CLINTON-GORE V. STATE AND LOCAL GOVERNMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

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CLINTON-GORE V. STATE AND LOCAL GOVERNMENTS

TUESDAY, JULY 28, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. David M. McIntosh (chairman of the subcommittee) presiding.

Present: Representatives McIntosh, Scarborough, Snowbarger, Barr, Sessions, Tierney, Sanders and Kucinich.

Also present: Representative Mac Collins.

Staff present: Mildred Webber, staff director; Keith Ausbrook, chief counsel; Sean Cunningham, counsel; Karen Barnes and Barbara F. Kahlow, professional staff members; R. Andrew Wilder, clerk; and Elizabeth Mundinger, minority counsel.

Mr. MCINTOSH. The subcommittee will come to order.

Let me first state, if the Members will permit me to take a minute to express my sorrow over the loss of the two officers, J.J. Chestnut and Detective John Gibson. Both were very kind to me personally, and their families, their friends, their fellow officers and the staff that witnessed the shooting, our thoughts and prayers are with you. We appreciate the sacrifice that those two officers made, and today we will be able to pay tribute to them.

In the first order of business, I want to welcome our colleague Mac Collins, who has introduced a resolution on the issue of federalism and is very interested in the subject. And, I ask unanimous consent that he be allowed to sit in the hearing. I understand he has a statement that will be submitted for the record.

[The prepared statement of Hon. Mac Collins follows:]

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UNITED STATES
HOUSE OF REPRESENTATIVES

Statement of the Honorable Mac Collins (GA-03)

Before the House Government Reform and Oversight Committee Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs

July 28, 1998

President Clinton's Executive Order 13083, entitled "Federalism," raises deep concerns regarding the Administration's view of the role of the Federal government in our society. This order represents a radical departure from traditional interpretations of our Constitution and threatens the authority of the United States Congress, the sovereignty of the States, and the most basic rights of individual citizens.

The Constitutional division of power between Federal and State governments is detailed in the Tenth Amendment to the Constitution which reads, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Clearly, the Tenth Amendment was not drafted merely to divide power, as the President suggests in his order, but was crafted to limit Federal jurisdiction and protect the sovereignty of the States. Previous administrations have understood this distinction.

In 1987, President Reagan issued Executive Order 12612 establishing his administration's policy with regard to handling issues affecting the division of powers between States and the Federal government. This order embodied the principles set forth in the Tenth Amendment. It read, "executive departments and agencies must maintain the division of governmental responsibilities between the national government and the States that was intended by the framers of the Constitution, and must ensure that the principles of federalism established by the framers guide the executive departments and agencies in the formulation and implementation of policies."

In sharp contrast to President Reagan's policy, the Clinton Executive Order turns the Tenth Amendment on its head, suggesting that the Federal government has broad powers to infringe on the authority given the States and the Congress under the Constitution. Executive Order 13083 establishes dangerously broad and vague criteria for differentiating between national and State jurisdictions. The criteria are so expansive that almost any action taken by a Federal agency could be deemed appropriate.

Most troubling is the fact that President Clinton's order attempts

to provide Federal departments and agencies new powers to dictate policy and regulations to State legislatures, governors, and agencies. The order further suggests that any issue affecting more than one State should automatically fall under Federal jurisdiction. Such broad Federal authority would render State governments powerless and virtually irrelevant.

Additionally, by granting executive jurisdiction over all matters related to "international obligations," this order threatens to bypass the United States Congress, allowing executive departments and agencies to impose on the States provisions of unratified international treaties or agreements. This would violate both the Tenth Amendment and the treaty ratification authority granted the Senate under Article II, Section 2, of the Constitution.

In order to respond to the Administration's attempt to usurp the powers of Congress and the States, I have introduced a resolution, House Concurrent Resolution 299, drawn directly from President Reagan's 1987 executive order, reiterating the fundamental principles of the Tenth Amendment's division of powers.

Additionally, the resolution reiterates the Reagan Administration's criteria for formulating and implementing policies that affect the balance of powers between the Federal government and the States. These criteria are based upon the understanding that "constitutional authority for Federal action is clear and certain only when the authority for the action may be found in a specific provision of the Constitution, when there is no provision in the Constitution prohibiting Federal action, and when the action does not encroach upon authority reserved to the States."

The resolution further establishes strict guidelines that executive departments and agencies should follow whenever Federal policy preempts State law. These guidelines protect State legislatures, departments, and agencies from Federal influence.

It is time for Congress to take a stand in defense of its own authority, the sovereignty of the States, and the Constitutional rights of American citizens. The Federal executive departments and agencies cannot be allowed to violate the Constitutional separation and division of powers. I urge all of my colleagues to take a stand for the Constitution by cosponsoring House Concurrent Resolution 299.

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Mr. MCINTOSH. The purpose of today's hearing is to examine the potential impacts of President Clinton's recent Executive Order 13083 on federalism. Basically, this Executive order addresses the relationship between the Federal Government and State and local governments. Today's hearing will examine the need for a possible bipartisan legislative solution to address the concerns of State and local governments.

This hearing will allow key State and local elected officials to voice their concerns and former and current administrations to explain their views on the federalism Executive order.

I want to welcome the five State and local elected officials who represent today key organizations of State and local officials. State governments will be ably represented by Utah Governor Michael Leavitt, who serves on the Executive Committee of the National Governors' Association; and North Carolina State Representative Daniel Blue, who is the new president of the National Conference of State Legislatures. The local government community will be represented today by Philadelphia Mayor Ed Rendell, who is representing the U.S. Conference of Mayors; Philadelphia Councilman Brian O'Neill, who is president of the National League of Cities; and Wake County, NC, Commissioner Betty Lou Ward, who is the new president of the National Association of Counties.

I also want to welcome our current and former administration officials who will appear in the later panels. Michael Horowitz currently is a senior fellow at the Hudson Institute, served as chairman of the Domestic Policy Council Working Group on Federalism when he was general counsel at OMB in the Reagan administration. Eugene Hickok, currently Secretary of Education of the Commonwealth of Pennsylvania—Pennsylvania is currently well represented today—is here to speak as former special assistant at the Office of Legal Counsel, U.S. Department of Justice during the Reagan administration.

And, the Clinton administration will be represented by Mr. Edward DeSeve, who is Acting Deputy Director of Management at OMB.

And, finally Vermont's Lieutenant Governor Douglas Racine and Mark Schwartz from Oklahoma City will testify from their perspectives.

On May 14, 1998, President Clinton issued Executive Order 13083, which revoked two earlier federalism Executive orders, President Reagan's Executive Order 12612 of 1987, and President Clinton's own Executive Order 12875 issued in 1993. Executive Order 12612 provided many protections for State and local governments and reflected great deference to States and to local governments. President Reagan, who himself was a former Governor, consistently recognized the competence of State and local governments and their readiness to assume more responsibilities.

For example, prior to 12612, President Reagan returned responsibility to the States and to local governments in his 10 block grant programs. And in 1982, early in his administration, in his State of the Union Address he announced a new federalism initiative involving a grand sorting out of the responsibilities between Federal and State and local governments. Many of those ideas are being implemented in this Congress today.

Later in 1982, he issued Executive Order 12372, which required Federal agencies to "accommodate" State and local elected officials' concerns with proposed Federal financial assistance, and direct Federal development or explain why they have not deferred to the States. That Executive order and Executive Order 12612, issued in 1987, set in place operating principles and a required discipline for the Federal agencies to follow for all decisionmaking affecting State and local governments.

When I discovered President Clinton's Executive order, I wrote to him and asked—I could not understand how he as a former Governor would be willing to abandon the protections accorded the States since 1987 from unwarranted Federal regulatory burdens. In that letter, I explained that, prior to his new Executive order, there had been "important constraints on Federal regulatory power by requiring a minimum of Federal intrusion and substantial deference to State governance." I wrote, "With Executive Order 13083," the new Executive order, "you have swept away these limitations on the power of the Federal Government."

The bottom line is that the new order would wreak havoc on the balance of power envisioned by the Constitution between the States and the Federal Government. My letter, the purpose of that letter, was to ask why.

I asked the President why he stripped the most basic protection accorded the States, the preparation of a federalism assessment for all regulatory and legislative proposals, including the requirement for an analysis of the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy. That assessment simply forces the government to pause and ask itself, what are we doing, what will the effect be on the States? No longer would it be required as a result of the new Executive order.

I also asked why the President openly encouraged Federal agencies to intrude in State affairs, which would subject the States to unprecedented Federal regulatory intervention. President Clinton's Executive order revokes President Reagan's order's provisions regarding preemption that directed the agencies to, quote, "preempt State law only," and I emphasize only, "when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that Congress intended preemption of State law or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute."

In other words, unless the agency is required to preempt States, States would be given deference, and there would be no preemption. That is huge, as we all know, in terms of the reckless balance of power between the States and the Federal Government. Also under President Reagan's Executive order, any regulatory preemption of State law was restricted to the minimum level necessary; that protection no longer exists.

Since that time, I have also asked for all relevant documents from the Office of Management and Budget relating to the development, preparation and issuance of Executive Order 13083. On July 1st, counsel to the President Charles Ruff replied for the President.

He stated that the primary purpose of issuing the new order was to bring the previous orders up to date. According to Mr. Ruff, the Unfunded Mandates Reform Act of 1995 made clear that a federalism assessment was necessary only when a regulation may result in expenditures by State, local and tribal governments in the aggregate of $100 million or more.

That was the statute. Nothing was said in that statute, of course, about the Executive order and the Executive's ability to do assessments in other situations. President Reagan's Executive order didn't have a threshold, and, since the statute was passed in early 1995, the old Executive order signed by President Clinton would have required assessments regardless of a threshold.

On June 10th, my subcommittee called the National Governors' Association to ascertain its views. Shockingly, the executive director, Raymond Scheppach, was totally unaware of the order. He hadn't been consulted by the Clinton White House with regard to the order. Neither had any of the other six principal State and local government organizations, known as the Big Seven, prior to the issuance of this new Executive order which directly affected their ability to govern. And they weren't notified about it after the issuance.

We understand that our call to the National Governors' Association and each of the organizations led to their complaining to the Clinton White House about the failure to consult with them, as well as about the substance of the new Executive order. As a consequence, White House counsel informed us by telephone on July 15th that the administration planned to issue a second Executive order delaying the effective date.

Accordingly, on June 17th, the leadership of the Big Seven, National Governors' Association Chairman Ohio's Governor George Voinovich; the former National Conference of States Legislative president; National Legal Cities president, Brian O'Neill, who is with us today; the former National Association of Counties president; the president of the U.S. Conference of Mayors; president of the International City/County Management Association; and the chairman of the Council of State Governments wrote to the President requesting that the new order be withdrawn, saying, and I quote, "We feel that Executive Order 13083 so seriously erodes federalism that we must request its withdrawal." And they requested its withdrawal as quickly as possible.

Today, what we plan to do in this hearing is explore with the President's representative several questions which the American people deserve to have answered. Why was there no prior consultation with State and local elected officials and the Big Seven organizations that represent them? Why was there no notice after the issuance to State and local elected officials and the Big Seven? Why was the order issued in the first place? And finally, will the President act to restore the protections afforded by the Reagan and earlier Clinton Executive orders for State and local governments before the November elections?

The stealth issuance of the Clinton Executive order and its assertion of Federal authority over State and local governments makes clear that we must always be alert to ensure the proper balance of power between the Federal Government and the States and local

governments. As James Madison wrote, in Federalist No. 45, and I quote, "The powers delegated to the Federal Government are defined and limited. Those which are to remain with the State governments are numerous and indefinite."

[The prepared statement of Hon. David M. McIntosh follows:]

Chairman David M. McIntosh
Opening Statement
Clinton-Gore v. State and Local Governments
July 28, 1998

First, if the ranking member will permit, let me take a minute to express my sorrow over the loss of our two Capitol Hill Police Officers, J.J. Chestnut and Detective John Gibson. Both officers were very kind to me. To their families, friends, fellow officers and to Majority Whip Tom Delay and his staff, our thoughts and prayers are with you.

The purpose of today's hearing is to examine the potential impacts of President Clinton's recent Executive Order (E.O.) 13083, "Federalism," on State and local governments, and examine the need for a possible legislative solution to address the concerns of State and local governments. This hearing will allow key State and local elected officials to voice their concerns and former and current Administrations to explain their views on the Federalism executive orders.

I want to welcome five State and local elected officials who represent key organizations of State and local officials. States governments will be ably represented today by Utah Governor Michael O. Leavitt who serves on the Executive Committee of the National Governors' Association (NGA), and North Carolina State Representative Daniel T. Blue, Jr. who is the new President of the National Conference of States Legislatures (NCSL).

The local government community will be well represented today by Philadelphia Mayor Edward Rendell who is representing the U.S. Conference of Mayors (USCM), Philadelphia Councilman Brian J. O'Neill who is President of the National League of Cities (NLC), and Wake County, North Carolina Commissioner Betty Lou Ward who is the new President of the National Association of Counties (NACO).

I also want to welcome our current and former Administration officials. Michael J. Horowitz, currently a Senior Fellow at the Hudson Institute, served as Chairman of the Domestic Policy Council Working Group on Federalism when he was General Counsel of the Office of Management and Budget during the Reagan Administration. Eugene Hickok, currently Secretary of Education of the Commonwealth of Pennsylvania, is here to speak as former Special Assistant, Office of Legal Counsel, U.S. Department of Justice during the Reagan Administration.

The Clinton Administration is represented by G. Edward DeSeve, who is Acting Deputy Director for Management at OMB. A former OMB official whose office falls within the line of authority under Mr. DeSeve is widely reported to have been the chief author of the Clinton executive order.

Finally, Vermont's Lieutenant Governor Douglas Racine and Councilman Mark Schwartz from Oklahoma City will also testify.

On May 14, 1998, President Clinton issued E.O. 13083 which revoked two earlier Federalism executive orders -- President Reagan's E.O. 12612 of 1987 and President Clinton's E.O. 12875 of 1993. E.O. 12612 provided many protections for State and local governments and reflected great deference to State and local governments. President Reagan, a former Governor, consistently recognized the competence of State and local governments and their readiness to assume more responsibility.

For example, prior to his E.O. 12612, President Reagan returned responsibility to State and local governments in his ten "block grant" programs. In his 1982 State of the Union Address, he announced a Federalism Initiative involving a grand sorting out of responsibilities between the federal government and State and local governments. Later in 1982, he issued E.O. 12372, which required federal agencies to "accommodate State and local elected officials' concerns" with proposed federal financial assistance and direct federal development or explain why not. That executive order, and E.O. 12612, issued in 1987, set in place operating principles and a required discipline for the federal agencies to follow for all decision-making affecting State and local governments.

When I discovered President Clinton's executive order, I wrote President Clinton that "I could not understand how [he], as a former Governor, could willingly abandon the protections accorded the states since 1987 from unwarranted federal regulatory burdens." I explained that, prior to his new order, there had been "important constraints on federal regulatory power by requiring a minimum of federal intrusion and substantial deference to state governance." I wrote, "With E.O. 13083, you have swept away these limitations on the power of the federal government." The bottom line is that the new order would wreak havoc on the balance of power envisioned by the Constitution between the States and the federal government. I simply asked "why."

I asked why the President stripped the most basic protection accorded the States -- the preparation of a Federalism Assessment for all regulatory and legislative proposals, including the requirement for an analysis of "the extent to which the policy imposes additional costs or burdens on the states, including the likely source of funding for the states and the ability of the states to fulfill the purposes of the policy."

I also asked why the President openly encouraged federal agencies to intrude in State affairs, which could subject the States to unprecedented federal regulatory intervention. President Clinton's order revokes President Reagan order's preemption provisions that directed agencies to "preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with exercise of Federal authority under the Federal statute" (emphasis added). Also, under President Reagan's executive order, any regulatory preemption of State law was restricted to the minimum level necessary. That protection no longer exists.

Since that time, I have also asked for all relevant documents from the Office of Management and Budget relating to the development, preparation, and issuance of the executive order.

On July 1st, Counsel to the President Charles F.C. Ruff replied for the President. He stated that "[t]he primary purpose in issuing the Order was to bring the previous orders up to date." According to Mr. Ruff, the Unfunded Mandates Reform Act (UMRA) of 1995 made clear that a federalism assessment was necessary only when a regulation may result in expenditures by State, local, and tribal governments in the aggregate of $100,000,000 or more. President Reagan's order set no threshold for a federalism assessment, and a $100 million threshold would exclude most regulations that affect State and local governments.

On June 10th, my Subcommittee called NGA to ascertain NGA's views of the new executive order. Shockingly, NGA's Executive Director Raymond Scheppach was totally unaware of the order. Apparently, the Clinton White House had neither consulted with any of the seven principal State and local government organizations (the Big 7) prior to issuance of the new order nor notified them about it after its issuance.

We understand that, after our call to NGA, each of the Big 7 organizations complained to the Clinton White House about the failure to consult with them, as well as about the substance of the new order. As a consequence, the White House Counsel informed us by telephone on July 15th that the Administration planned to issue a second executive order delaying the effective date.

On July 17th, leadership of the Big 7 -- NGA Chairman Ohio Governor George V. Voinovich, the former NCSL President, NLC President Brian O'Neill (who is with us today), the former NACO President, the President of the USCM, the President of the International City/County Management Association (ICMA), and the Chairman of the Council of State Governments (CSG) -- wrote the President requesting that the new order be withdrawn, saying, "we feel that Executive Order 13083 so seriously erodes federalism that we must request its withdrawal," and they requested its withdrawal "as quickly as possible."

Today, we plan to explore with the President's representative several questions which the American people deserve to have answered:

- Why was there was no prior consultation with State and local elected officials and the Big 7 organizations that represent them?
- Why was there no notice after issuance to State and local elected officials and the Big 7?
- Why was the order issued in the first place?
- Will the President act to restore the protections afforded by the Reagan and earlier Clinton executive orders for State and local governments before the November elections?

The stealth issuance of the Clinton executive order and its assertion of federal authority over the State and local governments makes clear that we must always be alert to ensure the proper balance of power between the federal government and State and local governments. As James Madison wrote in Federalist No. 45, "The powers delegated . . . to the Federal government are defined and limited. Those which are to remain in the State governments are numerous and indefinite."

Mr. MCINTOSH. With that, let me turn to the ranking member, Mr. Tierney, and ask him, do you have any opening statement?

Mr. TIERNEY. I do, Mr. Chairman, thank you.

Good morning, gentlemen.

Mr. Chairman, I welcome the opportunity to discuss the balance between Federal, State and local governments. I believe that the States are often best suited to find innovative and targeted solutions to society's problems. Nevertheless, the Federal Government also plays an important role—and I'm sorry, Ms. Ward, I looked up and said good morning, gentlemen. I wasn't looking that far along the panel. Good morning to you.

Pollution travels across State lines. So do many of our goods and services. The Federal Government should protect all citizens from abusive behavior that crosses State borders. Furthermore the Federal Government should ensure that Americans in every State have a safe work environment, access to good education and access to adequate medical care.

I support a discussion of federalism, but I'm also concerned about some of the misleading criticisms that have been lodged. People that don't support the President's domestic agenda claim that the order totally violates the Constitution. To the contrary, I think that the administration's delay of 90 days to review this program and its seemingly open-mindedness on this hopefully addresses that kind of contention. And I think that we might, as we have been in the Kyoto Protocol approaches in hearings, Mr. Chairman, be a little bit out in front of ourselves where the final Executive order is not before us today and not really a subject for consideration.

I think that a lot of our groups that you cited in your opening remarks have, in fact, drawn attention to the order to some of the concerns, that the administration at least seems to be responsive to those concerns and open to the idea of discussing them and taking information on them and perhaps even revising the order, so that at this point in time, at least, it seems that we're having hearings on an order that has not yet been implemented and may not, at least in its present form, even be implemented eventually.

It's a little bit contradictory, too, Mr. Chairman, when some attack the administration for issuing the Executive order, while at the same time supporting much of the Republican's leadership in Congress that would trample on States' rights. The Contract with America, for instance, the Republican leadership's agenda in the 104th Congress, included a number of provisions that would have preempted State law. One provision known as the takings legislation would have put substantial limits on the ability of State and local governments to enforce land use restrictions that benefit their communities.

Another provision would preempt State product liability law by putting a cap on punitive damages. This would have been a boom to big business, like the tobacco industry that made huge profits by placing American lives in danger. And now there's speculation that manufacturers of inherently dangerous handguns, including Saturday night specials, would seek to hide behind restrictive proposals.

Others have tried to play both sides of the federalism issue. For instance, in a Dear Colleague letter criticizing the Executive order, one Representative claimed that the order threatens State gun

laws, yet that same Representative is also a cosponsor of Federal legislation that would exempt certain individuals from State laws that prohibit concealed weapons. It's a little bit astounding, that kind of contradiction.

Apparently, Mr. Chairman, if the Republican Congress tries to impose its will on all the States, that's OK. On the other hand, if the Democratic President wants to make proposals, we cry foul.

It's my suggestion, Mr. Chairman, that this constitutional principle is best discussed independent of a particular legislative agenda and cooperatively. We should strive to delineate either a common understanding of the principle or some distinct and understandable alternatives that can be openly debated. Nevertheless, absent the majority's endless campaign to infer that the administration is continually involved in some conspiracy, first on the Kyoto Protocol and now on States' rights, there is no significant evidence to that position.

In fact, the evidence is that the proposed order is broad, includes much of former President Reagan's order, and has been extended for our review and consideration for 90 days so the administration officials can further discuss any potential further clarification with State and local officials. This subcommittee would be improved by emulating that spirit of cooperation instead of confrontation on the issue. And I hope our hearing and our testimony is in line with that as to how the hearing might be improved and delineated in that respect.

And I'd like to yield for a couple of comments, if I might, Mr. Chairman, to my colleague Mr. Kucinich.

Mr. MCINTOSH. Certainly.

Mr. Kucinich.

Mr. KUCINICH. Thank you, Mr. Chairman.

We're all familiar with the Executive order issued by President Clinton, entitled "Federalism," which directs Federal agents regarding the balance of power between Federal, State and local governments. And I've served as a city councilman, as a mayor and as a State senator and now as a Member of Congress. I think I understand the complex relationships which exist between the Federal Government and various other governmental levels.

I know that the Clinton administration has established a process for State consultations, streamlined the waiver process, protected against unfunded mandates. When the President signed the Unfunded Mandate Relief Act of 1995, I think he was making a very strong statement about the requirements for analysis of costs and burdens on State and local government; also with the welfare bill in 1996, provided for greater flexibility for States; and his action in opposing legislation like the takings legislation and other bills which expand Federal law to areas traditionally reserved to States have, I think, been commendable.

Still there remains some Federal problems in the area of preemption that have been discussed, and that's why I think it's important that Mr. McIntosh has called this hearing. We're going to see, I think, in the next Congress a battle fought out over utility dereg and how that might affect on the ability of municipalities to have their own municipal electric system. We're going to see a battle fought out over WTO implementing legislation, as to whether or

not States and localities can be forced to back down from passing laws that they felt were important in the face of possible prosecution by the Justice Department. We're going to see a continued battle fought out over the attempts of the Federal Government to force States to have nuclear waste dumps.

Now, these are all huge issues, and so this panel that's here, I'm certain, will give us some information reflecting their concerns. And I think basically, based on Mr. Tierney's testimony, we can see that the results are mixed. It all depends on what you stand for. If you'd rather have the Federal Government on your side on an issue that you happen to propose, then you try to use the power of the Federal Government to support your position. If you don't like what the Federal Government's promoting, then you try to use the power of the State to stop it. Therein, ladies and gentlemen, is written the history of the United States of America.

