving of protection and recognition as any other commercial bird activity.

threats could effectively be nullified by prohibitions of the type found in the Farm Bill amendments and in H.R. 817. However, if one cuts past the rhetoric and self-serving rationales offered by those pressing Congress for passage of the (now-enacted) gamefowl provisions of the Animal Welfare Act and reviews the legislative history underlying the 2002 Farm Bill amendments, the purpose of these amendments was to assist states prohibiting gamefowl activities in enforcing their domestic laws at the expense of other states.[3] In other words, Congress has enacted a statute which supports the economic policy decisions of some states at the expense of those states who have made a different economic policy choice. H.R. 817 would further this policy which UGBA believes, with substantial reason, to be constitutionally prohibited, inconsistent with the principles of federalism, unnecessarily intrusive on the ordered liberty of individual citizens, and even counterproductive to some of the stated goals of the legislation. It does this by increasing the penalties associated with gamefowl activities and imposing thereby more strict limitations.

III. H.R. 817 SHOULD NOT BE ENACTED

A. PRINCIPLES OF FEDERALISM AND COMITY PROHIBIT SUCH ENACTMENTS

The Federal Constitution is built on the principle of federalism. As the United States Supreme Court has noted, each state was from the beginning, and is today, a separate sovereign which retains all the aspects of sovereignty except those surrendered in the Constitution. Some prohibitions on invading that sovereignty are expressly stated in the Constitution, such as the language of the 9th and 10th Amendments such as, among other

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[3] That this is the actual purpose of H.R. 817 as well as the Farm Bill amendments is reinforced by the fact that the title given to H.R. 817 is the Animal Fighting Prohibition Enforcement Act. Gamefowl fighting is *not* prohibited by either the Farm Bill amendments nor H.R. 817. The prohibitions were enacted by individual states within their borders. Such states could *not* constitutionally extend such bans beyond their borders. What H.R. 817, and the Farm Bill amendments before H.R. 817, did was to make it easier for those states that did enact bans to

things, the immunity of states from suit in federal courts. Others are inherent in the structure and the history of the document itself. Some grants of federal authority in the Constitution, such as the Commerce Clause of Article I, Sec. 8, have allowed certain inroads into state sovereignty and, indeed, have been held in the past to grant extraordinary regulatory power over the economic lives of the states, the courts have, in the recent past, began to narrow that authority, bringing it closer to the historical bounds it was to be confined to by the framers and ratifiers of the Constitution. Even where the power of the United States extends over the states, the courts have held that such power should not be exercised lightly or without due deference to the rights of states to make their own decisions within their own borders.

Among the decisions that remain in the hands of the states are those decisions going to the functions of the states and the economic and social policy choices that will affect their states. In other words, states are entitled to choose what economic and social activities they will follow within their borders, decisions that cannot be dictated by the United States absent a constitutional amendment. In many areas, the United States has been allowed to influence the policy choices of states by offering them incentives (such as block grants with conditions attached which can be entered into voluntarily), but not to dictate directly.

Very clearly, the framers and ratifiers of the Constitution had no intention of allowing some states to impose their wills and legal and policy choices on other states. It was for fear that other states would attempt to do so that constitutional provisions such as the Full Faith and Credit clause exist. Indeed, it was the fear of states imposing their economic policy choices on other states that prompted the framers and ratifiers to include the Commerce Clause in the Constitution. It was there to prevent states from engaging in trade wars, imposing tariffs on other states to strong arm them into adopting policies desired by the first state, and the like. It would be ironic indeed if states were able to do

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enforce their domestic laws by imposing the will of those states onto other states with the complicity of the United States.

indirectly, through federal legislation, what they clearly cannot do directly, and yet this is exactly what H.R. 817 seeks to do and what the Farm Bill Amendments did.[4]

It is my considered opinion that the Farm Bill Amendments are unconstitutional, and will ultimately be found to be so, as would be the provisions of H.R. 817, if it is enacted. However, even were this not so, Congress should be very reluctant to act, given the constitutional principles of federalism and comity, in such a way as to allow the policy preferences of any number of states to be imposed on states of a different view through federal legislation. States which allow gamefowl activities derive benefits from doing so. For example, they derive revenue from such activities, whether they are direct gamefowl activities or indirectly related activities such as veterinary services, feed production and manufacture and the like. Likewise, they derive veterinary and public health and safety benefits by making sure that gamefowl and related activities are conducted in the open where they are subject to regulation, inspection, and oversight.[5]

Congress should be reluctant to start down a path in which it assists those states having one policy preference over the interests of those states who do not share the same policy

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[4] Some may point to litigation that was brought in the United States District Court in Louisiana as proof that the Farm Bill Amendments were constitutional and so, therefore, must be the provisions of H.R. 817. They should not take comfort in this fact. The Louisiana case was a single case bought in a single District Court and is binding only in that district. It was not appealed. However, there were a number of issues that were *not* raised in that case which will certainly be raised in future litigation either in the same District with different parties or in other Districts. Those questions going to the constitutionality of the existing law and H.R. 817, if enacted, may well cause a different result. Further, courts of appeal considering these questions may well come to a different result. In other words, a final decision regarding the constitutionality of the Farm Bill Amendments and H.R. 817 has not been rendered. Any number of persons have pointed to cases that they felt answered a question in the way they wanted only to have the rug pulled from under them in later cases.