So it's going to be particularly interesting to see how this latest dialog plays out, because there is a dynamic tension built into our Constitution. The 10th amendment is written specifically to try to make sure that the rights of States are not trampled on, at the same time we are called the United States of America, and we presume that we have some kind of overriding national interest at stake at times. And in this debate, we'll see who's oxen is carrying the weight and who's ox may be gored along the way.

So it's a pleasure to see all of you here, and I look forward to this discussion. And, Mr. Chairman, thank you.

Mr. MCINTOSH. Thank you, Mr. Kucinich.

Let me address two points, just technical points, in Mr. Tierney's statement. One, having worked at the Justice Department when President Reagan's Executive order was being considered, I think it's important to note that that Executive order and the President's Executive order don't address the scope of authority that Congress has under the Constitution to write legislation. What they say is if Congress has failed to act and not clearly mandated that there be a preemption of State law, then the executive branch will defer to the States and not add additional requirements and seek through its policies to additionally preempt the States.

I think that's important, because it explains some of the differences that my colleagues raised on why people could come up with apparently contradictory positions. In legislation, they may argue that a certain bill is necessary up here in Congress, but still want to have the protection and the executive not go further than what Congress may do as we work our will on those legislative principles.

The second point that I think is important to make in all of this is that, and I made it in my opening remarks, we may—and today I would like to explore the question—we may need to not wait for the President to reissue an Executive order. Congress itself may need to today take up this issue of how much deference the executive branch needs to make and codify what would previously have been an Executive order into law, thereby requiring the agencies to do it. That would have the advantage of preventing it from being changed in the dead of night and by some future President or this President.

That is a serious question that I want to entertain with all of the witnesses today. And, therefore, we needn't wait until the President acts in issuing his new Executive order.

Let me turn now to our colleagues. We're going to proceed in the order in which they came in. So I will recognize for a brief opening statement Mr. Scarborough.

Mr. SCARBOROUGH. I thank you, Mr. Chairman, for holding this important hearing on this mournful day, but I certainly appreciate it, and I know you had to move ahead with it.

I wanted to comment briefly on a few things said not only by yourself, but by the ranking member, Mr. Tierney, who is a good friend of mine, and who I enjoy listening to because he's so eloquent, whether he's right or not. But he brought in—he talked about gun control. He talked about tort reform. He talked about takings and just about everything else to show that he said there was no great conspiracy, but appeared to suggest that there was a Republican conspiracy that somehow we were going to take this issue and politicize it.

Yet, if you look at the quotes that have been coming out, not only of the Washington Post, New York Times, legal experts, as well as this own White House, you see that the White House made a terrible mistake, made a terrible legal miscalculation, also made a terrible political miscalculation. White House agents quoted in the Post saying, we screwed up. David Broder in the opening line of his statement on this story said it was an explosion waiting to happen. The Los Angeles Times wrote in their headline that the Clinton White House plans Executive order blitz to circumvent the will of Congress, and there we have a balance of power conflict as well as a federalism conflict. A NYU law professor was quoted in the New York Times as saying that the President was constantly breaking established boundaries of executive power, and, of course, the arrogance of Paul Begala didn't help when he said—he was quoted in just about every major publication—quote, a stroke of a pen, you make new law, pretty cool.

As far as the White House being open-minded, as the David Broder article in the Washington Post suggested, that the White House only became open-minded on this issue after State and local officials raised holy hell over an issue being brought up regarding federalism, where they were not advised whatsoever. They believed, and I believe, and many people on this panel, including—maybe not on this panel, but many Democrats in this Congress believe that the President's Executive order reverses 220 years of federalism policy that was created by our Founders and reaffirmed by President Reagan 15 years ago.

Regrettably it establishes radical policymaking guidelines that undermine the foundation of federalism by legitimizing unnecessary and unconstitutional Federal bureaucratic powers and action. Neither the Constitution, the Bill of Rights, nor the Federalist Papers even remotely justify the Executive order or its expansion of Federal regulatory activity. In Thomas Jefferson's words, the States are "the most competent administrators for our domestic concerns, and the surest bulwarks against anti-republican tendencies." The constitutional relationship among the sovereign gov-

ernments, State and national, is formalized in and protected by the 10th amendment to the Constitution.

Jefferson went on to state that, the States are the true bearers of our liberty in this country and the wisest conservative power ever contrived by man. The principle of federalism is the radical idea of the Constitution and of our government and is the distinctive and defining feature of the Federal Constitution.

Citing the 10th amendment, that all powers not delegated to the United States by the Constitution or prohibited to the States are reserved to the States and the people, Jefferson stated, the 10th amendment is the foundation of the Constitution. To take a single step beyond the boundaries thus specifically drawn on the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition.

And we believe, I think, accurately, historically, legally, that's exactly what this Executive order does. It sets an extremely poor dangerous precedent that does violence not only to the Constitution, the 10th amendment, the writings of Jefferson, but also to 222 years of federalism policy.

And therefore, Mr. Chairman, I thank you for holding a hearing on this very important issue. And I certainly look forward to us resolving this matter before August 15th when the White House has the ability to put this into effect. And with that I yield back the balance of my time.

Mr. MCINTOSH. Thank you, Mr. Scarborough.

[The prepared statement of Hon. Joe Scarborough follows:]

Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs Hearing on "State and Local Governments"
Congressman Joe Scarborough
July 28, 1998

Executive Order 13083, signed by President Clinton on May 14, is a serious affront to the federalist framework established in the U.S. Constitution. It could potentially lead to the abuse of power by individual agencies as they attempt to interpret it. The Order establishes broad, ambiguous and unconstitutional tests to justify Washington bureaucratic intervention in matters that typically are left to states and local communities.

Executive Order 13083 reverses 222 years of federalism policy created by our Founders and reaffirmed by President Reagan 15 years ago. Regrettably, Executive Order 13083 establishes radical policymaking guidelines that undermine the foundations of federalism by legitimizing unnecessary and unconstitutional federal bureaucratic powers and actions. Neither the Constitution, the Bill of Rights, nor the Federalist Papers even remotely justify the Executive Order 13083 or its expansion of federal regulatory activity.

In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against anitrepublican tendencies." The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.
The 10th Amendment clearly and unequivocally states that aside from those specifically enumerated powers that justify federal action in Article I, the federal government cannot exercise authority over the states, local communities, or individuals. Regrettably, President Clinton's distorted version of American federalism makes Americans, their communities and their states unconstitutionally subservient to the federal government.

Jefferson stated "The states are the true barriers of our liberty in this country and the wisest conservative power ever contrived by man. ... The principle of federalism is the radical idea of the constitution of our government and the distinctive and defining feature of the federal Constitution." Citing the 10th Amendment that "all powers not delegated to the U.S. by the Constitution, not prohibited to it by the States, are reserved to the states or to the people", Jefferson stated "the 10th

Amendment is the foundation of the Constitution...to take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition."

According to Federalist Paper No. 32, the State governments clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation of state sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the union; where it granted in one instance an authority to the union, and in another prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. Executive Order 13083, particularly Section 2, represents a radical departure from the constitutional principles of limited national government upon which our nation was founded.

According to Attorney General Edwin Meese, Clinton's Executive Order 13083 represents a seriously warped view of what Federalism requires. This order instructs federal bureaucrats to meddle whenever they deem that they have more "expertise" and resources to regulate the matter than the states, and when "states would be reluctant to impose necessary regulations."

President Clinton's behavior, however, raises flags both about his idea of the Presidency and his politics. Two years ago, a federal appeals court unanimously struck down, as "quite far-reaching" an order by Mr. Clinton barring contracts from federal companies if they hired permanent replacements for striking workers, an obvious gesture to the grandees of the AFL-CIO. Pointedly identifying the separation-of-powers issue, the court said "We leave to the Congress the question of whether a protective function is appropriate.."

We have a Presidency that has attempted to build between itself and the other branches a kind of non-accountability. It is time for this timid Congress, whose duty it is to properly frame political issues for the public, to do what the Founding Fathers intended and start to act as a check and balance on what the *Wall Street Journal* called the President's "assertion of royal prerogatives." We must put an end to what the *Los Angeles Times* has defined as "President Clinton's blitz of executive orders during the next few weeks, part of the White House strategy to make progress on Clinton's domestic agenda with or without Congressional help".

The guidelines the White House believe justify federal regulatory action are set out under "Federalism Policymaking Criteria" in Section 3. The more ambiguous and open–ended of the criteria "justifying" federal action include:

-"When decentralization increases the costs of government thus imposing additional burdens on the taxpayer."

-"When States would be reluctant to impose necessary regulations because of fears the regulated business activity will relocate to other states."

-"When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities."

-"When the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations."

On Tuesday, July 14, 1998, two months to the day after Clinton signed the order, the Washington representatives of the "Big Seven" organizations of state and local government had a stormy meeting with Mickey Ibarra, the chief of White House intergovernmental relations, and then drafted a letter to Clinton demanding that he withdraw the executive order. The reason: No state or local government official was consulted in the drafting of the executive order, a directive the Big Seven officials said in the draft "calls into question fundamental principles of federalism." The draft letter said "we are concerned that all references to the Tenth Amendment, identification of new costs or burdens, preemption and reduction of unfunded mandates are revoked...We believe the changes in the order and the manner in which they were made raise serious questions" about the administration's commitment to partnership with state and local governments.

Executive Order 13083 represents a dangerous and radical departure from the Founders of our Republic. Clearly, aside from those specifically enumerated powers that justify federal action in Article I of the Constitution, the Founders did not intend that the federal government should exercise authority over the states and local communities that makes individuals more, not less, subservient to the federal government. It is imperative that we stay true to the meaning of the Constitution, the 10th Amendment, and the ideas of Madison, Hamilton, Jefferson and Reagan.

My office has been flooded with calls and letters from constituents concerned with the intent of Executive Order 13083. In response, I have introduced H.R. 4232, that declares Executive Order 13083 is of no force or effect. I also plan to offer an amendment to H.R. 4194 that would limit the use of funds to carry out this flawed

executive order. In the present climate, it is vitally important for Americans to understand that the Constitution is incapable of enforcing itself. That task ultimately rests with the citizenry. If the American people demand adherence to the Constitution, government officials, including President Clinton, will respect the limitations that were wisely placed on their power.

Mr. MCINTOSH. Let me turn now to Mr. Sanders for an opening statement.

Mr. SANDERS. Thank you very much, Mr. Chairman. Before I begin, I wonder if I could ask a personal favor of you of sorts. In the audience and with us today is the Lieutenant Governor of the State of Vermont, Douglas Racine. I'm looking at your list of panels, and you have Mr. Racine and Mark Schwartz, who is a councilman from Oklahoma City, in the third panel. Would it be possible to at least move the third panel to the second panel so we can hear from elected officials before we hear from legal experts? Would that be possible?

I mean, I think what the goal of today is wanting to hear from people who are elected who represent folks back home. And with all due respect to our friends from the Justice Department and legal officials, it might be more appropriate.

Mr. MCINTOSH. You want to collapse it down to two panels? You know, I would be inclined to do that, because I think we need to move expeditiously in order to be able to attend the ceremonies this afternoon.

Mr. SANDERS. I think that's a consideration as well.

Mr. MCINTOSH. So, yes, I think that's a good idea, Mr. Sanders.

Mr. SANDERS. Thank you, Mr. Chairman.

Mr. Chairman, let me just, as an Independent, perhaps say a few words. My experience has been that—I speak also as the former mayor of the largest city in the State of Vermont, the city of Burlington—is that my experience has been both over the years that there seems to be—very often ideology and States rights do not get in the way when somebody has an issue that they want to pursue. And I've noticed that under the Reagan administration, there were great defenders of local government and State rights.

When they thought the Federal Government should do something, they went over—the local and State government, Bush administration, the Clinton administration. If people want to do something, they could always come up with a justification of doing it, whether they are liberal Democrats or conservative Republicans. So it seems to be this is not a Democratic or a Republican issue, liberal or conservative.

I would just point out, Mr. Chairman, on two issues, you know, we talk a lot about States rights. And I believe in States rights. I happen to believe that the folks back home often can implement programs and have a better sense of what's going on than we here in Washington. But I would point out just two areas that we are dealing with right today, when ideologically folks who often talk about local government and States rights, my goodness, in these instances, the Federal Government knows best.

In the State of Vermont, we have arguably the best protections for consumers in terms of health care. This is something our legislature and our Governor has felt important. In the State of Vermont, citizens have the right to go to an emergency room and have the managed care plan pay for resulting care if a person reasonably believes he or she is experiencing an emergency. That's what our legislature felt was appropriate. In the State of the Vermont, our people have the right to receive health care from an out-of-network provider when the health plan's network of providers is inadequate.

In our State of Vermont, we have the right of a person with a serious illness or disability to use a specialist as a primary care provider, et cetera.

Generally speaking, I think it is believed that in the State of Vermont, consumers have very, very strong rights in terms of HMOs and managed care. Well, you know, just last week, all of these rights developed by the people of the State of Vermont, our legislature and our Governor, well they're gone, because virtually every Republican voted for an HMO bill which would override the rights of the people of the State of Vermont. What happened to States rights on that issue? People of Vermont were not listened to.

Another issue that Mr. Kucinich and I have worked on very hard, and we've had Republican support on this issue, deals with the World Trade Organization, big issue. And actually I think, Dennis, our amendment is coming up tomorrow. And we would love to have your support on this, Mr. Chairman, and we may very well.

And here is an issue. And it's crystallized in what's going on in Massachusetts and, in fact, will be going on in Vermont, I am told, next legislative session. Here's the story. The people of Massachusetts in their wisdom believed that their State should not allow contracts to go to companies that are doing business with the military and brutal dictatorship in Burma, OK? You may agree with that, you may disagree with that, but that is what the people of Massachusetts felt. And this is absolutely consistent with the role that many States and cities, including the city of Burlington, played in trying to overturn apartheid in South Africa. What people said, we want to put as much pressure as we can on military dictatorships, on racist regimes, and, therefore, we're going to discourage companies investing in our State if they do business in the authoritarian, racist or dictatorial societies.

I think States have the right to do that. But you know what? Under the WTO, the World Trade Organization, this is a violation of, quote/unquote, free trade. My goodness, imagine the people of Massachusetts standing up and saying, we want to stand with the democratically elected Government of Burma, and they right now are being pressured by the Federal Government to not go forward in their efforts.

There was recently a case in Maryland, where in Maryland they wanted to deal with the dictatorship in Nigeria, the same issue. People from the State Department were coming down, and saying, gee, you're violating Federal law, that's a Federal decision. States and local government should not have the right to do that, I think.

And the truth is, this is really shocking, if you carry this out to the extreme degree, it would suggest that if Adolf Hitler became the leader of a country again, local and State government could not use its powers to try to stop another Hitler, because it would be in violation of free trade. Why couldn't Hitler's government invest in Vermont or in Massachusetts or anyplace else? How dare local and State governments stand up for States rights?

Well, we will see the vote tomorrow as to how many folks will be supporting the Kucinich-Sanders amendment which says that local and State governments should have the right to make those very moral decisions.

So, Mr. Chairman, I guess I would simply conclude that my experience has been that very often is the issue that dictates Federal policy, and suddenly when people are for the issue, then we hear arguments like it's important to have unanimity or one voice all over the country. We don't want all of these confusing rules and regulations. That comes from conservative Republicans, I should tell you, as well.

So I'm glad you called the hearing. I think we're discussing important issues, and I yield back the balance of my time.

Mr. MCINTOSH. Thank you, Mr. Sanders, you made your point very persuasively on both political parties.

I want to focus in on the particular question here, which is should we try to have protections against that same phenomena which we may be guilty of here up on the Hill occurring in the executive branch, sort of the—out of the light of day? And I'm troubled by that. Thank you, Mr. Sanders.

Let me turn now to Mr. Sessions for a brief opening statement.

Mr. SESSIONS. Thank you, Mr. Chairman. I'm not going to consume much time. I will make an observation that I agree with Mr. Kucinich which he talked about that what this is all about is the use of power. I will tell you that I disagree with the conclusions that he, I believe, will end up drawing as to whether it was correct with what the President has done in his Executive order, because I deeply disagree with that.

But I will tell you that I believe that our hearing today should once again be focused upon how decisions are made and what those decisions are. And I believe that one of the most important things that will come out today is that I believe that the White House and this President, this administration, unilaterally defies common sense and do not care what people think, no prior consultation, and the light of day very often is not invoked in what they do. They do things, as a matter of fact, in the dead of night or when the President is out of the country, and I'm deeply sorry for that.

And, Mr. Chairman, I appreciate you bringing this to the light of day so that we have an opportunity to hear from people who, I believe, should have a greater use of power and freedom on the local basis, and things that are back home. That's what 1994 was all about, was how we balanced the power and share it with other people.

Thank you.

Mr. MCINTOSH. Thank you, Mr. Sessions.

Let me now turn to Mr. Barr, who also, along with Mr. Scarborough, has a legislative proposal on this issue.

Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. I would ask unanimous consent that my full remarks be included in the record.

Mr. MCINTOSH. Without objection.

Mr. BARR. Thank you.

Mr. Chairman, I think these are very, very important hearings. They're both important theoretically and philosophically, as well as from a practical standpoint. Rarely do we see an Executive order such as this one that portends such very serious, practical, real-life problems at the same time as it is frightening in its philosophical scope.

If one just peruses very quickly the language of Executive Order 13083, one sees language that provides the justification for unilateral Federal action into virtually any area of State or local government that any particular Federal agency or department wishes to go into. The bounds of the areas in which the Federal, any Federal, agency or department under this Executive order, basing its action on this Executive order, could go are absolutely unlimited.

While purporting in its prefatory language to be consistent with principals of federalism, it is not. It is an Executive order that bears no relationship whatsoever to the Constitution. It turns the 10th amendment and concepts of separation of powers on their head. The scope of this Executive order is frightening.

I commend the chairman for both bringing this matter to the attention of the officials here today and others. The President apparently was attempting, both through signing this while he was out of the country, as well as not publicizing it in any way, shape or form, other than what might be required by printing it in the Federal Register—was attempting to sneak this through, and I appreciate it being brought to the light of day by a number of people, including our colleague Mac Collins, who is with us here today, including the chairman, including Mr. Scarborough, Mr. Sessions and others.

As the chairman indicated, I do have a legislative remedy which will rescind Executive Order 13083 and place in its stead legally Executive Order 12612, which is a true federalism Executive order, consistent with both the terms and the philosophy underlying the Constitution of this great land.

And I urge all of my colleagues to sign on to H.R. 4196 and urge the witnesses here today on all three panels or two panels, however we break it up, to urge their Members of Congress to support this legislation.

One does not have to be somebody possessed of a very fertile imagination to recognize the various areas into which the Federal Government could go based on the justification afforded by this Executive order. We're already witnessing, for example, Mr. Chairman, several examples of what really must be termed a systemic effort to subvert the Constitution and the separation of powers doctrine by this administration. This Executive order is just the broadest and boldest example.

We also know, Mr. Chairman, as you're well aware, of efforts by the FBI to levy a gun tax, without any congressional authority whatsoever. We also know of efforts by the FBI currently under way to begin a registry of lawful gun owners in direct contravention of at least two Federal statutes. We had a hearing about a week and a half ago with regard to an Executive order that amended an Executive order by President Nixon which proposes and mandates affirmative action for homosexuals and others of various, quote, undefined sexual orientation.

We also know, Mr. Chairman, of efforts through rules and regulations, which is the other side of this systematic subversion of the Constitution, perpetrated by this administration, rules and regulations that would, in effect, force a national identification card on every citizen of this country, as well as a national medical identification card or a medical identifier.

So, Mr. Chairman, you've highlighted today, not only a very serious problem with this particular Executive order, but also in doing so, you have highlighted a systematic effort that we must get a handle on right now before this moves any further. As our colleague, Mr. Sanders, has indicated, this is not simply a Democrat or a Republican problem, although, as I see it, with most problems of the sort that we're tackling here today, this particular administration takes it to—takes a quantum leap and takes it to a level not contemplated by any prior administration.

And in this particular instance, in setting forward the theoretical and philosophical blueprint for concepts of federalism, there is no prior action by any administration of the scope contemplated by this Executive Order 13083. It is something that I am and I'm sure a lot of our colleagues are hearing about from citizens and elected officials at State and local government levels. I hope that this hearing today is not the final step, but merely the first step in a concerted effort by the Congress as representatives of the people of this country to get a handle on the Constitution to once again raise its terms to the forefront.

And I commend the chairman very much for holding this hearing today and look forward to it and future hearings on these most important topics.

Mr. MCINTOSH. Thank you, Mr. Barr.

[The prepared statement of Hon. Bob Barr follows:]

Mr. Chairman, I want to commend you for holding today's hearing on the important constitutional concept of federalism, including a focus on President Clinton's Executive Order 13083; an Executive Order clearly turns the principle of federalism on its head.

This Executive Order completely undercuts the concept of federalism which forms the basis of our entire system of government. These actions reverse much of President Ronald Reagan's sound policy on federalism. This Executive Order deeply undermines, if not obliterates, the Tenth Amendment to the United States Constitution.

13083 establishes policy guidelines that will undermine the foundations of federalism by legitimizing unnecessary and unconstitutional national regulatory powers and action.

In response to the President's action, I have introduced the "State Sovereignty Act of 1998," H.R. 4196. H.R. 4196 directs the head of each federal department and agency that every activity be carried out in accordance with President Reagan's Executive Order 12612, not President Clinton's Executive Order 13083. In addition, my bill states that President Clinton's Executive Order will have no force or effect.

Mr. Chairman, I look forward to working with you on moving this bill or other legislation to stop this federal power grab by the Clinton Administration.

As most of us are aware, in 1987, President Ronald Reagan issued Executive Order 12612, reaffirming the principles of federalism and the powers reserved to states and individuals as outlined in the Tenth Amendment.

Ronald Reagan's now defunct Executive Order detailed in great length, that the federal government was given few, limited, and enumerated powers.

The Framers granted in the Constitution specific federal powers, and outlined when the government legitimately may exercise its authority. They did not intend the federal government to exercise authority over the states, local communities, and the people except in very limited and clearly delineated circumstances, such as a national currency, or customs matters.

President Clinton's Executive Order explicitly overturns Reagan's Order. In addition, the Executive Order lists several all-encompassing "exceptions" under which the powers of the states and the people could be abrogated by any federal agency, ignoring and overriding the Tenth Amendment.

Some individuals, I presume we will hear from today, will argue this Executive Order constitutes nothing more than the President's opinion and does not carry the force of law. These individuals are wrong.

A July 3rd Wall Street Journal article entitled "King Clinton" states, "Mr. Clinton's aides have let it be know that he intends to pursue an 'executive order strategy' to put in place policies that the GOP Congress refuses to do legislatively. This was once known as royal decree." Now, it's simply business as usual for an Administration seeking desperately to enact an agenda and leave a legacy it cannot, or will not try to, implement lawfully and legitimately.

I quote from a New York Times article which appeared two days later, noting that with some of President Clinton's "closest advisers deeply pessimistic about the chances of getting major legislation passed during the rest of the year, Mr. Clinton plans to issue a series of executive orders to demonstrate that he can still be effective."

Clinton political advisor Paul Begula is quoted in the same article stating "stroke of the pen -- Law of the Land, Kind of Cool." Kinda Cool. That's what we have. If this were simply the humor of an out-of-power pundit, we might giggle at the play on words. But it isn't a joke; and these aren't the musing of a mere citizen. These words reflect the frightening agenda of a desperate Administration.

Mr. Begula is wrong. The Constitution sets out the principles of our democratic system of government not a presidential advisor. The Framers established a principle of checks and balances; not one of dictatorship

Mr. Chairman, the President's recent actions raise a bright red flag signaling just what he thinks of the office of the President. I have heard from hundreds of constituents from around the country about their outrage over this Executive Order.

It is time for this Congress to focus the political issues for the public. Today we take the first step to bring back the Framers' principles of checks and balances.

This is not a theoretical debate. The consequences of our failure to act will be real, immediate, and continuing; from taxes levied by federal agencies with no congressional authorization, to international agreements being forced on state and local governments without any advise and consent by the Senate.

The Clinton Administration believes power should be given to, taken by, and retained in Washington. They believe in a top-down governing structure -- where we as Republicans believe in a bottom-up structure. Power comes from the individual not the Federal Government.

President Clinton issued an Executive Order when he first was elected to the White House in 1993. At that time, President Clinton embraced the principles outlined by President Reagan. Today I hope the witnesses will address:

- Why the change now in the last few months of this Administration?

- **Why was this Executive Order released when the President was in England?**

- **Why were state and local officials not contacted about the Executive Order prior to its release?**

- **What cost will this Executive Order have on the budgets of local governments when steps are taken to preempt municipal authority?**

Mr. Chairman we are going to hear from a Governor, a mayor, a state representative, a county commissioner, and a city councilman -- clearly there is concern about this Executive Order at all levels government.

Congress must stop these actions by responding aggressively and quickly. Blocking this unconstitutional Executive Order on federalism must be the place to start; and now.

Congress cannot issue an Executive Order; but it does have the ability to pass a law that has the effect to stop the preempting of historic rights and authority of this nation's state and local governments.

Some say an Executive Order is no problem since it only affects the executive branch. Well, that's precisely the point; it elevates the executive branch to unconstitutional heights. Others say, well, it's only an Executive Order and doesn't have the force of law. The problem is, it will have the force of law for all practical purposes, unless we stop it. If we don't, we can't later complain.

Finally, Mr. Chairman, I would direct the attention of those who downplay the importance of Executive Order 13083 as a solitary action, to a series of other actions taken by the Administration -- executive orders and regulations -- that clearly illustrate a systematic effort to accrue more and more power to the federal government in utter disregard for checks and balances of a government of separate branches of power: a national ID card by rules; a medical ID card by rules; affirmative action for aberrant "sexual orientation" by Executive Order... What's next, the Kyoto Protocol by Presidential Proclamation?

Mr. MCINTOSH. Let me turn now to Mr. Snowbarger. Do you have an opening statement you would like to share with me?

Mr. SNOWBARGER. Mr. Chairman, real briefly. I apologize for coming in late, but I appreciate the chairman holding these hearings.

Having come out of the State Legislature of Kansas and having been there for 12 years, we consistently found areas where we felt like the Federal Government was intruding and imposing various requirements on it. It was bad enough when Congress was doing it; I don't think we like the executive branch doing it any better. So I look forward to hearing from the witnesses today and again appreciate you calling the hearing.

Mr. MCINTOSH. Thank you, Mr. Snowbarger.

And, Mr. Collins, your statement will be put in the record, and welcome to the committee.

Let us turn now to our first panel of order. Before we begin, the subcommittee has seen a great public interest in the subject of today's hearing, federalism, and many interested parties have asked to submit comments for the record. I would ask unanimous consent that the record remain open for 3 days to allow the subcommittee to receive and enter into the record comments on this subject.

Seeing no objection, so ordered.

Let me welcome our panel introduced to the audience in my opening statement. It is the policy of Chairman Burton of the full committee, he asks each of us on the subcommittees to implement this for him, that we swear in all of our witnesses. So don't think it's something that is personal to you. But if you would stand and raise your hands, and I will implement the oath.

[Witnesses sworn.]

Mr. MCINTOSH. Thank you. Let the record show that the each of the witnesses answered in the affirmative.

Let me hear now from our first witness, the Governor of Utah, Mr. Michael Leavitt, who told me earlier that he traveled here specifically for the purpose of testifying today.

I understand that you have to head over to the Senate, and so please share with us your testimony. Thank you, Governor.

STATEMENTS OF MICHAEL O. LEAVITT, GOVERNOR, STATE OF UTAH, MEMBER OF THE EXECUTIVE COMMITTEE, NATIONAL GOVERNORS' ASSOCIATION; DANIEL T. BLUE, JR., STATE REPRESENTATIVE, STATE OF NORTH CAROLINA, PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES; EDWARD RENDELL, MAYOR, PHILADELPHIA, PA, U.S. CONFERENCE OF MAYORS; BRIAN J. O'NEILL, COUNCILMAN, PHILADELPHIA, PA, PRESIDENT, NATIONAL LEAGUE OF CITIES; AND BETTY LOU WARD, COMMISSIONER, WAKE COUNTY, PRESIDENT, NATIONAL ASSOCIATION OF COUNTIES

Governor LEAVITT. Thank you, Mr. Chairman and members of the committee. I would like to express my appreciation for the opportunity to testify on this Executive order on federalism. The States have an enormous stake on this matter, as do the local governments. I'm here to speak today, however, on behalf of 50 Governors from the National Governors' Association.

Today we discuss the President's Executive order, and while we welcome this, I want to make it clear that the point that's been made that the administration has no corner on preemption is a valid one, and one that I agree with. The Governors have a very positive working relationship with the White House; however, it's our belief that Executive Order 13083 is wrong-headed and unacceptable. It was presented to us after the fact. It was released quietly, as it has been pointed out, while the President was in England. That's the first problem: Zero consultation.

The second problem, and paramount, is the concern—concern of the States is the order itself. It represents a 180-degree turn from all previous federalism Executive orders and is inconsistent with the principles of balance on which this country was founded. Here is a major pronouncement on federalism from a sitting President that fails to even mention the 10th amendment.

This new order represents a fundamental shift in presumption. Where all previous Executive orders on federalism aimed to restrain Federal actions over States, the current version is written to justify Federal supremacy. States are not supplicants, and the government is not the landlord or the overlord. States are not special interests. States are full constitutional players, a counterbalance to the national government and a protector of the people. Given the secrecy that has surrounded this order and the complete turnabout of its language and the scope, one can only conclude that the Clinton administration deliberately set upon a course to expand the role of the Federal Government, not exactly the end of the era of big government.

I would like to argue today that the Executive Order 13083 repudiates the masterful wisdom of our Founders and is not consistent with the U.S. Constitution. The Governors seek your assistance in being able to halt that course.

Mr. Chairman, and members of the committee, I would like to ask you to keep the 10th amendment in mind as we walk through key points of all of the Federal Executive orders since 1987 and the order that has been proposed. I'll just speak about a couple of them in the interest of time.

The current order speaks of specific intent to limit the size and the scope of the national government. The proposed order makes a vague reference to a system of checks and balances.

The current order makes it clear that the Constitution created a national government of enumerated powers. The proposed order celebrates the word "supreme."

States are subject only in the existing order to limits of the Constitution and the constitutional acts of Congress. It deals with the limits of the States. That's consistent with the 10th amendment. States are subjected to the limits set forth in the proposed amendment to the Constitution or, emphasis on the word "or," limits in Federal law; again, a reversal of the presumption of the proposed order dealing with limits set in Federal law. This is completely inconsistent with the 10th amendment. It's not surprising, as I indicated, that the new order actually drops all references to the 10th amendment.

Undoubtedly the largest area of concern is the policymaking criteria. The existing federalism order deals only with constitutional

and statutory. The proposed would include matters justifying Federal action that would include things such as need, decentralized costs, inadequate State protections of rights, which is something that we can all support, but the word is—where there is not adequate, again a subjective judgment on the part of those in the bureaucracy.

Mr. Chairman, given the low threshold and the subjective nature of policy judgments, I'd like to ask someone to show me a scenario where a Federal action could not be justified under this criteria.

Let me reiterate the problem. This Executive order reverses the presumption. The burden has always fallen to the Federal Government to justify as an enumerated power any action over the States, otherwise the power belongs to the States, very clear language of the Constitution.

The policymaking criteria are the whys and the wherefores that justify Federal intervention in States' affairs. In all previous orders, intervention has been undertaken with clear and constitutional authority and if necessitated by a problem of national scope. That appears too restrictive for the current administration. The new law—the new order, rather, would empower bureaucrats and Federal agencies to determine for themselves if there's a constitutional and legal authority.

In essence, this order authorizes unelected civil servants to determine the States' needs and to set the Federal Government on a course to meet them. Where in the Constitution is the national government given justification to act on grounds that a State may be reluctant because of its fears for business relocation? Can an executive branch seriously contend that the State and local governments lack expertise and resources for domestic action when they already provide 75 percent of the funds for all domestic activities? And can you, as the legislative branch, sit by and license the administration not to take—not just to make law, but to remake the Constitution? I can't fathom a Congress allowing usurpation not just of the States, but also of legislative function.

I can't help but wonder what James Madison would say if he saw what we were dealing with. What would he say about the volumes of Federal laws prescribing in great detail how every State and city would conduct its most unique tasks? My guess is he might agree with former Governor Bruce Babbitt, who is now the Secretary of Interior, who said this about the Founders and big government a number of years ago. He said, "We've allowed their creation—a carefully layered construction of Federal, State and local responsibilities—to become scrambled into one great undifferentiated amorphous omelette by a cook in Washington."

My guess is that James Madison would agree, Mr. Chairman.

My time is up. The Senate has unanimously agreed with our position and on July 22nd, asked the administration to withdraw the order. We would ask the House to do the same.

[The prepared statement of Governor Leavitt follows:]

Good morning Mr. Chairman and members of the committee. Thank you for the opportunity to testify on the President's Executive Order on Federalism. The states have an enormous stake in this matter. I am here to speak on their behalf and that of the 50 Governors of the National Governors' Association.

The Governors have a positive working relationship with this White House. However, it is our belief that Executive Order 13083 is wrongheaded and unacceptable. It was presented to us after the fact, released quietly on May 14 while the President was in England. That is the first problem: zero consultation.

The second problem – and the paramount concern of the states – is the order itself. It represents a 180-degree turn from all previous federalism executive orders and is inconsistent with the principles of balance on which this national was founded. Here is a major pronouncement on federalism from a sitting President that fails to mention the Tenth Amendment?

This new order represents a fundamental shift in presumption. Where all previous executive orders on federalism aimed to restrain federal actions over states, the current version is written to justify federal supremacy.

States are not supplicants and the federal government the overlord. States are not special interests. States are full constitutional players – a counterbalance to the national government and a protector of the people.

Given the secrecy surrounding this order and the complete turnabout of its language and scope, one can only conclude the Clinton Administration deliberately set upon a course to expand the role of the federal government. Not exactly the end of the "era of big government."

I would argue that Executive Order 13083 repudiates the masterful wisdom of our founders and is now inconsistent with the United States Constitution. The Governors seek your assistance to halt that course.

Executive Order Language Comparisons

Mr. Chairman and members of the committee, I would ask you to keep the Tenth Amendment in mind while I walk through a comparison of the key points in all federalism executive orders since 1987 and the Clinton executive order of 1998.

Examples of Major Language Changes

Executive Order 12612 October 26, 1987	*Executive Order 13083 May 14, 1998*
Specific intent to limit the size and scope of the national government	Vague reference to "a system of checks and balances"
Constitution created a national government of enumerated powers	Constitution created a federal government of supreme, but limited powers
States are subject only to limits of the Constitution or constitutionally authorized Acts of Congress	States are subject to limits set forth in the Constitution OR limits in federal law.
The constitutional relationship is protected by the Tenth Amendment	Dropped
Federal oversight is neither necessary or desirable over state-administered policy	Federal oversight should not necessarily intrude on state discretion
Policymaking criteria: • Only when constitutional and statutory • Clear and certain and only when found in a specific provision of the Constitution and does not encroach upon authority reserved for the states • Consult with "organizations" representing the states	Policymaking criteria: • Matters that justify federal action include: -- need -- decentralized costs -- inadequate state protections of rights -- states would be reluctant because of fears -- states lack expertise or resources -- international obligations -- Indian tribes • Consult "representatives" of the states
Special requirements for preemption	Dropped
Agencies shall prepare a Federalism Assessment	Dropped
Reduce unfunded mandates	Provide funds necessary OR consult states

Mr. Chairman, given the low threshold and subjective nature of these policymaking judgments, I'd like someone to show me a scenario where federal action could NOT be justified under these criteria. Let me reiterate the problem. Executive Order 13083 reverses the presumption. The burden has always fallen to the federal government to justify, as an enumerated power, any action over the states. Otherwise, the power belongs to the states.

The policymaking criteria are the whys and wherefores that justify federal intervention in state affairs. In all previous orders, intervention was to be undertaken with "clear and constitutional authority" and if necessitated by a problem of national scope.

That appears too restrictive for the current administration. The new order empowers bureaucrats and federal agencies to determine for themselves if there is "constitutional and legal authority" for whatever they want to d without regard for "clear and certain constitutional authority."

In essence, this order authorizes unelected bureaucrats to determine the states' "needs" and set the federal government on a course of action to meet them. It says the federal government can swoop in with a remedy because some career civil servant somewhere in the maze decides the federal bureaucracy can do it more cheaply. Since when?

Where in the Constitution is the national government given justification to act on grounds that a state may be reluctant because it fears business relocation to another state? Can the executive branch seriously contend state and local governments lack the expertise and resources for domestic action when they already provide 75 percent of the funds for all domestic activities?

And can you, the legislative branch, sit by and license the administration to not just make law, but to remake the Constitution? I cannot fathom Congress allowing usurpation not just of the states, but of the legislative function.

I wondered, as I read this order, what James Madison would say if he saw it. What he would say about the volumes of federal laws prescribing in great detail how every state and city conduct the most uniquely local tasks. What he would say about the staff assistants of assistant deputy under-secretaries of federal departments who think their real job is to double as a state health director, chief of police, or local road superintendent.

He would have agreed readily with former Arizona Governor Bruce Babbitt, now Secretary of Interior in this administration, who said this about the founders and big government a number of years ago: "*We have allowed their creation – a carefully layered construction of federal, state, and local responsibilities – to become scrambled into one great undifferentiated amorphous omelet by a cook in Washington?*"

The secretary was a Governor then – and so was the President.

Actions Taken to Date

The administration seems surprised by how upset state and local officials are with this order. Administration officials claim the purpose of the changes is simple is simple updates in light of recent Supreme Court decisions and passage of the Unfunded Mandate Reform Act.

That argument lacks credibility. The Supreme Court decisions all helped bolster the Tenth Amendment. Why would this lead to deletion of the Tenth Amendment in the new executive order? I'll tell you why. Because this directive is not an update. It envisions a completely different concept of federalism – one of federal supremacy.

To day, the White House has ignored requests to withdraw the order. It has merely extended the comment period to 90 days to allow more input. Members of the committee, an after-the-fact invitation does not consultation make.

The nation's Governors are unswervingly opposed to the new executive order and seek your assistance in getting it withdrawn. We would then be willing to sit down with the federal government, as equal state partners in the democracy of this great land, and work with them – if the federalism executive orders passed down unchanged by previous Presidents truly do need changing.

The Senate unanimously agreed with our position on July 22 and asked the administration to withdraw Executive Order 13083. I would ask the House to do the same. Thank you.

Mr. MCINTOSH. Let me suggest—I think Mayor Rendell also has an appointment, and so I'm going to ask him to go out of order and give his testimony next. Then, if I could have unanimous consent from the committee, I think what we will do is John and I each will have a couple of questions to pose for you, Governor, and Mayor, and then let you go. And then we will proceed with the rest of the panel in the regular order of questioning.

Mayor Rendell.

Mr. RENDELL. Thank you, Mr. Chairman. And I hesitate to point out that my appointment is at the White House.

Mr. MCINTOSH. Perhaps you can convey the substance of this hearing to them.

Mr. RENDELL. Let me begin by saying that as Governor Leavitt, I am testifying on behalf of the U.S. Conference of Mayors, an association that represents over 1,000 cities with populations in excess of 30,000. And the Nation's mayors, the ones that are in the U.S. Conference of Mayors, are unanimous in their opposition to both the process and a great deal of the substance that's in this Executive order.

Let me also say as Governor Leavitt did, though I think preemption of local government is not the sole preserver of the executive branch, we are as strongly opposed to the takings bill as anything in this Executive order. The takings bill will preempt one of our traditional powers in local government, that is the power to regulate our own land use. And that has been eroded by Federal action before, and the takings bill is as serious a threat as we see on the horizon.

No. 1, our objection to this Executive order, the second order in this subject by the President, is on process. As Governor Leavitt has said and as many members of this committee have said, we were all kept in the dark about this. We were not consulted. None of the Big Seven organizations has had a chance to give their input on something that we would seem to be the first line of organizations that would, in fact, be consulted with. That is also contrary, as Governor Leavitt pointed out, to the excellent working relationship that we at USCM have had with the administration; whether it was on empowerment zones, on mandates, on the crime bill, on the welfare-to-work jobs bill, on economic development issues in general, or on the President's previous Executive Order 12875 on federalism, we were always consulted.

When 12875 came out, Victor Ashe, the President of the USCM, wrote both the President and every department head in the Federal Government and said, we want to help in the implementation of this order.

So we are very interested in this. We are not Johnny-Come-Lately's to this field. The process disturbs us mightily, and we would ask the administration to withdraw the order and to work with us and the Congress in reaffirming 12875, or to fashion a new order that meets most of the objections that have been raised by members of this panel and members of the Big Seven organizations.

On the substantive part of the order, as Governor Leavitt said, there are many things that are troubling. Let me just point out two. One is in the area of unfunded Federal mandates.

As you all know, the mayors and every other organization here worked very, very hard to get the unfunded Federal mandates legislation passed, sponsored by Senator Dirk Kempthorne, a former mayor. And we fought hard to get accompanying regulations.

As you recall, in the President's previous order, 12875, it was also a process issued to a degree; it said before any mandates could be issued it required that the government must consult, the Executive Department and agencies must consult State and local government. That language has been changed to the word "may."

Second, the previous Executive order said that there could be no mandate unless funds were provided by the Federal Government, and there is a reference now to avoid imposition of substantial and direct compliance costs, but not as clear-cut a reference. This would seem to be a serious step back from the achievement that we all, Congress and all of these organizations made, on unfunded mandates.

Third, the power of the Environmental Protection Agency is one, and you are all aware even better than we are of the keen balance between environmental protection and the economy. We recently had a meeting hosted by Detroit Mayor Dennis Archer, one of the Nation's great mayors, with Carol Browner, the Administrator of EPA, where Mayor Archer said some of the interim regulations EPA has formulated is going to make it very, very difficult for us to continue our economic development and job creation efforts. So this is not just a process issue.

I was asked outside, is this all because you were not consulted? That is part of it, but that is not the heart of it. The heart of it is that we believe that there are things in here that strike an unfavorable balance, and we hope they will be redressed, and we thank you for your efforts.

[The prepared statement of Mr. Rendell follows:]

Mr. Chairman and Members of the Subcommittee. The United States Conference of Mayors, a bi-partisan organization representing over 1,050 cities with populations of 30,000 or greater, welcomes the opportunity to present testify on the issue of federalism. My name is Edward Rendell. I am the Mayor of Philadelphia. and an Advisory Board Member of The U.S. Conference of Mayors.

The nation's mayors have long been concerned with the proper relationship of the various levels of government — local, state and federal — and have worked to strengthen a federal partnership where appropriate and to guarantee local autonomy whenever possible.

In 1993, Senator Dirk Kempthorne (ID), the former Mayor of Boise, brought the issue of unfunded mandates before our body. The nation's mayors responded by overwhelming endorsing the Kempthorne bill, and was the first national organization to do so. Mayors then helped lead the effort to enact unfunded mandates legislation, and, working with our state and local partners and leaders in the Senate and House, were proud to see passage of the Unfunded Mandates Reform Act of 1995 and its signing by President Clinton.

While the primary focus of that Act was on new mandates which originate in Congress, the Act also addressed the critical issue of mandates and rulemakings which originate in the federal departments and agencies. Mayors recognized this to be an equally important concern and strongly supported the inclusion of these provisions — Title II — in the final legislation.

But prior to enactment and the signing of the Unfunded Mandates Reform Act, the nation's mayors were pleased to work closely with the Reagan Administration on Executive Order No. 12612, "Federalism," and the Clinton Administration on the development of Executive Order No. 12875, "Enhancing the Intergovernmental Partnership."

The interest of the nation's mayors in the implementation of Executive Order 12875 did not end with its signing by President Clinton on October 26, 1993. As you will see in the attached letter from Knoxville Mayor Victor Ashe, then President of The U.S. Conference of Mayors, the Conference wrote to President Clinton and the federal departments and agencies in the fall of 1994 requesting specific information regarding implementation plans for Executive Order 12875. Attached are response letters from President Clinton and many of the federal departments and agencies (Departments of Commerce, Defense, Education, Energy, Health and Human Services, Interior, Justice, Labor, State, Transportation, and Treasury, and the Environmental Protection Agency).

And prior to the above mentioned exchange of letters, the Administration — working through its Office of Information and Regulatory Affairs within the Office of Management and Budget — held a number of conferences with state and local government organizations including The U.S. Conference of Mayors regarding implementation of Executive Order 12875. As stated by then OIRA Administrator Sally Katzen in the attached invitation of June 20, 1994 to such a conference, "The first two conferences have provided useful insights into the nature of the Federal-State-local-tribal

regulatory partnership, and into the process of consultation between levels of government for Federal regulations which impose mandates covered by Executive Order (E.O.) No 12875."

It is clear from our work with the Clinton Administration on implementation of Executive Order 12875 that there was a serious recognition on both sides of the importance of the Order and its successful implementation.

The nation's mayors have worked in partnership with the Administration on a number of other critical priorities — foremost of which was enactment of the federal crime bill which included the authorization of 100,000 officers for community policing efforts, as well as a number of other key anti-crime initiatives.

Mayors are currently working closely with the Administration on priorities including brownfields redevelopment, support for other community and economic development activities, drug control, improvements in our nation's public schools, and support for sustainable communities. President Clinton has personally participated in many of our national meetings and special sessions focused on issues such as drug control and public schools, as have numerous members of his Cabinet.

It is within the above mentioned context that we were extremely surprised to learn that a new Executive Order on Federalism had been signed by President Clinton on May 14, 1998. As mentioned in the July 17 letter sent to President Clinton by the leaders of the "Big 7" state and local organizations, including Conference President Mayor Deedee Corradini of Salt Lake City, "No state and local government official was consulted in the

drafting of E.O. 13083. In contrast, this administration fully engaged state and local officials and their associations in the drafting of your E.O. 12875."

The new Executive Order would not only revoke both President Reagan's Executive Order and the previous Clinton Executive Order, but contains serious changes to the federal government's interpretation of its authority, including the elimination of specific references to limitations on the preemption of state and local authority, elimination of a direct reference to the 10th Amendment to the Constitution, and an expanded list of instances where federal action is justified.