[5] As will be discussed in more detail below, attempts to ban some activities have the effect of driving them underground, where they can no longer be effectively monitored and controlled by regulatory authorities. Most persons, including UGBA members, are law-abiding and would abide by legal limitations amounting to a ban. However, there will always be those who will not. It should be remembered that many gamefowl activities, as well as many other activities, are culturally driven and tend to continue to take place underground if the law seeks to

views. It is not hard to imagine that, should rodeos become the next target, that states who accept animal rights activists' views that rodeos are as bad as gamefowl activities will seek to impose similar limitations on the industries which can be said to support rodeos. Likewise it is not difficult to envision states that oppose gaming or gambling from trying to impose limitations on their residents traveling to other states to gamble, or from prohibiting slot machines from being shipped in interstate commerce to states in which gaming is legal, all to enforce their policy preferences on other states.

B. H.R. 817 VIOLATES THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL CITIZENS AND RESIDENTS

Individual citizens and residents of the United States have liberty interests at stake here as well.

For example, there is a constitutionally recognized right to travel in the United States which includes the right to travel for economic reasons which cannot be inappropriately burdened by the states or the federal government. For this reason, it has been held to be unconstitutional for a state to impose time-bound residency requirements for professional licensure in a state. The same principles that guide existing case law in this area would deny government the right to prohibit the regulated public from taking or sending the stock or tools of their business, trade or their hobby or sport in interstate travel from a place in which the use, possession, or ownership of the stock or tool was lawful to a place in which the activity using such stock or tool is lawful. Again, by analogy, imagine a law which prohibited shipping a gaming machine from a place in which its possession or manufacture was legal across state lines to a place which its possession and/or use is lawful.[6] This is precisely what H.R. 817 purports to do. It is my professional and

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ban them. When this happens, the mechanisms that ensure public and veterinary health and safety cannot do their jobs.

[6] Similarly, imagine a law which prohibits persons from traveling from a state in which gaming or gamefowl activities are not lawful to one in which one or both are legal for the purposes of engaging in the gaming or gamefowl activities. A more obvious constitutional

personal opinion that H.R. 817, if enacted, would unconstitutionally interfere with the constitutional right to travel of UGBA members and others.

Similarly, H.R. 817 imposes a first amendment burden on individuals which cannot be sustained. While commercial speech can be subjected to somewhat more stringent regulations that other types of speech, the power of the government to prohibit even commercial speech is limited. Certain time, place, and manner restrictions can be placed, but the limitations imposed by H.R. 817 go beyond any currently allowed restrictions on commercial speech. Indeed, it infringes not only on the rights of the speaker by prohibiting him or her from advertising activities which are legal in the states in which they are carried out in states in which such activities would be illegal (again, imagine Las Vegas from being prohibited from advertising casinos in states in which casino gambling is not permitted), but also the right of citizens to receive such information. Furthermore, the way H.R. 817 is drafted, persons could be held to violate the law if they simply cite places where such activities are permitted in the context of an article arguing that such activities should not be banned anywhere. Congress should be leery of pushing such boundaries.

These are not the only constitutional problems I see in H.R. 817, but they serve as a significant example of the problems within H.R. 817.[7]

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violation cannot be imagined. A law prohibiting individuals from carrying tools or possessions necessary for the enjoyment of gaming or gamefowl activities to a state in which such activities are allowed is scarcely less obviously unconstitutional. It cannot be overlooked here that the animal right organizations and activists supporting this legislation have as a stated goal the criminalization of other lawful activities involving interaction with animals such as hunting, fishing, trapping, rodeos and horse racing. Wayne Pacelle, Chief Executive Officer of the Humane Society of the United States, has made it clear that HSUS's "goal is to get sport hunting in the same category as cockfighting and dogfighting. Our opponents say that hunting is a tradition. We say traditions can change." (Bozeman Daily Chronicle, Oct. 8, 1991). It is clear that if successful here, HSUS will attempt to obtain similar laws as to these other targeted activities.

[7] Although it is not my purpose in this testimony to address every problem that H.R. 817 presents, but merely to focus on legal issues, I nevertheless stop here to note that H.R. 817, and its predecessor, the Farm Bill amendments, are utterly insensitive to the cultural impacts

C. ANIMAL AND PUBLIC HEALTH CONCERNS WILL BE DISSERVED BY H.R. 817

Animal and public health issues have been cited as reasons why H.R. 817 should be enacted. I respectfully submit that animal and public health would be adversely affected by H.R. 817. The reasons for this are fairly clear.