As a result, the Big 7 letter of July 17 urged the President to withdraw Executive Order 13083 to, "provide for meaningful consultations with state and local officials not on E.O. 13083, but on whether any changes ought to be considered with respect to Executive Orders 12875 (Enhancing the Intergovernmental Partnership) and 12612 (Federalism)."

In addition, the July 17 letter stated our appreciation for the Administration's decision to extend the effective date of Executive Order 13083 for 90 days — during which time the existing orders will stay in effect — but still called for the withdrawal of the new Order so that discussions can take place with the two previous orders as the point of reference.

We were disappointed to see that the Administration's July 20 response, signed by Mr. Mickey Ibarra, Assistant to the President and Director of Intergovernmental Affairs, restated the Administration's decision to extend the effective date of the new Order for 90

days and desire to meet and begin discussions, but made no reference to our request that Executive Order 13083 be withdrawn.

We must also point out that on July 22, a sense of the Senate resolution was passed by unanimous consent calling on the President to "repeal" the new Order.

The issue of federalism and the need for a proper balance of power and authority continues to be of critical importance. Discussions are currently taking place between the nation's mayors and the Administration regarding the critical issue of "environmental justice" and the application of Title VI of the Civil Rights Act of 1964 to environmental permits written by state and federal agencies that receive federal funds.

As discussed in a recent meeting hosted by Detroit Mayor Dennis Archer with a number of mayors and EPA Administrator Carol Browner, interim EPA regulations could have serious repercussions on economic redevelopment and job creation in our nation's cities -- particularly those which have faced serious challenges and are now on the edge of an era of new opportunities for their citizens. We are now working with U.S. EPA to revise the interim policy to reflect local perspectives on this issue.

We are also working closely with the Administration and Congress on legislation which could significantly impact the future of tax policy in states and cities by limiting our ability to impose taxes on sales and activities over the internet.

And we continue to face challenges to the balance of federalism in the telecommunications arena, as Members of Congress, industry representatives and others too often try to "federalize" local authorities over zoning and local rights-of-way.

Much progress has been made in developing a context for analyzing the proper roles of the various levels of government with respect to any given issue, such as those examples listed above. We believe that Executive Orders 12612 and 12875 have greatly helped define this context.

With so many key issues before us today, and with unlimited potential for new issues, it is essential that a federalism policy not only reflect a proper balance of authority, but be developed in cooperation with and supported by state and local governments.

In conclusion, The United States Conference of Mayors appreciates the opportunity to testify before this Subcommittee, and will continue to work with our state and local partners, the Administration, and Congress to ensure that the nation's federalism policy remains strong and balanced.

National Governors' Association
National Conference of State Legislatures
Council of State Governments
National Association of Counties
The U.S. Conference of Mayors
National League of Cities
International City/County Management Association

July 17, 1998

The Honorable William J. Clinton
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

We are writing on behalf of the nation's elected state and local government leaders to request that you withdraw Executive Order 13083. We urge this action to provide for meaningful consultations with state and local officials not on E.O. 13083, but on whether any changes ought to be considered with respect to Executive Orders 12875 (Enhancing the Intergovernmental Partnership) and 12612 (Federalism). No state and local government official was consulted in the drafting of E.O. 13083. In contrast, this administration fully engaged state and local officials and their associations in the drafting of your E.O. 12875.

While we appreciate the offer by your administration to extend the comment period by 90 days, we feel that Executive Order 13083 so seriously erodes federalism that we must request its withdrawal.

Because we all have imminent meetings of our elected leaders, we believe it especially critical for you to consider and act upon our request to withdraw the order as quickly as possible.

Sincerely,

Governor George V. Voinovich, Ohio
Chairman
National Governors' Association

Senator Richard Finan, Ohio
Senate President
President, National Conference of State Legislatures

Commissioner Randy Johnson
Hennepin County, Minnesota
President, National Association of Counties

Brian O'Neill
Council Member
City of Philadelphia
President, National League of Cities

Deedee Corradini
Mayor of Salt Lake City
President
The U.S. Conference of Mayors

Gary Gwyn, City Manager
Grand Prairie, Texas
President
International City/County
Management Association

Representative Charlie Williams
Chairman
Council of State Governments
Mississippi

THE WHITE HOUSE
WASHINGTON

July 20, 1998

The Honorable Deedee Corradini
Mayor of Salt Lake City
President of The U.S. Conference of Mayors
451 South State Rm 306
Salt Lake City, Utah 84111

Dear Mayor Corradini:

I have been asked to reply to your July 17 letter to the President regarding Executive Order 13083.

In response to concerns raised by the "Big Seven" at their July 14 meeting with me, the Administration agreed to delay the implementation of Executive Order 13083 for 90 days. During this extended period, Executive Orders 12612 and 12875 will remain in effect. I have spoken to each executive director of the "Big Seven" to inform them of the Administration's decision.

I know that you anticipate, as we do, that this extra time will be put to constructive use. The Office of Intergovernmental Affairs and my colleagues at the White House are committed to working closely with you on this issue. We are ready to meet next week at your earliest convenience to begin our discussions.

President Clinton has demonstrated his commitment to federalism many times. As a former Governor, the President knows first-hand that the federal government must be sensitive to the needs of state and local governments to address the variety of challenges we face. Enclosed is a fact sheet for your review.

I look forward to working with you to reach common ground.

Sincerely,

Mickey Ibarra
Assistant to the President
and Director of Intergovernmental Affairs

Enclosure

cc: Thomas Cochran
Executive Director, U.S. Conference of Mayors

THE WHITE HOUSE

WASHINGTON

Fact Sheet on Federalism
July 10, 1998

A New Executive Order on Federalism. To update federal government policy in light of recent Supreme Court decisions and recent legislation, the President has issued a new executive order on federalism. That order, E.O. 13803, combines and clarifies previous executive orders on "Federalism" and "Enhancing the Intergovernmental Partnership." The new Executive Order, E.O. 13803:

- Reflects President Clinton's belief that striking the proper balance between state and federal power is essential to protect individual liberty:

  > "Federalism reflects the principle that dividing power between the Federal Government and the States serves to protect individual liberty. Preserving State authority provides an essential balance to the power of the Federal Government, while preserving the supremacy of Federal law provides an essential balance to the power of the States." [E.O. 13083, Sec. 2(a)]

- Directs agencies to closely examine the constitutional and statutory authority behind any federal action that would limit the policy-making discretion of States and local governments, and to carefully assess whether that action is necessary.

- Builds on earlier orders and recent legislation to protect states from expensive and onerous unfunded mandates.

- Instructs agencies to streamline their processes under which State and local governments apply for waivers of statutory and regulatory requirements

- Directs agencies to consider waiver applications with a "view towards increasing opportunities for utilizing flexible policy approaches at the State or local level." [E.O. 13083, Sec. 5(b)]

- Lays out fundamental federalism principles that should guide federal policymaking. These include:

  > "States and local governments are often uniquely situated to discern the sentiments of the people and to govern accordingly." [E.O. 13083, Sec. 2 (a)]

  > "Uniform, national standards can inhibit the creation of effective solutions to those problems." [E.O. 13083, Sec. 2 (f)]

- Sets forth federal policy making criteria that agencies shall consider, along with fundamental federalism principles, in formulating or implementing policies that have federalism implications.

A Proven Record on Federalism. This Executive Order builds on the President's longstanding support for federalism. As a former Governor, the President knows first-hand that the federal government must be sensitive to the needs of state and local governments for flexibility in designing bottom-up plans to address all sorts of problems. The President has built a strong record on federalism by making sure major legislation is attuned to the needs of state and local governments:

- Signed into law the Unfunded Mandates Relief Act of 1995, a top legislative priority for state and local governments that had languished in Washington for years.

- Signed into law the landmark new welfare bill in 1996 that gives states unparalleled flexibility to design and implement their own programs to move welfare recipients into the workforce.

- Created a new 100,000 cops program that gives cities and towns help in beefing up their community policing forces without having to fill out an enormous amount of paperwork.

- Ensured that state and local governments are consulted extensively on regulatory matters.

- Opposed provisions in legislation that would unduly expand federal law into areas traditionally reserved to the states. This includes the "takings" legislation that would shift authority over local land use issues away from local communities and state courts to Federal courts, subjecting communities to the threat of premature, expensive litigation that would favor wealthy developers over neighboring property owners and the community at large.

- Working to secure passage of G.I. Bill for Workers that consolidates federal training efforts and gives states and individuals new flexibility to retrain for the jobs of the future.

- Promoted the policy of actively issuing statutory and regulatory waivers for state and local governments in order to promote flexible policy approaches at the State and local level.

THE UNITED STATES CONFERENCE OF MAYORS

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September 13, 1994

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

We appreciate the letter you sent to Majority Leader George Mitchell on October 6, 1994 and to Speaker Thomas Foley on October 7, 1994. Unfortunately, your letters fell on deaf ears. The Majority Leader and Speaker refused your request to schedule for a final vote the nation's mayors' priority legislation, the Kempthorne-Glenn bill, which would have gone a long way in curbing unwarranted and unfunded mandates on towns, cities, counties and states.

The battle carried forth by Democratic and Republican mayors to secure relief from unfunded federal mandate legislation has been remarkable. Idaho Senator Dirk Kempthorne, former mayor of Boise, came to our New York City Annual Meeting in 1993 to unveil his bill, and in one year we secured the endorsement of 67 Senators. We have continued over and over in our campaign to register our concerns with the Democratic Leadership in the House and Senate and to emphasize the grassroots pressure we have felt from our constituents to pass this bill. Unfortunately, in meeting after meeting with bipartisan state and local leaders, Mr. Mitchell and Mr. Foley refused to take the leadership on our effort.

While we have lost the skirmish, the issue continues. Presently we are taking the issue to every candidate running for the House and Senate this year. With the support of our sister organization, the National Association of Counties, we will secure pledges from all those who seek national office to support the number one priority of local government in the next Congress - - to pass the Kempthorne-Glenn bill without weakening amendments. Senator Kempthorne intends to re-introduce our bill at the beginning of the 104th Congress, and we have informed the Senator that we will be with him until we are victorious.

At our recent Leadership Meeting in Knoxville, our National Unfunded Mandates Task Force, chaired by Chicago Mayor Richard M. Daley, was given the charge from our Executive Committee and Advisory Board to renew the fight with increased political action in the next Congress. Without question, Democratic and Republican mayors will push the new Congress to be more responsive to the needs of our people.

We ask that you monitor the activity of your federal departments and agencies to determine if your cabinet officers are enforcing Executive Order 12866 which you signed on September 30, 1993 and Executive Order 12875 which you signed on October 26, 1993. It would be interesting to have a report as to compliance by cabinet officers. Your assistance to make certain that the federal departments and agencies comply with your orders is important as we work together in a federal-state-local partnership to provide quality service with a minimum of "red tape" for all our citizens.

Again, we appreciate the public statement you made at the National Governors Conference endorsing the Kempthorne-Glenn bill, and we appreciate the letters you sent mentioned above. We must report to you, however, that mayors throughout the nation are frustrated with the lack of priority given to our priority by Majority Leader Mitchell and Speaker Foley. We look forward to working with you, the White House staff, the cabinet officers and departments to enact our legislation during the first months of the next Congress.

Sincerely yours

Victor Ashe
Mayor of Knoxville
President

THE WHITE HOUSE

WASHINGTON

November 10, 1994

The Honorable Victor Ashe
President
The U.S. Conference of Mayors
1620 I Street, N.W.
Washington, D.C. 20006

Dear Victor:

Thank you for your letter of support for our efforts to pass legislation to limit unfunded mandates. I understand how important the Kempthorne-Glenn bill was to you and to all leaders who must face tough budgetary choices. Although Congress did not pass this bill, I remain confident that Congress will address this important issue next year.

I appreciate your interest in ensuring agency compliance with Executive Orders 12866 and 12875. Earlier this year, Sally Katzen, the administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, provided explicit instructions for all departments and agencies adhering to the provisions of Executive Order 12875. Additionally, under the provisions of Executive Order 12866, when OIRA reviews various federal agencies, it must check to make sure that those agencies are complying with federal mandate guidelines.

I will certainly keep your views in mind as we strive to improve efficiency and promote fairness for all our citizens.

Sincerely,

Bill Clinton

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

DEC 12 [illegible]

The Honorable Victor Ashe
Mayor of Knoxville
President, The U.S. Conference of Mayors
1620 Eye Street, N.W.
Washington, DC 20006

Dear Mayor Ashe:

Thank you for your letter regarding Executive Order 12875, Enhancing The Intergovernmental Partnership. I am committed to strengthening the bond between the Department of Commerce and local and state officials.

Part of the Commerce Department's efforts to strengthen the intergovernmental partnership include outreach to state and local officials by the Trade Promotion Coordinating Committee in preparing the First and Second Annual Reports of the National Export Strategy and the *Commerce Update*, a fact sheet produced by the Office of Intergovernmental Affairs to keep state and local officials apprised of Commerce issues of interest to the states and local governments.

I look forward to working with you and all this Nation's Mayors to strengthen the partnership between Commerce and local and state governments.

Sincerely,

Ronald H. Brown

OFFICE OF THE SECRETARY OF DEFENSE
WASHINGTON, DC 20301

Administration
& Management

09 NOV 1994

Honorable Victor Ashe
Mayor of Knoxville
President, The U.S. Conference of Mayors
1620 Eye Street, Northwest
Washington, D.C. 20006

Dear Mayor Ashe:

This is in response to your letter of October 25, 1994, to the Secretary of Defense concerning our response to Executive Order 12875, "Enhancing The Intergovernmental Partnership." The Secretary has asked me to respond to you directly in view of my role as the Regulatory Policy Officer for the Department of Defense.

The Department of Defense is not a regulatory agency, but in the course of its operations, does issue regulations on occasion that impact on the general public. These regulations are small in number and do not have the far-reaching impacts as those found in the regulatory agencies such as the Departments of Energy and Health and Human Services. However, in response to the President's initiative to lessen the regulatory burden on the public, we have written a Regulatory Plan that has been fully coordinated at the highest levels of government and reflects the regulatory planning in the Department.

We do not plan to issue, nor have we issued, any regulations that would impose unfunded mandates on the State, local, and tribal governments. In the unlikely event that would occur, the provisions of Executive Order 12875 would be carefully followed.

We hope this information will be useful to you in your Conference leadership meeting in Chicago next week. We continue to look forward to working with the nation's mayors to strengthen even further our intergovernmental partnership.

Sincerely,

D. O. Cooke
Director

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

January 30, 1995

Honorable Victor Ashe
President
The United States Conference of Mayors
1620 Eye Street, NW
Washington, DC 20006

Dear Mr. Ashe:

This letter responds to your request of October 25, 1994, for information on how the Department of Education (ED) has responded to Executive Order (E.O.) 12875, "Enhancing the Intergovernmental Partnership." Please accept my apologies for the delay in responding. The Department fully supports the President's commitment in E.O. 12875 to minimizing unfunded Federal mandates to the extent feasible and permitted by law. Moreover, the Department is committed to reducing regulatory burdens on States and communities and providing them as much flexibility as possible in their efforts to improve student achievement.

The Office of Management and Budget (OMB) has taken the lead in organizing the implementation of the Order by Federal agencies. Sally Katzen, Administrator of OMB's Office of Information and Regulatory Affairs, conducted conferences on the Federal Government's regulatory partnership with State, local, and tribal governments on December 6, 1993 and March 23, 1994. This Department, as well as many other agencies, participated in these conferences. Representatives of the U.S. Conference of Mayors participated at the conferences, so I know that you are familiar with these efforts to encourage discussion of the concerns of State and local officials about unfunded Federal mandates and possible Federal responses to reduce or eliminate problems, including providing funds to reimburse compliance costs in appropriate cases. In addition, on January 11, 1994, with the concurrence of Leon Panetta, then Director of OMB, Ms. Katzen issued a memorandum for Heads of Executive Departments and Agencies and Independent Regulatory Agencies on "Guidance for Implementing E.O. 12875, Section 1, 'Reduction of Unfunded Mandates.'"

The Department has complied with the OMB guidance through increased intergovernmental consultations when possible unfunded Federal mandates are identified in regulations and by providing OMB with a summary of these consultations, and a strong justification for any regulation containing an unfunded mandate, at the time the regulation is sent to OMB for review under E.O. 12866, "Regulatory Planning and Review."

In one instance in which a possible unfunded mandate was identified in regulations under consideration by the Department (proposed amendments to regulations implementing the Carl D. Perkins Vocational and Applied Technology Education Act with respect to the scope of services that States and their recipients must provide to members of special populations and the scope of the local program evaluation), extensive consultations were held with State and local officials. However, the issuance of regulations was ultimately deferred by the Congress until it has an opportunity to consider reauthorizing legislation for the Perkins Act.

In addition to complying with E.O. 12875, the Department is engaged in pursuing other efforts to reduce burdens on State and local governments. For example, the Goals 2000: Educate America Act, the School-to-Work Opportunities Act of 1994, and the recently reauthorized Elementary and Secondary Education Act of 1965 (ESEA) all authorize the Secretary to grant waivers of statutory and regulatory requirements. Goals 2000 also authorizes a demonstration program under which six States may be delegated authority to waive Federal statutory and regulatory requirements. I sent a letter to Governors and Chief State School Officers on January 23 advising them of these new authorities. In addition, in implementing these new acts and other legislation, the Department starts with the assumption that it should not regulate unless it is necessary to do so.

On January 13, 1995, the Department also published a notice of proposed criteria for optional State consolidated plans submitted under section 14302 of the ESEA, as recently reauthorized by the Improving America's Schools Act, Pub. L. 103-382. Use of consolidated plans would allow States and school districts to submit one consolidated plan for all programs under the ESEA, instead of a series of separate plans.

I hope that this discussion of our efforts to strengthen the intergovernmental partnership and to eliminate or reduce the burden of unfunded Federal mandates responds to your request for information. We are also considering other opportunities to reduce burdens on State and local governments that may not be as severe as unfunded mandates but which are nonetheless unnecessary. If you have any suggestions for areas we should examine, I invite you to share them with me.

Yours sincerely,

Dick Riley

Richard W. Riley

The Secretary of Energy
Washington, DC 20585

December 22, 1994

The Honorable Victor Ashe
Mayor of Knoxville and President
The United States Conference of Mayors
1620 Eye Street, NW
Washington, DC 20006

Dear Mayor Ashe:

Thank you for your letters of October 25 and December 16, 1994, requesting information about the efforts of the Department of Energy to implement Executive Order 12875 on "Enhancing the Intergovernmental Partnership."

The Department of Energy is committed to consultation with State, local, and tribal governments in the development and implementation of policies and programs that affect them. In particular, we are sensitive to the need to consult with our intergovernmental partners to reduce the incidence of so-called "unfunded mandates;" that is Federal requirements applicable to State, local, or tribal governments for which the Federal Government is not providing sufficient funding to cover the costs of compliance.

The Department is fully implementing the requirements of Executive Order 12875. Only two departmental rules or regulatory proposals have been identified as possible unfunded mandates, and both of these simply implement statutory requirements on State governments--the Department does not have discretion to eliminate these requirements. Although the Executive Order does not address statutorily established mandates, we have consulted and are continuing to consult with affected governments to discuss implementation issues.

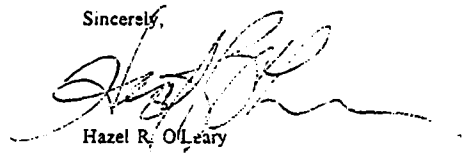
The Department has provided waiver procedures with respect to statutorily imposed unfunded mandates to the full extent authorized by law. For example, the Department has provided that affected parties, including governmental entities, may petition the Department for exception relief from certain statutory requirements where application of the requirement would cause "serious hardship or gross inequity" (10 CFR §§ 205.50 et seq.; see 42 U.S.C. § 7194).

In the same spirit of reinventing Federal Government rules, the Department is undertaking an extensive review of all existing regulations to determine how rules can be modified to eliminate unnecessary regulatory burden. Based on the results of intergovernmental input and other public comments, we have

recently targeted a number of our existing regulations for elimination or modification, including efforts to streamline the existing regulations concerning grants to State and local governments for improving energy efficiency of schools and hospitals. A copy of the recent Federal Register notice concerning this review is enclosed for your information. We welcome any comments on the proposal from The United States Conference of Mayors.

We appreciate your interest in the Department and regret that our response was not made available to you before the conference leadership meeting. The Department looks forward to working with The United States Conference of Mayors to strengthen the working relationships between the Department and local government officials.

Sincerely,



Hazel R. O'Leary

Enclosure

12. In § 1131.61, paragraph (b) is removed, paragraphs (c) through (f) are redesignated as paragraphs (b) through (e), and newly redesignated paragraph (d) is revised to read as follows:

§ 1131.61 Computation of uniform price.

* * * * *

(d) * * *

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1131.60(f).

* * * * *

13. In § 1131.71, the introductory text of paragraph (a) is revised, paragraph (b) is redesignated as paragraph (c), and a new paragraph (b) is added to read as follows:

§ 1131.71 Payments to the producer-settlement fund.

(a) On or before the 13th day after the end of the month, each handler, except a handler described in § 1131.10, shall pay to the market administrator the amount, if any, by which the amount specified in paragraph (a)(1) of this section exceeds the amount specified in paragraph (a)(2) of this section:

* * * * *

(b) On or before the 13th day after the end of the month, each handler described in § 1131.10, except those which are exempt from such payment pursuant to § 1131.60(j), shall pay to the market administrator the amount computed pursuant to § 1131.60(j).

* * * * *

14. In § 1131.72, the word "for" is revised to read "from" in the section heading, paragraph (b) is removed, and paragraph (c) is redesignated as paragraph (b).

15. In § 1131.77, the last sentence is removed.

16. In § 1131.85, paragraph (h) is removed.

Dated: November 4, 1994

Kenneth C. Clayton,

Acting Administrator.

[FR Doc. 94-27922 Filed 11-10-94; 8:45 am]

BILLING CODE 3410-01-P

DEPARTMENT OF ENERGY

Office of General Counsel

10 CFR Ch. II, III, and XI; 18 CFR Ch. I; and 48 CFR Ch. 9

[Docket No. GC-NOI-94-110]

Review of Existing Regulations for Modification or Elimination

AGENCY: Department of Energy.

ACTION: Notice of inquiry.

SUMMARY: This is the second step of an effort by the Department of Energy (DOE or Department) to involve the public in assessing opportunities for streamlining the Department's existing regulations. In a notice of inquiry published on March 1, 1994 (59 FR 9682), the Department sought public comments on general areas of its existing regulations that should be modified or eliminated. In this document, the Department seeks public comment on specific regulations that have been targeted for modification or elimination based on the earlier public comments. This streamlining effort is in response to Executive Order 12866, "Regulatory Planning and Review."

This document also establishes a plan for performing similar reviews under the Regulatory Flexibility Act.

DATES: Written comments (10 copies) will be considered if received by the Department no later than December 29, 1994.

ADDRESSES: Written comments (10 copies) and the envelope should be marked, "Second Notice of Inquiry, Docket No. GC-NOI-94-110." Written comments should be submitted to: U.S. Department of Energy, Office of General Counsel, GC-1, Attn: Romulo Diaz, Jr., 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Romulo L. Diaz, Jr., U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-2902.

SUPPLEMENTARY INFORMATION:

I. Background

This streamlining effort is in response to Executive Order 12866, "Regulatory Planning and Review," published October 4, 1993 (58 FR 51735). The Executive Order requires that existing significant regulations be reviewed to: make them more effective in achieving regulatory objectives; reduce regulatory burden; or align them more closely with the President's priorities or principles of the Executive Order. DOE has expanded the scope of its review to include all of its existing regulations.

It is the Department's intention to implement any modifications or revisions to existing regulations through appropriate administrative actions, including issuance of notices of proposed rulemaking.

The Department published on March 1, 1994, a notice of inquiry (NOI) requesting that the public provide general comments on areas where existing DOE regulations should be modified or eliminated. The Department received 14 written public comments in response to that notice. Those comments, combined with an extensive internal review, were used as the basis for developing the list of potentially beneficial regulatory modifications or deletions set forth below.

II. Discussion

Most of the public comments focused on the Department of Energy Acquisition Regulations (DEAR), although a few comments related to the Department's National Environmental Policy Act (NEPA) regulations and DOE's Institutional Conservation Program regulations.

Streamline Procurement Activities

Many of the comments were based on recommendations formulated in January 1994 by a group of contractor purchasing managers representing eight of the Department's management and operating (M&O) contractors: PNL; Associated Universities, Inc.; Bechtel; EG&G, Inc.; FERMCO; Stanford University; Westinghouse; and the University of California. That group produced a report entitled "DOE Contractor Purchasing, from Rigid Rules to Guiding Principles," (M&O Contractors' Report) which was submitted to Secretary O'Leary on January 31, 1994. Although the M&O Contractors' Report was prepared before the first NOI was issued, its recommendations are germane to a number of DOE efforts to streamline the DEAR.

Pursuant to Executive Order 12861 (58 FR 48255, September 14, 1993), the Department's Office of Human Resources and Administration has an effort underway to reduce internal regulatory guidance by a minimum of 50 percent. In fact, through a recent final rulemaking published on May 10, 1994 (59 FR 24357), the Department eliminated approximately ten percent of the DEAR, and is continuing its efforts to comply with Executive Orders 12861 and 12866 through an extensive regulatory analysis.

An internal DOE task group is currently conducting a detailed review of the DEAR to identify additional areas for reduction. The initial effort of the task group is to eliminate unnecessary language from the DEAR, such as provisions that duplicate other regulations, or purely internal administrative provisions that should be included in an Acquisition Manual or Handbook. Later stages of the review will consider more substantive changes.

In addition, several DOE task forces, established to implement a number of

Contract Reform Team, entitled "Making Contracting Work Better and Cost Less" (DOE/S–107), are considering recommendations that relate to M&O contractor regulations and practices. The comments received in response to the March 1, 1994, NOI have been forwarded to those groups.

Those commenters addressing the DEAR reiterated their willingness to work with DOE on reducing unnecessary regulatory burdens. We would welcome the opportunity to work with M&O contractors and other DOE stakeholders on this effort.

Simplify NEPA Compliance

With regard to suggestions for revisions to the Department's NEPA regulations (10 CFR Part 1021), the Department believes that a new Secretarial Policy addresses the substance of the public comments. (Secretarial Policy on the National Environmental Policy Act, U. S. Department of Energy, June 13, 1994.) Under the new policy, Secretary O'Leary has directed a number of actions to streamline the NEPA process, minimize the cost and time for document preparation and review, emphasize teamwork, and make the process more useful to decision makers and the public. The Secretary invited full Departmental participation, including contractors, to implement these new policies.

Improve Institutional Conservation Program (ICP)

The States of New York, Vermont and Utah commented on the need to improve the flexibility of DOE's ICP regulations (10 CFR Part 455). Under the ICP, the Department provides matching funds for engineering studies and implementation of identified conservation measures. The commenters noted that Federal dollars, while not large, have provided the necessary leverage to spur many major energy conservation initiatives on behalf of schools and hospitals. The State of Vermont noted the program's "well deserved reputation . . . for regulatory overload" and urged that the Federal Government "minimize [its] involvement in the administration of ICP to give the [S]tates the flexibility needed to operate this program in a more cost-effective manner." The State of New York, among other things, noted its concerns that the DOE regulations had not fully implemented the flexibility inherent in the State Energy Efficiency Programs Improvement Act of 1990 (P.L. 101–440), and that delays in ICP approvals due to environmental reviews could be reduced by blanket exceptions for the ICP or clearer NEPA policy and procedures applicable to the ICP. Within the framework provided by DOE's NEPA regulations and the recently issued Secretarial Policy on NEPA, DOE has the flexibility for and has initiated certain NEPA process improvements, such as the preparation of a broad, programmatic NEPA assessment for the ICP to simplify and accelerate NEPA review for individual projects. The Department would welcome specific recommendations on how to modify existing ICP regulations consistent with statutory requirements, as well as whether any statutory revisions are needed.

Changes in Statutory Authorities and Mission

DOE's Golden Field Office noted that the authorizing authority for geothermal loan guarantees and for alcohol, biomass and municipal waste projects has expired, so that 10 CFR Parts 791 and 799 should be eliminated. Moreover, the Golden Field Office commented that the Department had never entered into loans or loan guarantees for activities covered by 10 CFR Parts 792, 794, 796–798, nor have such activities received Congressional appropriations.

The Department's Oak Ridge Operations Office suggested that 10 CFR Parts 760–766 be reviewed for possible modification in light of the Department's new emphasis on environmental management and shift away from nuclear weapons activities.

Proposed Targets

Upon review of the comments received on the March 1, 1994, Federal Register notice and the Department's internal review, the Department has targeted the following regulations or areas for modification or elimination:

(1) Eliminate regulations in 10 CFR Part 515 (Powerplant and Industrial Fuel Use Act).

(2) Eliminate 10 CFR Part 721 (Electric and Hybrid Vehicle Research, Development, Demonstration, and Production Loan Guarantees).

(3) Eliminate 10 CFR Part 799 (Loan Guarantees for Alcohol Fuels, Biomass Energy and Municipal Waste Projects).

(4) Eliminate 10 CFR Part 792 (Loans for Reservoir Confirmation Projects).

(5) Eliminate 10 CFR Part 794 (Loans for Development of Wind Energy Systems and Small Hydroelectric Power Projects).

(6) Eliminate 10 CFR Part 795 (Federal Loan Guarantees for Alternative Fuel Demonstration Facilities).

(7) Eliminate 10 CFR Part 797 (Loans for Small Hydroelectric Power Project Feasibility Studies and Related Licensing.

(8) Eliminate 10 CFR Part 798 (Urban Wastes Demonstration Facilities Guarantee Program).

(9) Modify 10 CFR Part 455 (Grants Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions).

(10) Modify 10 CFR Part 760 (Domestic Uranium Program).

(11) Modify 10 CFR Part 761 (Criteria to Assess Viability of Domestic Uranium Mining and Milling Industry).

(12) Modify 10 CFR Part 762 (Uranium Enrichment Services Criteria).

(13) Modify 10 CFR Part 763 (Uranium Enrichment Late Payment Charges).

III. Plan Under the Regulatory Flexibility Act

The Department is incorporating a requirement for regulatory review under the Regulatory Flexibility Act (RFA). (P.L. 96–354, 5 U.S.C. 601–612), with the program for periodically reviewing existing regulations under Executive Order 12866. Among its provisions, the RFA requires each agency to publish in the Federal Register a plan for the periodic review of the agency's existing rules which have or will have a significant economic impact on a substantial number of small businesses, organizations, and governmental jurisdictions affected by a rule (5 U.S.C. 610). The purpose of the RFA review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of small entities. The plan must provide for the review of all such existing rules once within ten years of their promulgation as final rules. As part of its RFA plan, DOE is expanding the scope of the RFA review to include review of all of DOE's existing regulations, not just regulations with a significant economic impact upon a substantial number of small entities. This will be accomplished as part of the Department's periodic review of existing regulations under Executive Order 12866.

Issued in Washington, DC on November 8, 1994.

Robert R. Nordhaus,

General Counsel.

[FR Doc. 94–27830 Filed 11–[illegible]

BILLING CODE 6450–01–P

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

NOV 10 1994

The Honorable Victor Ashe
President
The U.S. Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mayor Ashe:

I am responding to your October 25th request for a status report on the steps taken by our Department to implement the President's Executive Order 12875 regarding enhancing intergovernmental partnerships and avoiding unfunded mandates. HHS has been aggressive about the enforcement of the President's order and I am pleased to share with you the status of our efforts.

Shortly after the Executive Order became effective, we issued our own instructions for HHS. These instructions stated that we are committed to avoiding the imposition of unfunded mandates on state, local, and tribal governments and that we will carry out both the letter and spirit of the Executive Order. We will review any actions by this Department impacting upon another level of government, whether they fall under the heading of "regulation" or not. If an increased cost to another level of government arises from our regulation on private entities, we will treat that as a possible unfunded mandate and review it.

We will also review actions which involve small amounts of funds nationally but which could be seen as significant mandates on individual governments required to change a policy or practice to avoid fiscal or compliance problems. Should an unfunded mandate become an option under serious consideration, we will consult with the effected level(s) of government as early and as completely as possible.

Since the President's order went into effect in January of this year, we have been careful to screen all proposed regulations for any language which could be construed as creating an unfunded mandate, other than requirements which were already mandated by statute. You have my commitment that we will continue to be diligent in this regard.

We have also solicited public comment about our existing regulations. Our January 20, 1994 Federal Register notice included the following invitation:

> We specifically encourage State, local, and tribal governments to assist in the identification of regulations

that impose significant or unique burdens and that appear to have outlived their justification or be otherwise inconsistent with the public interest. We are particularly interested in reforms leading to the reduction of unfunded mandates, a Presidential priority communicated in his Executive Order 12875.

We continue to invite your recommendations on any existing regulations the U.S. Conference of Mayors feels we should review.

I welcome any comments and suggestions which the Conference may have about the approach we have taken to move forward this important Presidential objective. John Monahan, our Director of Intergovernmental Affairs, and his staff stand ready to provide you with any further information you may need about this matter.

Sincerely,

Donna E. Shalala

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 14 1995

Mr. Victor Ashe
President
United States Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Ashe:

I am replying to your letters of October 25 and December 16, 1994 to Secretary Babbitt regarding the Department's response to Executive Order 12875: "Enhancing the Intergovernmental Partnership". In your letters you asked for us to describe the steps we have taken to implement this Executive Order especially in regard to Section 1, Reduction in Unfunded Mandates. Please accept my apologies for the Department's apparent failure to respond to your October 25 letter.

Executive Order 12875 was provided to each of our Bureaus and Offices for implementation. Subsequently, as a separate effort, this office conducted a survey of all Bureaus and offices throughout the Department in order to identify any unfunded mandates for which the Department or one of the Bureaus has exclusive or primary oversight responsibility.

In conducting this survey, we defined unfunded mandates as anything that the Federal Government imposes, either by statute or regulation upon State, local or Tribal governments that results in direct costs to such governments. This broad definition resulted in the Bureaus identifying some programs which would be excluded under more recent and narrower definitions of unfunded mandates. These more recent definitions exclude those programs where the Federal government provides grants to State or local governments that elect to participate in the program even though they will incur costs for which they will not be reimbursed by the Federal government.

Based on our survey, the Department has responsibility for very few laws or regulations that include unfunded Federal mandates. Most of the ones we have result in very minimal effects on State, local, or Tribal governments. However, there are two significant exceptions:

- Implementation of Section 504 of the Rehabilitation Act of 1973 as amended, under which the Department issued regulations (see 43 CFR 17,Subpart B) on July 7, 1982 entitled, Nondiscrimination in Federally Assisted Programs of the Department of the Interior. Under Section 504, Federally assisted programs and activities of State and local governments, including Tribal governments, are required to make all aspects of

the operations, when viewed in their entirety, accessible to people with disabilities; and

- Implementation of Title II of the Americans with Disabilities Act (ADA) (see regulations published by the Department of Justice on July 28, 1991 at 28 CFR 35, Subpart G which enumerate the responsibilities of the Department of the Interior) with respect to ensuring nondiscrimination on the basis of disability in State and local government programs, activities and services. Under these regulations, this Department has complaint investigatory and compliance oversight responsibilities over all units of State or local government, regardless of whether or not they receive Federal assistance, that regulate or administer services, programs or activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation and museums. The Department has determined that Title II does not apply to Tribal governments.

Both of these laws and accompanying regulations preceded Executive Order 12875. These two laws affect essentially all units of State and local government. The Department of the Interior is one of several Federal agencies involved in overseeing the efforts of State and local governments in complying with these laws.

The following are examples the Bureaus sent to our office in response to the broad survey. These are all examples of requirements that State, local or Tribal governments must meet in order to participate in various programs. Several of the examples cited below are ones in which State, local or Tribal government participation is voluntary. Therefore, most of these examples would not be included under the definition of unfunded mandates which is generally accepted today.

Bureau of Reclamation (BOR): There are four different types of plans, reports and certifications required of irrigation districts, that are units of local government, which receive water from Federal reclamation projects provided at subsidized rates. (The costs were estimated to be between two to thirteen million dollars.) The Bureau has efforts underway to reduce these reporting burdens.

National Park Service (NPS): Under the Historic Preservation Fund Grant program, States are required to maintain a State office at their expense as a condition for receiving the Federal grants. Under the Land and Water Conservation Fund Grant Program, States are required to pay for appraisals of lands they propose to acquire with these grants. (The estimated annual cost to the States for these appraisals presently is less than $100,000.) These two programs would not be included in most unfunded mandate definitions today.

Bureau of Indian Affairs (BIA): About a dozen unfunded mandates with widely differing characteristics and resulting costs were identified which presently affect Tribal governments. However, this situation is changing as more Tribes come under the Self Governance program where they have wider discretion over the use of funds as well as the authority to redesign Tribal programs to meet local circumstances and needs. This is an important component of the commitment of the Federal government, reaffirmed by President Clinton on April 29, 1994, to Tribal Self Determination. In the President's Fiscal 1996 Budget $767 million or 48 percent

of BIA's entire budget is subject to Tribal Priority Allocations under which tribes may establish their own priorities for the use of these funds based on local conditions and needs.

U.S. Fish and Wildlife Service (FWS): Two programs were identified in our survey: These two programs are under Section 6 of the Endangered Species Act and The Partnership in Wildlife Act. In each case State participation is voluntary. Participating States accept costs for which they are not fully reimbursed. These programs would be excluded from most unfunded mandate definitions today.

Payments in Lieu of Taxes (PILT): These payments go to local governments for losses to their real property tax base due to the occurrence of Federal lands, including those administered by the U.S. Fish and Wildlife Service, within their boundaries. These payments are designed to supplement other Federal land receipt payments local governments may receive. The payments are based on a formula which factors in entitlement acres and population. Congress recently authorized an increase in these payments and the Department's FY1996 Budget includes $113.9 million, an increase of $10 million for these payments. Affected States and localities argue previous levels had not fully offset the losses to local governments that receive PILT payments, most of which are rural jurisdictions.

Compact of Freely Associated States (CFAS): This compact guaranteed freedom of migration from areas of the Former Trust Territory of the Pacific Islands to Guam and the Commonwealth of the Northern Mariana Islands. The migration has resulted in these latter governments paying for increased costs for public facilities and services.

As you can see, except for our responsibilities under The Rehabilitation Act of 1993, Section 504 and Title II of the ADA, both of which apply governmentwide, the Department of the Interior has very few unfunded Federal mandates. We are taking steps to reduce the impacts of many of the mandates we presently administer.

Across the Department we are considering and have already initiated numerous efforts to increase flexibility, reduce reporting requirements and streamline processes under both previously existing regulations as well as new ones required under legislation recently enacted by the Congress. Our goal is to reduce the burden of regulations on State, local and Tribal governments as well as private industry.

We welcome your expressions of interest in the steps we have taken to implement Executive Order 12875 and the opportunity to inform you about related efforts which have been initiated over the past two years.

Sincerely,

Brooks B. Yeager, Director
Office of Policy Analysis

Office of the Attorney General
Washington, D. C. 20530

November 14, 1994

The Honorable Victor Ashe
Mayor of Knoxville
President, U.S. Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mayor Ashe,

Thank you for your recent letter regarding Executive Order 12875, *Enhancing the Intergovernmental Partnership*. As you know, the purpose of this Executive Order is to promote a more effective partnership between the federal government and states and localities. This subject is of even greater importance for the Department as we embark on the implementation of the Violent Crime Control and Law Enforcement Act of 1994.

The Executive Order requires each agency to establish a meaningful mechanism for consultation with state and local officials in the development of regulatory proposals that contain significant unfunded mandates. Unless the agency provides the funds for compliance with such mandates, the agency must consult in detail with affected governmental units and provide a justification for the requirements to the Office of Management and Budget as part of the Administration's regulatory review process. By its terms, this consultation process applies to regulatory requirements not required by statute -- that is, where the imposition of the requirement is within the discretion of the regulatory agency. Because of the limited nature of the Department of Justice's regulatory activities, the threshold standards of the Executive Order will rarely be met.

The Office of Policy Development (OPD) is responsible for coordinating the Department's discretionary rule-making functions. Since the Executive Order took effect in January, OPD has been charged with determining whether proposed Departmental regulations would impose significant unfunded mandates on state or local governments. Since January, OPD has yet to identify a new rule under development that would impose a significant unfunded mandate on state or local governments as a matter of discretionary regulatory authority. In the event that such a regulation is identified, the Office of Public Liaison and Intergovernmental Affairs will coordinate the consultation with appropriate state and local officials.

You can be sure that the Department of Justice is committed to working closely with state and local governments well beyond that required by the President's Executive Order. In particular, implementation of the Violent Crime Control Act, for which the Department and state and local government officials fought so hard, depends greatly upon our success in forging close and effective working relationships with state and local governments.

To that end, we have had an ongoing series of briefings and consultations with state and local officials on various aspects of the Violent Crime Control Act and its implementation. Besides the several discussions we have had with the U.S. Conference of Mayors, formal briefings have been held by the Department for the staff and/or membership of the National Governors Association, the National Association of Attorneys General, the National District Attorneys Association, the National League of Cities, and the National Association of Counties. In addition, Department officials have met with dozens of individual state and local officials on various aspects of implementation. At each of these briefings and meetings, we have solicited input and suggestions about the implementation process.

The Department is particularly interested in receiving comments and suggestions from state and local officials on the regulations and guidelines which will govern the various grant programs under the Violent Crime Control Act. Recent discussions were held with representatives of the U.S. Conference of Mayors, National League of Cities and National Association of Counties on administration of the *State Criminal Alien Assistance Program* (SCAAP) grants. At the time of this writing, the Department is seeking feedback from the U.S. Conference of Mayors, and from other organizations representing state and local officials, on proposed draft guidelines for the *COPS AHEAD* and *COPS FAST* grant programs. The Department will continue to work closely with state and local officials in formulating plans for administering these and other grant programs.

Please feel free to contact me with respect to any specific concerns that you or other members of the U.S. Conference of Mayors may have regarding the development of regulations by the Department of Justice.

Sincerely,

Janet Reno

SECRETARY OF LABOR
WASHINGTON

FEB 9 1995

The Honorable Victor Ashe
Mayor of Knoxville
President
U.S. Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mayor Ashe:

Thank you for requesting an overview of how the U.S. Department of Labor has responded to Executive Order 12875, Enhancing the Intergovernmental Partnership.

I want you to know that Deputy Secretary, Thomas P. Glynn and I personally share the President's commitment to enhancing the coordination of our policies with those who represent local and state governments, recognizing that we are full partners in governing. The consultations we held at your annual meeting this week are just the latest example of the many we have had with mayors since this Administration took office.

One of the first things we did upon taking office was to begin establishing enhanced channels to facilitate our communications. We have enhanced the "intergovernmental" in the Office of Congressional and Intergovernmental Affairs, and appointed a revitalized group of Secretary's Representatives around the country. I strongly encourage you to utilize these channels to bring to my personal attention any problems that require resolution, including any that may arise in the implementation of Executive Order 12875. These channels are also there to facilitate resolution of specific problems, and to regularly share ideas that will further our partnership.

I believe we have been particularly attentive to seeking the involvement of the mayors as we develop new policy initiatives -- whether it be employment and training or OSHA reform. As we move ahead in this very busy legislative session, we want to work together to ensure that our consultations on mutual priorities are as complete as possible.

The purpose of Executive Order 12875 is to focus individual agencies on the need for systemic approaches to promote our partnership in two areas that are of particular concern -- the establishment of regulations that could impose new mandates on your members, and the processing of waiver applications from your members under programs that permit such opportunities. I have vested the program Assistant Secretaries within DOL with

responsibility for implementing such approaches, and I would welcome any reactions you or your members have -- favorable as well as unfavorable -- to the implementation of the Executive Order in particular DOL agencies. We have already benefited from your personal input in one situation, and I hope the systemic improvement produced will continue to bear fruit. I have attached a list of our executive staff as well as Regional Secretary's Representatives and I would ask that you continue to have staff work through Nancy Kirshner, Director of Intergovernmental Affairs at (202) 219-6141 to expedite any requests.

I look forward to continuing and expanding our close and mutually productive communications.

Sincerely yours,

Robert B. Reich

Attachments

SECRETARY OF LABOR
WASHINGTON
DOL EXECUTIVE STAFF

ROBERT B. REICH *SECRETARY OF LABOR*	219-8271
THOMAS P. GLYNN *DEPUTY SECRETARY*	219-6151
STEVE ROSENTHAL *ASSOCIATE DEPUTY SECRETARY*	219-2455
KRIS BALDERSTON *ACTING CHIEF OF STAFF*	219-8271
T. MICHAEL KERR *DIRECTOR, EXECUTIVE SECRETARIAT*	219-8271
TIMOTHY BARNICLE *ASSISTANT SECRETARY for POLICY*	219-6181
KATHERINE G. ABRAHAM *COMMISSIONER* *BUREAU of LABOR STATISTICS*	606-7800
BERNARD E. ANDERSON *ASSISTANT SECRETARY* *EMPLOYMENT STANDARDS ADMINISTRATION*	219-6191
DOUGLAS ROSS *ASSISTANT SECRETARY* *EMPLOYMENT & TRAINING ADMINISTRATION*	273-0662
RENE REDWOOD *EXECUTIVE DIRECTOR* *GLASS CEILING COMMISSION*	219-7342
JOAQUIN F. OTERO *DEPUTY UNDER SECRETARY* *BUREAU of INTERNATIONAL LABOR AFFAIRS*	219-6043
DAVITT MCATEER *ASSISTANT SECRETARY* *MINE SAFETY AND HEALTH ADMINISTRATION*	(703)235-1385

CYNTHIA METZLER *ASSISTANT SECRETARY* *ADMINISTRATION AND MANAGEMENT*	219-9086
CHARLES L. SMITH *ACTING ASSISTANT SECRETARY* OFFICE of AMERICAN WORKPLACE	219-6045
GERI D. PALAST *ASSISTANT SECRETARY* *OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS*	219-4692
CHARLES C. MASTEN *INSPECTOR GENERAL*	219-7296
ANNE H. LEWIS *ASSISTANT SECRETARY* *OFFICE OF PUBLIC AFFAIRS*	219-5502
JOSEPH A. DEAR *ASSISTANT SECRETARY* *OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION*	219-7162
MARIA ECHAVESTE *ADMINISTRATOR* *WAGE AND HOUR DIVISION*	219-8305
E. OLENA BERG *ASSISTANT SECRETARY* *PENSION WELFARE BENEFITS ADMINISTRATION*	219-8233
THOMAS S. WILLIAMSON, JR. *SOLICITOR OF LABOR*	219-7675
PRESTON M. TAYLOR, JR. *ASSISTANT SECRETARY* *VETERANS EMPLOYMENT AND TRAINING SERVICES*	219-9116
KAREN NUSSBAUM *DIRECTOR, WOMEN'S BUREAU*	219-6611

USDOL Secretary's Representatives:
(REGIONAL OFFICES for OCIA)

Tom Davis, Secretary's Representative and **Sean King**, Deputy, of the Boston Regional Office, represent Secretary Reich in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

USDOL Region I Office
One Congress Street
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Telephone: (617) 565-2281
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Hulbert James, of the New York Regional Office, represents Secretary Reich in New Jersey, New York, Puerto Rico, and the Virgin Islands.