Prior to becoming an attorney, I was a registered nurse for nearly 20 years. I am therefore familiar with the principles of epidemiology and public health. Many of these principles are as applicable to animal health as to human health except that individual humans can report their illnesses and possible illnesses directly and a variety of mechanisms exist to ensure that important public health information is gathered and transmitted to appropriate officials. Animals, however, are dependant on humans to recognize and report potential health problems and to ensure that such mechanisms that exist to catch and treat animal disease are in play. Voluntary compliance is important both in human and animal health regimes. Indeed, a primary purpose of the UGBA is to promote animal health as illustrated by my above-description of the organization.

It has been my experience, both as an RN and as an attorney (including my time at the United States Department of Justice) that banning activities such as gamefowl activities does not end the activity, but merely drives it underground. Once it is driven underground, it is difficult, if not impossible, to ensure that the potential health problems created by the activity will be timely discovered and addressed.

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of its provisions. Gamefowl activities have been historically a part of the social fabric of many societies and cultures. The United States is not unique in this regard. Not only will H.R. 817 have a substantial impact on the economics of those involved directly and indirectly in the gamefowl industry, but also will have social and even religious impacts on them. I find it ironic that Congress has imposed a requirement of sensitivity to such matters in federal statutes such as the National Environmental Policy Act ("NEPA"), but refuses itself to take such considerations into account in an area which is primarily philosophically driven. Legitimate public policy

This is not to suggest that no ban of any kind on any activity should ever be enacted. I do suggest that every situation be separately evaluated to decide whether more harm than good will result from the ban. Likewise, I do not suggest that the gamefowl breeders who are members of the UGBA would intentionally or otherwise violate the provisions of H.R. 817. Most people are law-abiding, at least when they know and can understand the law (which is by no means a given). However, as my experience shows, there will always be some who, from conviction or for economic, cultural, and other reasons, will simply continue the banned activity underground. Indeed, where activities are heavily bound with culture (as is the case here), a defiance of the ban, whether *de facto* or *de jure* will be a virtual given.

When this happens, all of the potential adverse effects of the banned activity are likely to emerge. The regulatory, legal, social, and other oversight mechanisms, both formal and informal, either cannot function to catch problems before they become major, or can only do so with great difficulty and inefficiency. As a result, the very consequences the ban seeks to avoid emerge. In this case, some may suggest that H.R. 817 is *not* a ban and that, therefore, what I have said here is irrelevant. However, a review of H.R. 817 demonstrates that it is so onerous and so pervasive that it amounts to a *de facto* ban. The solution here in not to place onerous limitations on the activities in question, but to bring them into the same regulatory universe that all other animal related industries inhabit, such as regular inspections, mandatory vaccinations, and the like.

Further, to suggest that gamefowl breeding and related activities pose a unique threat that must be met with the stringent limitations amounting to ban is disingenuous at best. The birds involved in gamefowl activities are, to the best of my knowledge and understanding, no more prone to Exotic Newcastle disease, avian flu viruses, or arboviruses than any other commercially raised fowl and are no less subject to disease control measures than any other fowl. If these things are true, it is clear that the stated

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considerations, such as animal health, can be readily and easily dealt with as we do in every other activity involving animals, without decimating an activity which is a way of life for many.

health concerns are more motivated by a dislike for the gamefowl industry or for fear of political repercussions than by a fear of disease itself. For those who are motivated by a genuine concern for animal and public health safety issues, I respectfully submit that their concerns can be met in the same fashion that public and animal health and safety concerns are met when other fowl are at issue that by enacting H.R. 817. Indeed, UGBA members are as concerned as anyone about animal and human health issues. Their livelihoods, lifestyles, and culture are as threatened as anyone elses by an outbreak of avian flu virus, Exotic Newcastle disease or any other disease condition involving fowl.

The decisions about whether an activity such as gamefowl breeding and related activities should be allowed and under what circumstances are best left to the states who have the best idea what works for their state and their citizens and who can ensure that the activities are carried out in a safe and appropriate manner. The legislative authority of the United States should not be used by some states to impose their policy views on other states simply because it would make enforcement of their own policy preferences within the borders of their own states simpler.

D. H.R.817 INAPPROPRIATELY DIVERTS FEDERAL RESOURCES

H.R. 817 diverts federal resources to effectuate the policy choices of individual states. Given the important matters that face the United States today, ranging from homeland security to immigration and serious crime, it seems inappropriate to apply federal funds and law enforcement personnel and resources to effectuate a policy adopted by individual states who presumably believe that the policy deserves the dedication of law enforcement resources. It is not unreasonable to suggest that a state should not adopt a policy that it is not willing to dedicate its own resources to strenuously enforce.

IV. CONCLUSION

For all of the foregoing reasons, we respectfully ask for your opposition to HR 817.