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Pat Halpin-Murphy, of the Philadelphia Regional Office, represents Secretary Reich in Delaware, DC, Maryland, Pennsylvania, Virginia and West Virginia.

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Barbara Kelly, of the Atlanta Regional Office, represents Secretary Reich in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

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Richard Sawyer, of the San Francisco Regional Office, represents Secretary Reich in Arizona, California, Hawaii, and Nevada.

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Pat Stell, of the Seattle Regional Office, represents Secretary Reich in Alaska, Idaho, Oregon, and Washington.

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Seattle, WA 98101

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Facsimile: (206) 553-2086

The U.S. Department of Labor Secretary's Representatives are affilliated with the Office of Congressional and Intergovernmental Affairs. For general information regarding the Secretary's Representatives or for assistance in Regions VI, VII, or VIII, please contact Nancy R. Kirshner, Director of Intergovernmental Affairs at (202) 219-6141.

United States Department of State

Washington, D.C. 20520

January 10, 1995

The Honorable Victor Ashe
President
United States Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mayor Ashe:

On behalf of the Secretary of State, I am responding to your letter of December 16, 1994 regarding the Department's efforts to implement Executive Order 12875, Enhancing the Intergovernmental Partnership.

As you noted, the Executive Order concerns unfunded federal mandates imposed on state and local governments. In the case of this Department, we have no mandates that require actions from the mayors or other state and local officials.

I hope this information will be useful to you in communicating with the mayors on this issue.

Sincerely yours,

Joan H. Colbert
Coordinator for Intergovernmental Affairs
Bureau of Public Affairs

941026-02

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

November 28, 1994

The Honorable Victor Ashe
Mayor of Knoxville
President
U.S. Conference of Mayors
1620 Eye Street, NW
Washington, DC 20006

Dear Mayor Ashe:

Thank you for your letter regarding the Department's work to implement Presidential Executive Order 12875 to establish a stronger working relationship between the Federal Government and our State and local partners.

As a former mayor, I understand your concerns about implementing federal rules and regulations without necessarily being provided with the funding or other tools necessary to allow you to carry out these mandates. I can assure you that this Department is attempting to work more closely with mayors and other elected officials and that while our efforts can continually be improved, our desire is to consult with you before, during and after we establish rules and regulations.

It is my understanding that three of your biggest priorities relating to unfunded mandates affecting this Department include Clean Air Act (CAA) requirements, the requirements of the Americans with Disabilities Act (ADA) and our drug and alcohol rules. As you know, Congressional legislation on each of these issues was adopted prior to the President's Executive Order and our rulemaking process on each of these issues also began before October 1993. This does not preclude our desire to work with you on future needs.

For example, we have an ongoing working group with this Department, the Environmental Protection Agency and the Public Interest Groups constantly reviewing the EPA and DOT Clean Air Act rules to see how we can best work together on implementation without over-burdening local communities and states.

Our work on ADA issues has also reviewed issues of local concern. We have issued a notice of proposed rulemaking (NPRM) which would eliminate the requirement for state and local governments to provide annual updates of their paratransit plans once they have come into compliance. We recognize that providing annual reports on an accepted procedure may be an undue paper work burden and so we have proposed making adjustments to lessen this burden.

In the area of our drug and alcohol rules, we have proposed a new rule which would allow the random drug testing rate to decrease from 50% to 25% after two years of data in any industry shows a positive random testing rate of 1% or less. We also anticipate more flexibility in methods used for the alcohol screening (original) test, so that those of you who must give the test will have more options. Again, we recognize that you need some flexibility in implementing our rules and it is our hope these adjustments will be more efficient and less costly.

This Department is committed to adherence to the President's Executive Order and whenever we submit our final proposed rules to the Office of Budget and Management, we include a summary of comments from local officials. All of these efforts do not preclude our willingness to continue to work with you to ensure your concerns are addressed. I will ask our staff to provide you with more direct notification whenever there is a proposed rulemaking with local impacts. I hope you will continue to work with us and provide suggestions as to how we can improve our communications.

I look forward to working with you on many issues of mutual concern.

Sincerely,

Federico Peña

THE DEPUTY SECRETARY OF THE TREASURY
WASHINGTON

April 13, 1995

Mr. Victor Ashe
President
United States Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Ashe:

Thank you for your letter concerning unfunded mandates and the implementation of Executive Order 12875, *Enhancing the Intergovernmental Partnership*. In response to your request, we asked our bureaus to provide an overview of their interaction with State and local governments and an explanation of unfunded mandates created by bureau regulations.

For the purposes of the Executive Order, an unfunded mandate is any federal regulation *not required by statute* which imposes a requirement on State, local or tribal governments and which is not funded by the Federal Government. In addition, a mandate is not considered unfunded if the Office of Management and Budget is informed of prior consultations between the agency and affected governments.

Using this definition, we identified two unfunded mandates.

- Highway Use Tax: 42 U.S.C. 4481 requires that a State receive proof of payment of a federal excise tax before issuing a vehicle registration to a vehicle subject to the tax.

- Low-Income Housing Projects: Section 42 of the Internal Revenue Code, 26 U.S.C. 42 requires state agencies to evaluate the amount of housing project tax credit distributed to building developers.

The enclosure contains a summary of cur intergovernmental relations, as well as an explanation of the mandates listed above.

We feel that the Department of the Treasury does not promulgate any substantial unfunded mandates. To the extent that the above programs constitute unfunded mandates, we believe that these are necessary and appropriate regulations which impose minimal cost to the States.

Please be assured, however, that the Department will continue to review, and revise when appropriate, our regulations that affect State and local governments. The issue of unfunded mandates is a concern at all levels of government. We are aware of its importance and will stay alert to the issue.

Sincerely,

Frank N. Newman

Enclosure

ENCLOSURE

Treasury Mandates and Relationships with State, Local and Tribal Governments

The Department of the Treasury, through its bureaus, has significant contact with State, local, and tribal governments. This paper provides an overview of these relationships. Also included (where available) is a listing of our bureaus' intergovernmental mandates. These mandates are divided into two categories:

- those defined as unfunded mandates by Executive Order 12875, *Enhancing the Intergovernmental Partnership*, namely the Highway Use Tax and Low Income Housing Projects; and

- bureau regulations promulgated *pursuant to legislation*, which do not fall under the definition of an unfunded mandate in the Executive Order (i.e., The Bureau of Alcohol, Tobacco and Firearms enforces the Brady Act and Crime Control Act).

Category 1: Unfunded Mandates initiated by the Department of the Treasury:

INTERNAL REVENUE SERVICE

IRS interacts with all levels of government on tax matters. To facilitate the process, IRS has developed the FedState Program. Its goals are to act as a liaison between the various IRS offices, find ways to reduce the costs of tax administration, foster public respect for the tax system, function as a troubleshooter for the field offices, and initiate legislative proposals as needed.

Highway Use Tax: 42 U.S.C. 4481 imposes a federal excise tax on highway vehicles exceeding a certain weight. 26 C.F.R. 41.6001-2 requires that a State receive proof of payment of the excise tax before issuing a registration to a vehicle subject to the tax. A State is exempt from the proof of payment requirement if it has established a suspension registration system.

Failure of a State to comply with the proof of payment requirement may result in a reduction of Federal-aid highway funds apportioned under 23 U.S.C. 104(b)(5).

The IRS believes that compliance with this requirement imposes only de *minimis* costs on State governments; a State need only receive the proof of payment in connection with its regular registration process.

Low-Income Housing Projects: 26 U.S.C. 42 provides a federal tax credit for certain low-income housing projects. Each State is apportioned an amount of this credit, which it may allocate to building developers in the State.

A developer can claim the federal tax credit only if it receives an allocation of the credit from a State housing agency under a qualified allocation. The qualified allocation plan, which is defined in 26 U.S.C. 42, imposes a number of requirements on State housing agencies. For example, before allocating the credit to a particular project, the agency must evaluate the sources and uses of funds for the building project to ensure that the amount of credit allocated is not in excess of the amount necessary to ensure the feasibility of the project. The agency also must develop and implement procedures for monitoring project compliance with 26 U.S.C 42.

The IRS estimates that 26 U.S.C. 42 imposes compliance costs on States of between $20 and $30 million annually. It should be noted, however, that State housing agencies may charge a fee to recover all or part of the costs of complying with the qualified allocation plan requirements. Although the IRS believes that State agencies recover a substantial portion of their costs through fee systems, the cost estimate has not been adjusted to take such fees into account.

Category 2: Treasury regulations not defined as unfunded mandates by EO 12875:

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS (ATF)

As a law enforcement agency, ATF has significant interaction with State and local entities and, to a very limited extent, tribal entities. In the area of the taxation and marketing of alcoholic beverages, ATF shares information with State agencies. Additionally, in the area of firearms and explosives, ATF works closely with State and local law enforcement agencies investigating violations of Federal and State laws applicable to these items. ATF's regulation of alcohol, tobacco, firearms and explosives does not generally involve mandating programs or actions by State, local, or tribal entities.

ATF regulations required by statute and thus exempt from EO 12875 include:

- ◇ National Firearms Act
- ◇ Brady Handgun Violence Prevention Act

FINANCIAL CRIMES ENFORCEMENT NETWORK (FinCEN)

FinCEN's interaction with State, local, and tribal governments is limited to the provision of services and support of criminal and civil law enforcement activities by those governments, including the enforcement of the Bank Secrecy Act (BSA). FinCEN has recently expanded its support of State and local governments with Project Gateway, through which State and local law enforcement agencies are provided on-line access to information collected under BSA.

FinCEN regulations required by statute and thus exempt from EO 12875 include:

- ◇ Bank Secrecy Act

FINANCIAL MANAGEMENT SERVICES (FMS)

FMS interacts extensively with State governments through payment transactions and the operation of numerous joint ventures. FMS also works in coordination with the Federal Reserve to enforce the Reserve's regulations.

FMS regulations required by statute and thus exempt from EO 12875 include:

- ◇ Cash Management Improvement Act
- ◇ Electronic Benefits Transfer regulations
- ◇ Electronic Federal Tax Payment System

INTERNAL REVENUE SERVICE

In addition to the regulations discussed under "Category 1," IRS promulgates several mandates which are not addressed by Executive Order 12875. These include:

- ◇ Nuclear Decommissioning Costs
- ◇ Pollution Control Facilities Amortization

UNITED STATES CUSTOMS SERVICE

Customs interacts with State and local governments on revenue/debt collection matters, border issues, joint enforcement operations, and asset sharing.

Customs has a statutory fiduciary responsibility to perform a full range of customs services on behalf of Puerto Rico and the territories of the U.S. Virgin Islands. This entails enforcing their applicable laws, collecting duties, processing accounting transactions, making disbursements, etc.

Customs regulations required by statute and thus exempt from EO 12875 include:

- ◇ Treasury Forfeiture Fund

UNITED STATES SECRET SERVICE (USSS)

In the course of providing protective services, the Secret Service interacts with law enforcement agencies at the State, local and tribal levels.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 12 1994

OFFICE OF REGIONAL OPERATIONS
AND STATE/LOCAL RELATIONS

Honorable Victor Ashe
Mayor of Knoxville
President
The US Conference of Mayors
1620 Eye St., NW
Washington, DC 20006

Dear Mayor Ashe:

Administrator Browner has asked me to respond to your recent letter regarding Executive Order 12875, Enhancing the Intergovernmental Partnership. An interim response was FAXED to you at the Palmer House in Chicago, and I hope it reached you in time for the conference leadership meeting.

The Agency is working hard to respond to Executive Order 12875 and to the concerns we have heard from the states, local and tribal governments over the past several years, because we strongly believe that protecting the environment is a partnership in every sense of the word. Congress, regulators, administrators, implementors, federal, state, local and tribal governments, must all truly work together to achieve environmental goals. In fact, articulating what the Nation's environmental goals should be is one of our many joint projects with the regulated community.

EPA has recently held meetings across the country with state, local, and tribal representatives along with participants from business, industry and the general public, soliciting input for a set of environmental goals that the nation can agree upon and support.

We intend to increase the use of forums across a broad range of activities at the community level to gain better insight on local needs and better inform our own personnel about dynamics of localities and their environmental management needs.

The Agency has also embarked on an ambitious "Customer Service" project to redesign our policies and processes in response to citizen needs. Of course, states and local governments are very important conduits to the public. This is

another area for improving our efforts together. EPA has defined interim service standards that we believe will move us a good way towards helping these partnerships. A brief overview of these standards is attached for your information.

I am pleased to tell you that EPA is moving at once to establish a local government desk in each of our 10 regional offices in order to increase the attention of our field staff on local government needs and concerns and to provide a prominent location in each region to seek assistance. In all cases we will be working with state governments to provide coordinated and sensible management of delegated federal programs.

We are also moving ahead to accelerate the implementation of a process designed to decrease municipal and state monitoring requirements under programs such as the State Drinking Water Act.

We are exploring ways to build state, local, and tribal government participants into the Agency's new simplified rule-making process as well. We hope Washington's public interest groups will accept this challenge with us. For example, we hope the Conference of Mayors will help us get the word out about new regulations under consideration. We need your help in identifying which regulations in EPA's pipeline are likely to be the most important to all cities so that we can target our resources where they will make the most difference.

Of course, we are continuing projects such as those highlighted in the sixteen page document you received in Chicago. In EPA Regional Offices, in Program Offices, and in EPA Support offices, all staff members are taking a new look at what they are doing and how they can make it work better. Much change is incremental, as you might expect in a bureaucracy such as ours, but it is happening. We appreciate the support of the Conference of Mayors as we work to institutionalize change and welcome your continuing participation as the process evolves.

Sincerely yours,

Shelley A. Metzenbaum
Associate Administrator

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF REGIONAL OPERATIONS
AND STATE/LOCAL RELATIONS

November 14, 1994

FOR THE IMMEDIATE ATTENTION OF MAYOR VICTOR ASHE

Mayor Ashe, because our communications pipeline is somewhat cumbersome we have not been able to reply to your letter of October 27; however hope this information will be helpful for your presentation. We will be sending you a formal response very shortly. In the meantime, please call me if you have any questions at 202/260-0457.

Rand Snell
Director of State and Local Relations

WHAT EPA IS DOING TO STRENGTHEN INTERGOVERNMENTAL PARTNERSHIPS

• • • • •

DRAFT* 6/27/94

*This is a living document. Please forward new entry information or corrections to Ann Cole, OROSLR, at 202/260-3953 - FAX: 202/260-0200; or Chuck Kent, OROSLR, 202/260-2462 - FAX: 202/260-9365

WHAT EPA IS DOING TO STRENGTHEN INTERGOVERNMENTAL PARTNERSHIPS

States, tribal, and local governments have been making recommendations for several years about what EPA should do regarding environmental mandates. There are a number of common themes in these recommendations. They are:

- Flexibility
- Participation
- Prioritization and Integration
- Risk Assessment
- Improved Science
- Cost-benefit analysis
- Expanded Education and Training
- Funding

These are major themes of many new EPA initiatives, as well. For example, they are paramount in many guiding principles of our strategic plan, which illustrates that EPA has *heard* state, local, and tribal governments and is responding to their needs.

FLEXIBILITY

Cross-Media Initiatives:

• Key EPA NPR Recommendations are being implemented which develop pilot projects that provide states with programmatic flexibility to target their greatest environmental risk, while producing better environmental results and lowering administrative transaction costs. For example, a pilot project in cooperation with the State of Idaho. Contact: Region 10, Jim Werntz, 206/553-2634.

• Region 8 is piloting a block grant program with the states of Montana and North Dakota, giving them flexibility to manage their own work; to move resources from one program or media to another, if necessary, to meet program goals and optimize environmental results. Contact: Jack Bowles, 303/293-1454.

Media-Specific:

• OW has specifically asked Regions and States to more fully utilize the monitoring flexibilities built into OW drinking water regulations. In particular, states are strongly encouraged to develop, and Regions are encouraged to approve, monitoring waiver programs. States are also urged to maximize the use of sample compositing to the extent feasible and consistent with protection of public health. Contact: Jim Elder, 202/260-5543.

FLEXIBILITY (continued)

• The Combined Sewer Overflow guidance breaks new ground by giving States the ability to develop appropriate, site-specific NPDES permit requirements using a comprehensive, cost-effective national strategy. Contact Jeff Lape, 202/260-7361.

• Allowing performance standards rather than design standards, as in Subtitle D. Contact: Allen Geswein, 202/260-4687.

• In both the Underground Storage Tank and Municipal Solid Waste programs, the Agency recognized that local government financing required separate financial tests, and so have developed separate financial tests for local governments. This provides a way to pass the financial test without having to buy a third party instrument, thereby lowering costs and allowing them to self-insure. Contact: Subtitle D – Tim O'Malley, 703/308-8613; OUST: Sammy Ng, 703/308-8882.

• OSWER phased in both technical and financial responsibility requirements for Subtitle D and UST programs to give locals the most amount of time possible to come into compliance. Contact: Subtitle D – Tim O'Malley, 703/308-8613.

• OSWER has announced public meetings across the United States to solicit ideas from local officials from small communities regarding monitoring requirements for Subtitle D. The goal is to find ways small jurisdictions can comply with the the law at reasonable cost. Contact: Subtitle D – Scott Ellinger, 202/260-1350.

• Superfund: EPA has begun deferring superfund sites to states, rather than having cleanup come from the Federal level. This allows the state more flexibility to use revenues, taking into account site-specific interests of local communities. So far, 26 sites have been deferred. Contact: Ellen Brown, 260-4483.

Through, or To, State Governments:

• The Subtitle D state approval program encourages states to apply for approval of their own municipal solid waste landfill programs, and provides the maximum amount of flexibility to meet local needs. The Program is based on the philosophy that EPA should not dictate to states what their program should be. Contact: Ellen Brown, 202/260-4483.

• The Groundwater Program is also based on the idea that states should be able to develop their own approaches to groundwater protection. This approach encourages states to inventory groundwater aquifers and classify them based on reasonably expected future use, which would exempt groundwater not used for drinking water from costly compliance activities. Contact: Jim Elder, 202/260-5543.

• The Underground Storage Tank Program encourages states to seek and receive approval to run their own UST programs in lieu of the federal government. State

FLEXIBILITY (continued)

program approval allows maximum flexibility for states to meet minimum requirements. Contact: Sammy Ng, 703/308-8882.

• The Pesticides and Ground Water Office's State Management Plan (SMP) approach provides flexibility to States to tailor pesticide management to local conditions (e.g., pesticide use patterns, hydrogeologic conditions, and soil types). SMPs will vary in their scope and level of detail, reflecting specific state values, differing regulatory approaches, and the actual and potential threat posed to the state's ground water resource. Contact: Chuck Evans, 703/305-7199.

• Worker Protection Standards: EPA Regions will be delegated authority to make determinations about the equivalency of state worker protection provisions to corresponding provisions in the Federal Worker Protection Standards. Contact: Therese Murtagh, 703/305-5621 (FAX: 703/305-5588).

PARTICIPATION

Cross-Media Initiatives:

• State and local government participation is being built into EPA's revised rulemaking process. For example, AA's have responsibility for assuring that their programs produce quality rules, DEFINED AS RULES THAT CAN BE SUCCESSFULLY IMPLEMENTED IN THE FIELD. The revised process includes specific steps to:

> – inform states and local governments in advance of rulemaking and policy actions; and
>
> – provide them with opportunities to participate throughout the process to the extent allowed by law.

Contact: Donna Fletcher, 202/260-3210.

• EPA's environmental goals setting project includes states and local governments. Public meetings are being held across the country to talk with local officials and others about environmental goals for the nation. Contact: Derry Allen, 202/260-4028.

• EPA has a new Local Government Advisory Committee to make recommendations to the Administrator on ways to improve relationships between EPA and local governments. The Advisory Committee includes eighteen elected and appointed officials from city and county governments across the nation. Contact: Tom Moore, 202/260-0456.

• EPA has a new Small Town Task Force Advisory Committee, which includes local officials from jurisdictions under 2,500 in population, to provide advice and

recommendations to the Administrator on issues of concern to small communities. Contact: Tom Moore, 202/260-0456.

• The Administrator established a State/EPA Capacity Steering Committee made up of senior state and EPA managers to oversee implementation of the State Capacity Task Force Report. Contact: Chuck Kent, 202/260-2462.

• A Tribal Operations Committee has been formed, and EPA has committed to create a Tribal Office. Contact: Martha Prothro, 202/260-4724.

• EPA also has longstanding Advisory Committees and dialogues which include state and local officials:

– The Administrator and Deputy meet periodically with state Environmental Commissioners in All-States meetings. The next is scheduled for Fall, 1994. Contact: Chuck Kent, 202/260-2462.

– The EPA's Environmental Financial Advisory Board has participants from all levels of government. It focuses on environmental finance issues for local governments. In particular, it provides cost-benefit analyses based on risk assessment where appropriate; reducing the cost of funding environmental facilities; assisting state and local governments in setting priorities; and focusing across media to achieve economies of scale. Contact: George Ames, 202/260-8227

– The National Advisory Council on Environmental Policy and Technology includes leaders from state and local governments. It provides policy information and advice to the Administrator and other EPA officials regarding implementation of environmental programs. Contact: Abby Pirnie, 202/260-8079.

– Others are: Acid Rain Advisory Committee; Clean Air Act Advisory Committee; Clean Air Scientific Advisory Committee; Committee on National Accreditation of Environmental Laboratories; EPA Environmental Border Plan Public Advisory Committee; Federal Facility Environmental Restoration Dialogue Committee; Gulf of Mexico Program Policy Review Board; Lawn Care Pesticide Advisory Committee; Management Advisory Group to the Assistant Administrator for Water; National Air Pollution Control Techniques Advisory Committee; National Drinking Water Advisory Council; National Environmental Education Advisory Council; Science Advisory Board; and the Stratospheric Ozone Protection Advisory Committee. Contact: Mary Beatty, Committee Management Staff 202/260-5037.

• For the first time, EPA's annual planning meeting included representatives from State and Tribal governments. Contact: Shelley Metzenbaum, 202/260-4719.

PARTICIPATION (continued)

• Networks that include local officials, business, industry, environmental groups, and other interested parties exist, or are being formed, in many EPA Regional offices. Contact: Tom Moore, 202/260-0456.

• Region II's Brownfields initiative is conducting interviews with lenders, government officials, community boards and other major parties interested in redeveloping blighted areas that may have redevelopment potential. This is to find ways to overcome the perception that -- because of the possibility of contamination with hazardous waste and the perception of CECLA-liability (among other things) -- developers should focus on"greener"pastures in suburban and/or rural areas. Results of the study will be available in the third quarter of FY'94. Contact: George Meyer, 212/264-8356.

Media-specific

• OAQPS involves state and local air pollution control agencies in the development of policy and guidance for implementation of Titles I and V of the Clean Air Act, to insure that state and local concerns are reflected in the policy and guidance issued by EPA. Contact: Mike Trutna, 919/541-5345.

• Periodic conference calls with state and local program administrators are held by OAQPS to discuss ongoing projects/issues. An annual retreat is also held, specifically to discuss the most significant implementation issues with selected state and local administrators, and the office includes state and local representatives in annual long-range planning sessions. Contact: Jeff Clark, 919/541-5557.

• Opportunities for increased State and local government participation in EPA's policies and processes are being developed as EPA implements (1) Executive Order 12875 on Enhancing Intergovernmental Partnerships; (2) Executive Order 12866 on Regulatory Planning and Review; and (3) Executive Order 12862, Setting Customer Service Standards. Contact: (1) Donna Fletcher, 202/260-3210; (2) Tom Kelly, 202/260-4001; (3) Abby Pirney, 202/260-8079.

• Municipal Stakeholders' Meetings are held bi-monthly by the Office of Water senior management with municipalities and associations to discuss recent developments in programs, solicit feedback, and to foster a positive working relationship with key constituents and partners. Contact: Jim Horne, 202/260-5802.

• Focus Groups with local officials are held by Regional and headquarters offices to solicit input on EPA processes and policies. For example, the Stormwater Program in the Office of Water convened a series of focus groups to look at ways of effectively implementing stormwater controls for commercial sources and small communities. Contact: program offices.

PARTICIPATION (continued)

• The Office of Underground Storage Tanks is conducting joint inspections with local government inspectors as a way of training them, and forming better working relationships with them. Contact: Sammy Ng, 703/308-8882.

• The Office of Underground Storage Tanks met extensively with representatives from local government to talk about what would be useful to local officials in order to meet RCRA financial responsibility requirements. In the pre-proposal stage, early drafts of the rule were shared with knowledgeable local officials, and the office worked with national associations to test early versions of the rule. Contact: Sammy Ng, 703/308-8882.

• Public Meetings on Office of Water Strategic Plan: Early in 1993, OW held four public meetings to gather input from the general public and from key stakeholders. Comments and reactions were used to help develop a process for shaping the direction of future water programming. Contact: Jim Horne, 202/260-5802.

• The Pesticides and Ground Water Office's State Management Plan (SMP) approach, asks states to demonstrate that the public is involved in the process of Management Plan development and will be informed of significant program implementation activities, including monitoring results. Contact: Chuck Evans, 703/305-7199.

• States and local government representatives are participants in EPA regulatory negotiation processes being undertaken on major new regulatory activities. Currently, local government representatives are participating in the following regulations:

Interim Health-Based Lead Hazard Standards for Soil, Dust and Paint
Off-site Waste Operations
Federal Operating Permit Rules
New Source Review Reform
Criteria for Compliance with Environmental Standards-Spent Nuclear Fuel
Combustion Permitting and Expanded Public Participation
NESHAP for Wood Furniture Manufacturing
Control of VOC Emissions from Architectural and Industrial Maintenance Coatings

Contact: Chris Kirtz, 202/260-7565.

Through, or To, State Governments:

• The Office of Pesticide Programs (OPP) forms working groups with pesticide control officials to work on pesticide issues. Contact: Arty Williams, 703/305-7371.

PARTICIPATION (continued)

• The Office of Pesticide Programs holds conference calls with state lead agencies the day prior to major announcements related to pesticide programs, whenever feasible. Contact: Arty Williams, 703/305-7371.

• The Office of Pesticide Programs is piloting an initiative to coordinate the federal pesticide program with that of the state of California, to more closely harmonize registration processes, simplify procedures for registering reduced-risk pesticides, and revoke registration of high-risk pesticides. Additionally, both agencies are working toward exchange of OPPE and EPR work products to reduce duplication of effort and use resources more efficiently. Contact: Susan Wayland, 703/305-7092, or Cathy Kronopolus, 703/305-7891.

• Region 7 is working with state governments using existing Clean Water Act Section 319 grants to protect or restore water bodies affected by nonpoint source pollution. Grant projects, steered by local citizen advisory committees in concert with local soil and water conservation districts and county governments, allow the agencies flexibility to devise site-specific measures and fund demonstrations of technologies and approaches that meet water quality standards. Contact: Ray Hurley, 913/551-7365

PRIORITIZATION, AND INTEGRATED APPROACHES TO ENVIRONMENTAL PROTECTION

Cross-Media Initiatives:

DRAFT STRATEGIC PLAN: Ecosystem Protection, a major Guiding Principle for the Agency, will move toward a "place-driven" approach; that is, the work of the Agency would be driven by the [cross-media] environmental needs of communities and ecosystems. For any given "place," EPA will establish a process for determining long-term ecological, economic, and social needs and will re-orient its work to meet those needs.

Ecosystem Pilots currently under way include:

• Region 10 pilot project with the State of Idaho and four Idaho communities. This project would design compliance schedules taking into consideration protection of public health; protection of the environment; current tax structure and rates as compared to other local governments; ability of the local government to pay for the costs of compliance; current fiscal obligations of the local government; and other factors. Contact: Region 10, Jim Werntz, 206/553-1138. Also contact Deb Martin, OPPE, for information on comparative risk projects, 202/260-2699.

• EPA's Center for Environmental Research and Information (CERI), headquartered in Cincinnati, Ohio, is developing a protocol for comprehensive

PRIORITIZATION, AND INTEGRATED APPROACHES (continued)

environmental planning for small communities, which is intended to help small community officials set priorities and make critical decisions about environmental issues facing them. Contact: Randy Rivetta or Jim Kreissl, 513/569-7615.

SUSTAINABLE DEVELOPMENT APPROACHES also speak to the need to develop cross-media approaches to environmental protection in conjunction with local government participation. Current pilots under way include the Southeast Chicago Urban Environmental Initiative (contact: Gordon E. Jones, 312/353-3115); and the Northwest Forest Ecosystem Management Project (Contact: Gary O'Neal, 206/553-1792).

- EPA's Watershed Initiative, in its broadest sense, is a way of organizing and focusing on water programs and looking at issues on a watershed basis, providing flexibility to address the most significant threats.

- EPA is providing support to over 30 State, municipal, and tribal Comparative Risk projects. These projects are aimed at developing consensus-based rankings and management plans for environmental priorities. EPA is currently working with the City of Columbus, Ohio, to determine the priority risks for their community, and look at those risks in light of regulation-driven requirements and expenditures. Contact: Deb Martin, 202/260-2699

- The Great Plains Program is a geographic ecosystem-based initiative designed to integrate protection of human health with the environment in 13 Great Plains states. EPA's role – facilitating cooperation among stakeholders, compiling and sharing information, coordinating multiagency policy formation, and facilitating community forums for developing strategies for undergirded environmental management and sustainable development. Contact: Ray Hurley 913/551-7365.

- Multi-media enforcement: Region II's Multi-media Enforcement Program performs consolidated multi-media inspections; to-date, none have found significant violations in multiple programs. The program is currently undergoing a review to assess the past three years' aetivities and refine and improve the strategy, by examining program goals, the state role, EPA role, the use of targeting and the definition of success. The review is scheduled to be completed by October, 1994. Contact: Region II

Through, or To, State Governments:

- The Office of Pesticide Programs' State Management Plan's approach is a significant part of the Agency's larger Ground Water Policy, which seeks to develop Comprehensive State Ground Water Protection Programs that integrate all State and Federal programs to protect ground water resources. SMPs require that States describe the coordination mechanisms between all participating State agencies, local entities, and appropriate Federal agencies. Contact: Chuck Evans, 703/305-7199.

PRIORITIZATION, AND INTEGRATED APPROACHES (continued)

• The Platte Basin Watershed Protection Program is a program in which Region 7, in consultation with the Nebraska Department of Environmental Quality, concluded that a comprehensive ecosystem approach to the Platte River Basin in Nebraska could address areas of high risk related to pesticides, nitriates, toxics and ecosystem protection. Contact: Ray Hurley, 913/551-7365.

RISK ASSESSMENT

Media-Specific:

• The Agency prepares numerous risk assessments in support of decisionmaking. These include facility-specific risk assessments to support permitting, site-specific risk assessments to inform cleanup decisions, and risk assessments to support decisions on regulatory actions.

-- Example: in order to meet RCRA's standard of protecting human health and the environment, a risk assessment is an integral part of every rulemaking. Contact: Ellen Brown, 202/260-8929.

-- Example: Before EPA issues a regulation requiring States to develop a State Management Plan for pesticides, the Agency conducts an extensive risk assessment to determine that: (1) the pesticide in question poses an unreasonable risk to human health and the environment under FIFRA, (2) the risk posed cannot be addressed through less stringent FIFRA regulations, such as label requirements and restricted use classifications; and (3) the extent of the risk varies by location and therefore does not warrant national cancellation. Contact: Chuck Evans, 703/305-7199.

• EPA is working with several states to initiate the pilots to test the use of environmental indicators to measure progress against national environmental goals for water programs. Contact: Jim Horne, 202/260-5802.

Through, or To, State Governments:

• Region 7 and EPA Headquarters are conducting an assessment of the ecological conditions of the Platte River in Nebraska and have held public meetings to obtain local input on current conditions. This is one of five studies across the U.S. aimed at a better understanding of how to ensure ecological health. Contact: Walt Foster, 913/551-7290.

IMPROVED SCIENCE

Cross-Media Initiatives:

• EPA's draft strategic plan includes "Strong Science and Data" as one of its six Guiding Principles, to ensure the Nation's environmental policies are based on the best science and information available. Contact: see Strategic Planning documents.

• The Science Policy Council and its Steering Committee have developed a process for expanding and improving peer review, including the development of Standard Operating Procedures (SOPs) for each office; and identification of major scientific and technical work products as peer review candidates for the coming year. Contact: Tom Pfeiffer, 202/260-4723.

COST-BENEFIT ANALYSIS

Media-Specific:

• EPA prepares an analysis of the costs and benefits of each significant regulatory action, including the costs and benefits of alternative approaches. This includes quantifiable measures as well as measures of costs and benefits that are difficult to quantify, yet important to consider.

As directed by EO 12866, the Agency assesses the effect of individual regulations on state, local, and tribal governments as a part of these activities. In choosing among alternative regulatory approaches, the Agency selects the approach that maximizes net benefits unless a statute precludes us from doing so. The level of analysis is commensurate with the cost of the regulatory action -- an analysis can run anywhere from two pages, to over several thousand. Contact: George Ames (202) 260-6685; or Tim McProuty, 202/260-8436.

EXPANDED EDUCATION AND TRAINING

Cross-Media Initiatives:

• Region 8's Environmental Information Service Center (ESIC), equipped with the most up-to-date data bases, provides one-stop-shopping for local officials and other callers and visitors. Answers to non-technical, general questions are handled quickly and accurately; customer service standards are adhered to; and feedback and input is routinely sought from customers of EISC. Contact: Linda Woodworth, 303/391-6219.

• EPA Environmental Finance Centers provide state and local officials with multi-media education and training, and advisory services that facilitate participation by providing forums for frank discussion between local, federal, and state officials and financial experts; and technical assistance -- for example, case studies on how communities prioritize environmental activities using risk and finance. The Finance Centers also

EXPANDED EDUCATION AND TRAINING (continued)

generate publications and analyses on financing trends and techniques. Contact: Vera Hannigan, 202/260-6685.

• Environmental Finance Networks are currently under way at the following locations, with the goal of establishing Finance Centers at universities throughout the country: University of New Mexico; University of Maryland; Syracuse University in New York, and California State University at Hayward. Contact: Vera Hannigan 202/260-6685.

• EPA's Environmental Finance Program manages and operates the Environmental Financing Information Network (EFIN), an electronic multi-media environmental finance database, which communicates to states and local officials information on financing techniques for their environmental programs. By accessing EFIN, state and local governments are provided specific details that can assist them in setting priorities, communicate to them the latest information in improvements in science, cost benefit analysis, and case studies on funding methods. Contact: Vera Hannigan, 202/260-6685.

• The Environmental Finance Program has tested over 45 "real world" environmental finance models. For example, cost-benefit funding and management alternatives for small water and wastewater systems have been explored, and another project demonstrated how a public-private partnership can develop a recycling hotline at minimal cost to the taxpayer. Contact: Vera Hannigan, 202/260-6685.

• The Environmental Finance Program produced the compendium on Alternative Financing Mechanisms for Environmental Programs (AFM). This report is a user-friendly tool for state and local officials that provides information aimed at resolving two types of environmental funding shortfalls: state capacity (program personnel) and capital infrastructure needs. The report contains 81 AFMs organized in eleven categories, outlines circumstances under which the AFMs in a particular category might prove useful, and provides concrete examples illustrating the funding needs for which a given category might be appropriate. Contact: Vera Hannigan, 202/260-6685.

• Under a cooperative agreement with EPA, West Virginia University operates the National Environmental Training Center for Small Communities. In its third year, the Center focuses on drinking water, wastewater, and solid waste; and develops environmental curricula, disseminates information on training activities, and publishes a quarterly newsletter. Contact: Stephanie von Feck, 202/260-9762.

Media-Specific:

• OSWER is developing interactive videos as training tools for local officials. Contact: Ellen Brown, 202/260-4483.

EXPANDED EDUCATION AND TRAINING (continued)

• The Office of Water is launching the Point-source Information Provision and Exchange System (PIPES) electronic bulletin board system. Initially focusing on electronic access to information in support of the Pretreatment Program, it will eventually provide the public with a range of information services through a centralized, automated contact point. Contact: Louis Eby, 202/260-9525.

• OAQPS recently established a 100-satellite downlink network to bring inexpensive training to state and local offices. Contact: Jeff Clark, 919/541-5557.

• OAQPS operates an electronic bulletin board that includes air quality models, technical data, policy and guidance documents, etc. The board is accessible by state and local governments, as well as by anyone else in the world. They have also established a special area of that system that only state and local officials can use, to communicate among themselves. Contact: Jeff Clark, 919/541-5557.

• OPP and OECA sponsor in-residence training programs for senior state pesticide officials at various universities, focusing on pesticide program management and implementation issues. Contact: Judy Nelson, 202/260-4177.

• Through its Regional and headquarters offices, EPA conducts hundreds of outreach and education activities yearly, and operates nearly 40 telephone hotlines and electronic information networks to assist local officials and others.

FUNDING

Through, or To, State Governments:

• Under the RCRA core grant program, states can select priorities for receiving state program grants based on environmental significance and benefit. Contact: Ellen Brown, 202/260-4483.

Administration's Legislative Proposals

FLEXIBILITY

• The President's Superfund proposal would allow communities to demonstrate that alternative remedies would be appropriate based on local conditions. It also specifically mentions "reasonably anticipated land use" of the site to be one of the factors in selecting remedies. Contact: Ellen Brown, 202/260-4483.

• In encouraging the use of a "holistic" approach to address water pollution problems in a watershed or ecosystem, state and local water pollution control authorities will develop an integrated strategy that addresses both point and nonpoint sources of

ADMINISTRATION'S LEGISLATIVE PROPOSALS (continued)

pollution. This will result in cost-effective water quality improvement. Contact: Don Brady, 202/260-5368.

• Storm Water: By targeting storm water requirement to where the problems are, and to those who contribute to the problems, we are reducing costs for municipalities by about $1 billion per year. Cost savings are even greater for private sources (about $16 billion per year). Contact: William Swietlik, 202/260-9529.

• Combined Sewer Overflows: Our targeted approach for reducing overflows will reduce costs of control for municipalities by a little less than $11 billion annually. This approach yields substantial cost savings without compromising the water quality improvements when compared with the costs of meeting the current requirements. Contact: Jeff Lape, 202/260-7361.

• Effluent Trading: We are promoting effluent trading, especially for nutrients, as a means to reduce loadings cost-effectively and avoid costly upgrades at municipal treatment plants. Such trading schemes, when fully utilized, could save as much as $6.0 billion. Contact: Don Brady, 202/260-5368.

• Expanding SRF Eligibility: We are recommending that eligibility for SRF be expanded to include such other activities as restoration of riparian habitats and pollution prevention activities. These expansions would enable municipalities to reduce pollution in more cost-effective ways, thus minimizing costly upgrades. Contact: Water Resource Center for CWA Initiative Document, 202/260-7786.

• Clean Water Act (CWA) proposals support state-wide programs for comprehensive watershed management, with considerable flexibility for state planning – including multi-purpose water grants, streamlined administrative requirements, and the ability to consolidate existing state grants under one multi-purpose work plan.* Contact: Water Resource Center for CWA Initiative Document, 202/260-7786.

• CWA proposals would provide states flexibility to use up to 10% of each year's loan volume for negative interest loans (with rates down to 12%), or similar assistance to tackle the problems facing disadvantaged communities. Contact: Water Resource Center, 202/260-7786.

• Safe Drinking Water Act (SDWA) proposals include provisions for small system technology monitoring flexibility, and extended compliance deadlines for installation and construction needs. Contact: Jim Elder, 202/260-5543, or call the Water Resource Center, 202/260-7786, for a copy of the reauthorization overview.

• Proposals for monitoring flexibility. In SDWA proposals, the Administration proposes to eliminate the requirement to regulate 25 new contaminants every three years.

ADMINISTRATION'S LEGISLATIVE PROPOSALS (continued)

Instead, EPA, in conjunction with states, would study contaminants and regulate only those evidencing significant health risks. Contact: Jim Elder, 202/260-5543, or call the Water Resource Center, 202/260-7786, for a copy of the reauthorization overview.

PARTICIPATION

• The President's Superfund proposal would provide an opportunity for the establishment of Community Working Groups to achieve direct regular and meaningful consultation within the community in all stages of a response action. That would include local government officials as well as citizens. Contact: Matt Morrison 202/260-8302.

FUNDING

• The President's Clean Water Initiative (CWI) supports continuation of existing funding levels in key programs and, in certain cases, provides increased funding. For example, nonpoint source grants: the President's Initiative would increase nonpoint source grants to $80 million in 1994, and $100 million in years 1995-1998. Contact: Water Resource Center, 202/260-7786.

• In Clean Water Act reauthorization language, the Administration proposes to conduct a comprehensive analysis of the 1994 CWA's impact on the public health, economy, and environment of the United States, considering the incremental costs and benefits associated with various major elements of the reauthorized CWA. Contact: Mahesh Podar, 202/260-5387.

• Better targeting of stormwater sources, which would save private sources and municipalities between $16-18 billion/year. Contact: Bill Sweitlik, 202/260-9529.

• In Superfund legislation, the President has proposed to authorize the states take over all Superfund response activities. Contact: Ellen Brown, 202/260-4483.

• The President's Clean Water Initiative provides continued SRF funding to allow States to obtain $2 billion in annual loan activity. Contact: Water Resource Center for CWA Initiative Document, 202/260-5700.

• The Administration supports creating a multi-billion dollar, low-interest and zero-interest loan fund that would help communities build drinking water filtration plants and other needed treatment facilities. The President's budgets for FY '94 '95 include $1,299,000,000 for the new Drinking Water SRF. Contact: Jim Elder, 202/260-5543, or call the Water Resource Center, 202/260-7786, for a copy of the reauthorization overview.

• The President's CW Initiative would increase nonpoint source grants to

ADMINISTRATION'S LEGISLATIVE PROPOSALS (continued)

$80 million in 1994, and $100 million in years 1995-1998. Contact: Water Resource Center for CWA Initiative Document, 202/260-7786.

- Multi-purpose grants would allow states to adopt a watershed approach to target grants to the greatest risks. Contact: Water Resource Center for CWA Initiative Document, 202/260-7786.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

JUN 29 1994

Mr. J. Thomas Cochran
Executive Director
1620 Eye Street, N.W.
4th Floor
Washington, D.C. 20006

Dear Mr. Cochran:

I would like to invite you to participate in the Clinton Administration's third conference on the Federal government's regulatory partnership with State, local and tribal governments. The conference will be a working session to discuss specific Federal regulatory issues of concern to State, local and tribal governments. We will convene on Wednesday, July 6, 1994, from 2:00 p.m. to 5:00 p.m. in the White House Conference Center, 726 Jackson Place (next to Lafayette Park) in Washington, D.C.

The first two conferences have provided useful insights into the nature of the Federal-State-local-tribal regulatory partnership, and into the process of consultation between levels of government for Federal regulations which impose mandates covered by Executive Order (E.O.) No. 12875. The Office of Information and Regulatory Affairs has summarized lessons learned from the conferences and other meetings about the regulatory process in its report to the President on the implementation of E.O. 12866, and has used these lessons in our work to coordinate and oversee the issuance of regulations by Federal agencies.

In response to a request from several State and local associations, we invite you to shift the focus of the next conference to specific regulatory issues. We encourage you to bring an elected official from your organization to speak to the issue of greatest interest to you. Our goal in this discussion is to listen to your concerns and to work with you in developing strategies to ensure that agency rules are the most efficient and least burdensome possible.

Please let us know if you can attend the conference by Monday, June 27th. Please also indicate the name of the elected official that would accompany you, and the issue(s) that you would like to address so that we can structure the agenda accordingly. You can write me or contact Bill Wiggins of my staff at (202) 395-7340, fax (202) 395-7285; questions may be directed to Mr. Wiggins.

I look forward to seeing you on July 6th.

Sincerely,

Sally Katzen

Mr. MCINTOSH. Thank you, Mayor. I have really got two questions for you, but let me make sure I understand both of your testimonies, that your preferred position would be that the new Executive order be revoked completely, and returned back to the prior Executive order.

Mr. RENDELL. And if there is any change to be made in the prior order, that that be done after full consultation with us, and, of course, the Congress.

Governor LEAVITT. That clearly represents the point of view of the National Governors' Association.

Mr. MCINTOSH. Let me ask you this: Is it now time that we rely not simply on Executive orders, but that Congress take up legislation to implement the policy of the prior Executive order?

Governor LEAVITT. That would be a welcome discussion. I think the fact that this could be happening the way it did is a clear indication on a matter of this importance and this substance, and this need for long-term policy, that would be a welcome discussion.

Mr. RENDELL. I think it would be a productive discussion, although I will say to legislate in this area is very difficult. This is an area, as has been pointed out by many of the Members, that the differences often are amorphous, and to try to codify federalism in a piece of legislation, personally, and I am not speaking for the Conference now, personally, would be pretty difficult.

So I think it is an effort that is worth undertaking, but I think there would be some serious problems trying to codify it.

Mr. MCINTOSH. My thought would be something along the lines of a law that would create the background requirements for the agencies. If Congress doesn't say anything on the question of federalism in a statute, then codify the earlier Executive order and say this is the process you have to go through in writing regulations and developing policies. Now, obviously, if some future Congress, when they pass a future bill, says we are changing that slightly for the regulations under this bill, then they would have the ability to do that. But there would then be in law this sort of background requirement that you do the federalism assessments, that you preempt only when required and then to the minimum extent possible. That is one of the things we were thinking about exploring in legislation up here.

Mr. RENDELL. Sure, although one could say the 10th amendment lays that out fairly clearly.

Governor LEAVITT. We might start by insisting upon a clear pattern of behavior that would adhere to the 10th amendment. Those 28 words are very clear and concise language.

Mr. MCINTOSH. That is a good way to put it. The second question, and you don't have to go into it extensively, but my colleague, Mr. Scarborough, brought out the quote by Mr. Begala, "a stroke of the pen, a law of the land, kind of cool." Do you think this new Executive order is kind of cool?

Governor LEAVITT. The difficulty of this order is it deals in remarkable subtleties. The use of the words such as "need," "not adequate," "reluctant," those are subjective judgments. When turned to those who have an interest in trying to preserve their own base of power, they can be broadly, broadly interpreted, and there is no question in my mind that they are written with that in mind.

These are words that are licensed to drive a Mack truck through, and they are done specifically for that purpose.

This was not an accident. These are smart lawyers.

Mr. RENDELL. I hesitate to tell you this, and Paul Begala is a friend of mine, but I think it is kind of cool to sign a piece of legislation and create 100,000 new police officers for the Nation. That is cool, after input and discussion and thorough consideration. I wish we had done the same thing here.

Mr. MCINTOSH. Thank you, Mayor. I don't have any further questions.

Mr. Tierney, do you?

Mr. TIERNEY. I do have a couple. I agree with the Mayor on that last statement. I will just let it lie at that, that is a cool way to do government, not Mr. Begala's statements.

I would ask, just going back for a second, we have a Constitution that has withheld scrutiny pretty well for a long period of time. Is it necessary to have an Executive order on this issue, never mind legislation on the issue?

Governor LEAVITT. Well, we have lived with the existing Executive order, and while I think that it may be interpreted more broadly than it should have, nevertheless, it has been adequate. Our first priority is clearly to have this new order withdrawn.

Now, we welcome a discussion on legislation, but our first priority is to have this new order, which we think would do great violence to the States and local community, to have withdrawn.

Mr. TIERNEY. What violence would be done if we just revoked all orders regarding this issue and allowed the Constitution to set the standard?

Governor LEAVITT. Well, our purpose today is to clearly request that the order that is before us be withdrawn, because it would do great violence.

Mr. TIERNEY. I heard that, but I take it you don't choose to answer my question. I am not trying to be feisty with you here. I am trying to get an answer on that. I think you both are intelligent gentlemen. I would like to hear what your thoughts are on that.

Governor LEAVITT. At some point in time the President needed in his judgment to outline what the relationship would be. We now have 13 years of history operating under that order. As I read the order, it does not do violence, as this one does. I do believe that the Constitution is clear language, and I believe that if those who operate in the administration, as well as in the Congress, would read it again and again and would operate by it, America would be a better place. History is replete, particularly in the last 50 years, where that has not been adhered to by the Congress, as well as various administrations, both Republican and Democrat.

Mr. TIERNEY. I think that that is clear, and I appreciate that that is clear. I think we tried to make that point here, too. This is not just an executive issue, this is an issue that stems through all of that. Mayor, do you want to add to that?

Mr. RENDELL. Yes. I think the problem is that the Constitution can be a little vague as well. We say what is reserved to the Federal Government? Well, promote the general welfare. Does that mean the Federal Government has the right to impose environmental regulations on States and local governments? Some can

contend yes, and, if that is the case, I think an Executive order is needed to put bounds on that regulatory power, as the President did. After the unfunded Federal mandates bill passed, he issued the accompanying Executive order and it said before any regulations come out on mandates, you must consult with us. There must be a way to pay for them.

So I think there is a need.

Mr. TIERNEY. Between the Supreme Court's interpretation and the Constitution, you think there is a need for an Executive order, with some boundaries?

Mr. RENDELL. Yes.

Governor LEAVITT. If I could comment, one of the reasons given for renewal of this order was recent Supreme Court rulings. The fact of the matter is that in the last 3 years, there have been significant Supreme Court rulings, all of which have bolstered and strengthened the 10th amendment, which leads me to the conclusion that that argument lacks credibility. There was no reason to renew this order, based on Supreme Court rulings.

Mr. TIERNEY. Do each of you feel that the administration has reached out to you since the order was issued and there had been some controversy? Do you feel that your organizations are now being adequately consulted on this?

Governor LEAVITT. I would just suggest that discussions after the fact do not consultation make.

Mr. TIERNEY. I understand that. Unfortunately, this is where we are at. Now I am asking that given that situation, which I can't reverse, and I suspect anything we do here can't, is there now in your interpretation an effort by the administration to reach out and discuss this particular order and possible rescission or changes to it?

Governor LEAVITT. I received a very generous call from Mickey Ibarra, who has been great to work with us. However, I would point out that our requests to have the order withdrawn have not been acted upon. We do not believe that starting the discussion based on this draft is adequate consultation. It needs to be withdrawn. If there is to be an Executive order, it needs to be done after consultation and discussion. The first order of business is to get this off the table.

Mr. TIERNEY. And are you discussing that prospect with them still?

Governor LEAVITT. We continue to press them for that. We have received basically no response on that request.

Mr. RENDELL. I think the only response is the 90-day extension which we all received. But of yet, we haven't had any substantive discussions about what is wrong with the order.

Mr. TIERNEY. Last, gentleman, let me just ask you, on those occasions when Congress seems intent on doing a little preemption on its own, and I think we cited a number of instances where that is the case, what can you recommend on behalf of your organizations that might get some local voice, a State voice, into the process earlier or better?

Mr. RENDELL. Well, it is hard, again, to codify it, but on the takings bill, for example, somebody, whoever was the drafter of the takings bill, or whatever subcommittee that went through initially,

should have asked for our opinion right there. That is an awful piece of legislation. I mean, I don't know what motivated it, my guess is pressure from developers or home builders. But, gosh, if you take away land use power from local government, you have taken away the crux of what we do.

So I think the same type of input that we have asked the White House to give us here, I think on crucial bills, where anyone can see there is a preemption involved, we ought to be consulted from the get-go.

Governor LEAVITT. Fundamental to this issue is a commitment on the part of lawmakers to keep control of government at the lowest possible level and to recognize that the best government is that closest to the people. There are many things I think in terms of the way Congress operates that could be improved to accomplish that. I would be happy to submit ideas to you when the red light is not on.

Mr. TIERNEY. Thank you, gentleman.

Mr. MCINTOSH. Thank you. I appreciate both of you coming, and I appreciate the other members of the panel allowing us to go a little bit out of order here. Rest assured this committee will continue to pursue the objective of having the new Executive order withdrawn and seek possible legislative solutions, if we don't see that happening immediately.

Thank you.

Let me now turn back to the regular order. Mr. Blue, who is president of the National Conference of State Legislators, I understand you just finished with your national convention out in Nevada.

Again, thank you for waiting as we allowed them to proceed with their business. I appreciate your coming here today. Share with us your testimony, and the entire remarks, by the way, will be put into the record. But anything you would like to add, please go ahead and do that at this time.

Mr. BLUE. Thank you very much, Mr. Chairman and members of the subcommittee.

I want to thank you, Mr. Chairman, for offering NCSL an opportunity to participate in this hearing. The National Conference of State Legislatures, as you know, represents the State legislatures of the 50 States and the Nation's commonwealths and territories. Since its inception, again as I think the Chair knows, NCSL has been outspoken about the need to maintain and strengthen our Federal system of government.

State legislators are dedicated to the constitutional system, perhaps in ways that other bodies are not. We are dedicated to the system of federalism, we are dedicated to the system of strengthening intergovernmental relations, avoiding unfunded mandates and inappropriate grant conditions, encouraging program and administrative flexibility and opposing unjustified preemptions of the law, State law.

It is this dedication that I just spoke of that brings me here this morning, Mr. Chairman. You are right, we were in conference all last week; my legislative body is still in session, one of the few in the country. We are meeting as I speak, as a matter of fact. But this basic dedication is what I intend to talk a little bit about this

morning and present several recommendations to you that I believe would enhance the Federal regulatory and lawmaking process.

I have included those in my prepared comments. Some of the comments that I make will be redundant or repetitive of what the Governor and the mayor made, because there has been very extensive collaboration among the seven organizations that you recognized a little earlier.

I want, first, to talk about Executive Order 13083, the process which you mentioned earlier on in your comments. It was something done without our knowledge and developed without our knowledge, and, as you would expect, it provoked a uniform response from these seven organizations.

We have talked about it over the last several weeks and we said we did not quite understand why, and so we consulted the administration to try to determine why. Much to their credit, they have offered to extend the period for 90 days before the effective date of the Executive order, before implementation. We think that is a good first step, but I need to share with you, Mr. Chairman and the committee, the position of the seven organizations that are appearing before you today, and they have been set forth in a letter to you. I will just reiterate them.

Our position still is as expressed in the letter, and that is that the Executive Order 13083 ought to be rescinded. Second, its predecessors, both of the Executive orders relating to federalism ought to be reinstated. That is Executive Order 12875 as well as Executive Order 12612.

Third, I think there ought to be consultation with elected State and local government officials, representatives of our organizations, and those conversations ought to be initiated immediately so that we can determine or assess whether there is any need to modify either of the two previous Executive orders.

So let me make our first recommendation, and that is that we would urge this subcommittee and members of both the House and the Senate to join NCSL and its State and local government counterparts in a collective bipartisan call for revocation of Executive Order 13083, reinstatement of the previous two Executive orders, and a reinstitution of consultations with the elected officials and the local government officials on future Executive orders, as well as this Executive order, if they deal with issues of federalism or the issue of the intergovernmental partnership.

Now, the process followed by this administration in developing what became Executive Order 12875, enhancing the intergovernmental partnership, and 12876, regulatory reform, was exemplary.

We talk about it among ourselves quite often. It is based on a similar process, earlier employed by the Reagan administration.

There are plenty of good examples of how consultations should occur with elected State and local officials. While the ball has been dropped perhaps on this Executive Order, 13083, we think and our experience tells us it is atypical of the way that the NCSL and State legislatures have been dealt with by this administration. I could go through a long litany, I think, of consultations and elaborations that we have had with the administration, starting in the fall of 1992, during the transition, and culminating in 1993 with Executive Order 12875 and ultimately Executive Order 12612,

which was kept, although initially the effort was to rework the entire document.

I would suggest to the Chair and the committee that out of these consultations conducted earlier with the Clinton administration came the framework for regulatory consultations on implementing welfare reform, children's health, Medicaid, programmatic reform, safe drinking water and others over the past 24 months. Using this same model of collaboration, we think together we can assess whether there is any need to modify these Executive orders and other documents relating to federalism and intergovernmental relations. I would invite the Chair and the subcommittee members' attention to the remainder of my prepared comments, because the remainder set forth some broader areas of federalism that we have quite keen interest in from the standpoint of NCSL.

Thank you.

[The prepared statement of Mr. Blue follows:]

Mr. Chairman, members of the Subcommittee. I am Representative Dan Blue, a member of the North Carolina House of Representatives. I appear before you today on behalf of the National Conference of State Legislatures (NCSL). A mere four days ago, I was honored to be elected President of NCSL.

I want to thank you Mr. Chairman for offering NCSL an opportunity to participate in this hearing. The National Conference of State Legislatures represents the state legislatures of the 50 states and the nation's commonwealths and territories. Since its inception, NCSL has been outspoken about the need to maintain and strengthen our federal system of government. State legislators are dedicated to our constitutional system of federalism, strengthening intergovernmental relations, avoiding unfunded mandates and inappropriate grant conditions, encouraging program and administrative flexibility and opposing unjustified preemption of state law.

The cornerstone of NCSL's long-held basic policy on federalism (see attachment 1) states that: "to revitalize federalism, the three branches of the national government should carefully examine and refrain from enacting proposals that would limit the ability of state legislatures to exercise discretion over basic and traditional functions of state government." It is from this foundation that I wish to address the major topic of this hearing---President Clinton's Executive Order 13083 and federalism generally. I intend to present several recommendations that we believe would enhance the federal regulatory and lawmaking processes and would stimulate greater consultation with state and local government officials on matters of mutual concern.

I - EXECUTIVE ORDER 13083 - THE PROCESS. E.O. 13083 was signed on May 14, 1998. It was developed unilaterally, without consultation with elected state and local government associations or representatives of their associations. It provoked a uniform response from the Big 7, the umbrella body of organizations representing state and local government officials. We have said many times over the past weeks that we are "mystified" and "perplexed" by our exclusion from the process leading up to the promulgation of E.O. 13083. We remain so. To their credit, administration representatives have offered to extend the effective date for implementation of E.O. 13083 for an additional 90 days. This is a good first step. Nonetheless, this offer, standing alone, does not satisfy the three major ingredients of a new policy on "Federalism and Intergovernmental Relations" passed by NCSL last week at its 24th annual meeting (see attachment 2). In no uncertain terms, it is the position of NCSL and the position expressed in a letter from the Big 7 dated July 17, 1998, that:

(a) Executive Order 13083 must be revoked;
(b) its two predecessors, E.O. 12875 (1993, President Clinton) and 12612 (1987, President Reagan) must be reinstated; and
(c) consultations with elected state and local government officials and representatives of their organizations must be initiated to assess whether there is any need to modify E.O. 12875 and 12612.

RECOMMENDATION #1 - I urge this subcommittee and members of both the House and Senate to join NCSL and its state and local government counterparts in a collective, bipartisan call for revocation of E.O. 13083, reinstatement of E.O. 12875 and 12612 and reinstitution of consultations with elected state and local government

officials on executive orders dealing with federalism and the intergovernmental partnership.

The process followed by the Clinton administration in developing what became Executive Orders 12875 (Enhancing the Intergovernmental Partnership) and 12866 (Regulatory Reform) was exemplary. It was based on a similar process employed by the Reagan administration and its working group on federalism. There are plenty of good examples of how consultations should occur with elected state and local officials. While the "ball has been dropped on Executive Order 13083," this is atypical of the way NCSL and state legislators have been dealt with by this administration.

Bear in mind that the process used by the current administration in late 1992 through the fall of 1993 ultimately produced: (a) Executive Order 12875, which expedited the waiver process and was the precursor to enactment of the Unfunded Mandates Reform Act (UMRA); (b) Executive Order 12866, which modernized and enhanced the regulatory cost and benefit analysis guidelines for executive agencies; and (c) the retention of Executive Order 12612, despite the fact that the original effort focused exclusively on reworking that document. To say the least, it was successful and met our expectations.

Furthermore, out of these consultations conducted in 1992 and 1993 with the Clinton administration came the framework for regulatory consultations on implementing welfare reform, children's health, Medicaid programmatic and administrative reforms, safe drinking water amendments and others over the past 24 months. Using the same model of collaboration, we can, together, assess whether there is any need to modify and update executive orders and other documents related to federalism and intergovernmental relations.

II - EXECUTIVE ORDER 13083 - THE SUBSTANCE. Every one of us testifying before you today has closely studied the new executive order and its predecessors. The new executive order incorporates major changes in the process by which federal policymakers interact with state and local elected officials and their associations. It also incorporates major changes in the conditions for preempting state law and authorizing federal action intruding on state authority.

For example, the new executive order offers a list of nine reasons to federal regulators and policymakers to take action overriding state authority. These range from state fears regarding business relocations and state incapacity to make regulatory resources available to compliance with international obligations. Deleted are what used to be separate sections on preemption and, unfunded mandates as well as specific references to the Tenth Amendment. For another example, the new executive order concludes that states OFTEN are uniquely situated to discern the sentiments of the people and to govern accordingly. By comparison, E.O. 12612 affirms that states UNIQUELY possess the constitutional authority, the resources and the competence to discern the sentiments of the people and to govern accordingly.

The administration, in meetings with Big 7 executive directors and in responses to communications from members of Congress, indicates that the drafting of the new Executive Order was prompted by a combination of recent Supreme Court decisions, enactment of UMRA and a need to fortify and continue the expedited waiver process. Not having been at the table and, therefore, without any other

framework for responding, it seems that the new executive order is much more than an update. However, the best way to get at the rationale that went into the preparation of Executive Order 13083 is through effective consultation with the administration.

> **Recommendation #2. Using Executive Orders 12612 and 12875 as the foundation, the administration, in collaboration with elected state and local government officials, should assess the need for changing either of these policies. Together, I trust that we could mutually determine whether a new executive order blending the two documents would be a step forward for federalism and intergovernmental relations.**

It is very important that we move expeditiously and collaboratively to address this matter.

III - FEDERALISM - IMMEDIATE OPPORTUNITIES IN 1998. Congress also has a role in improving intergovernmental relations. There are three pieces of legislation now pending before the Congress, two of which would enhance our intergovernmental partnership and a third which NCSL believes would be a step backward.

> **Recommendation #3. The Congress should enact legislation that will provide a technical correction to the Unfunded Mandates Reform Act regarding scoring by the Congressional Budget Office of entitlements and mandatory programs. The Congress should also enact S. 981, legislation codifying Executive Order 12866.**

Regarding the former, language providing for the technical corrections to UMRA was inserted in H.R. 3534, legislation which has passed the House of Representatives. A similar provision is included in the Senate's companion legislation, S. 389. NCSL wholeheartedly endorses this technical correction. We remain very appreciative to this subcommittee and to many members of Congress who have provided the leadership in curbing unfunded mandates.

I realize that the issue of regulatory reform has drawn much attention during both the 104th and 105th Congresses. As you enter the final weeks of the 105th Congress, it appears that the only legislation enjoying potential bipartisan support that could lead to enactment is S. 981. This legislation would enhance the cost-benefit analysis process of pending and existing regulations and codify President Clinton's E.O. 12866. As written, it contains judicial review provisions. It may not include more far reaching reforms that many of you have advocated, but it would be a significant step forward.

> **Recommendation #4. The Congress should avoid cutting or constraining various state-federal partnership programs.**

The FY1999 House budget resolution, H.Con.Res 284, suggests that significant cuts in Medicaid, children's health and income security programs, namely TANF and the Social Services Block Grant, be imposed. For a variety of reasons, all spelled out in attachment 3, reductions in these programs would undermine aggressive efforts, made possible by enactment of federal legislation, to reform welfare and ensure health coverage for children. These reductions would fracture agreements made among federal, state and local officials. They represent a step backward for federalism and

intergovernmental relations.

IV - FEDERALISM - DEVOLUTION. Mr. Chairman, over the past four years, notable progress has been made in many issue areas with the restoration of authority to states and the bolstering of federalism. The list is quite impressive. Welfare Reform, the Unfunded Mandates Reform Act, the state Children's Health Insurance Program (CHIP) and long-sought Medicaid reforms of the 1997 balanced budget agreement, the Safe Drinking Water Act Amendments and, most recently, the TEA-21 legislation. All of these have met most of the many tests NCSL applies regarding flexibility, intergovernmental relations, sorting out of responsibilities, mandates and preemption. It has been our objective to sustain these successes during the rule-making processes. With a couple of notable exceptions, the UMRA has tempered the flood of unfunded federal mandates. States are now undertaking the implementation of the children's health program enacted last year. And, we are now entering the third challenging year of welfare reform subsequent to the federal legislation enacted in 1996.

But, there are troubling and disillusioning events occurring that could erode the balance and restoration of authority exemplified above. I speak to major efforts to preempt states regarding health insurance regulation, product liability, medical malpractice, juvenile justice, land use planning, financial services and electric utility restructuring. Federal preemption of state law is a major problem, one that is getting worse not better, despite progress in other areas of intergovernmental relations. The attached article (attachment 4) from NCSL's magazine, State Legislatures, summarizes what we conclude is the competing trends of devolution and counter-devolution.

In all the years I have been in the state legislature and active in NCSL, I continue to be impressed with the overwhelming bipartisan accord we enjoy regarding preservation of state authority. Virtually every issue on the counter-devolution list above has been addressed by most, if not all, state legislatures. It is not at all clear that federal intervention is required. And, while we recognize there may be some instances when national legislation and/or standards are essential even though they would compromise state authority, procedural safeguards must be put in place to ensure that such drastic steps are necessary. In other words, preemption is something we take very seriously.

Recommendation #5. Congress should enact legislation authorizing a preemption point of order akin to the UMRA point of order.

It is not our intention to ensnarl the federal legislative or regulatory processes. Rather, we believe it would be beneficial to have a preemption point of order to enhance the understanding of the consequences of preempting state and local government authority and to fortify the stature of the Tenth Amendment. Congress and federal agencies must be better informed about which state laws they are preempting and should much more explicit about the limits on the preemptive effect of federal action. Above all else, the federal government must be held accountable to the public for actions that preempt state law.

V- FEDERALISM - CONSULTATIONS. Much of the early part of my testimony touched on the consultation process with the executive branch regarding federalism executive orders. Let me suggest that future consultations between the House Government Reform and Oversight Committee and the

Senate Governmental Affairs Committee with state and local officials and representatives of their associations on general issues regarding federalism could prove beneficial. It is my experience that we tend to come before you when there is a crisis, such as with E.O. 13083, or a singular piece of pending legislation, such as with UMRA. Just as it is serving in the North Carolina House of Representatives, it is difficult getting a grasp of the big federalism picture in Congress when you are laboring on a myriad of seemingly unrelated issues. I believe it would be worthwhile for us to explore together a potential framework for further discussions.

NCSL has used a similar "consultation" process through a State-Local Government Task Force. I don't pretend that we have remedied all disputes between state officials and their local counterparts. But, we have uncovered ways to sensitize ourselves to each other's concerns and to develop strategies for making public policy and delivering services from which all benefit.

Thank you for offering this opportunity to me to testify before you today. I welcome your questions on the testimony I have provided today.

Attachment 1

National Conference of State Legislatures

OFFICIAL POLICY

Federalism

Our American federalism creatively unites states with unique cultural, political, and social diversity into a strong nation. The Tenth Amendment is the cornerstone of constitutional federalism and reserves broad powers to the states and to the people. Federalism protects liberty, enhances accountability and fosters innovation with less risk to the nation. NCSL strongly urges federal lawmakers to maintain a federalism that respects diversity without causing division and that fosters unity without enshrining uniformity.

Individual liberties can be protected by dividing power between levels of government. "The Constitution does not protect the sovereignty of states for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, (1992). When one level becomes deficient or engages in excesses, the other level of government serves as a channel for renewed expressions of self-government. This careful balance enhances the express protections of civil liberties within the Constitution.

By retaining power to govern, states can more confidently innovate in response to changing social needs. As Justice Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, (1932). It is a suitable role for the federal government to encourage innovation by states. The federal officials should recognize that failure is a risk associated with experimentation and permit states room to act and evaluate without judging prematurely the value of innovative programs. States are inherently capable of moving more quickly than the federal Congress to correct errors observed in policy and can be more sensitive to public needs.

The Supreme Court has sent a strong message to Congress that its powers under the Commerce Clause have boundaries. In *United States v. Lopez*, (1995), the Court properly strengthened the hand of states in negotiating the balance of powers. Congress should heed the wisdom of *Lopez* and not exercise its commerce powers without a compelling need to do so. Similarly, the Supreme Court should add to the ability of states to respond to pressing social and economic problems by interpreting the dormant Commerce Clause in a restrained manner sensitive to the powers of states in the federal system.

Responsiveness to constituencies within state boundaries is diminished as the power of the federal government grows disproportionately. Disturbingly, federal constraints upon state action grow even as states are increasingly acknowledged as innovators in public policy. To revitalize federalism, the three branches of the national government should carefully examine and refrain from enacting proposals that would limit the ability of state legislatures to exercise discretion over basic and traditional functions of state government.

NCSL dedicates itself to restoring balance to federalism through changes in the political process and through thoughtful consideration and broad national debate of proposals to amend the Constitution or to clarify federal law that are specifically intended to redress the erosion of state powers under the Constitution. NCSL does not by this policy endorse any specific proposal for or against constitutional change or call for a constitutional convention.

Attachment 2

National Conference of State Legislatures

OFFICIAL POLICY

FEDERALISM AND INTERGOVERNMENTAL RELATIONS

(Adopted July 21, 1998)

During the past decade, federal officials have been guided by three executive orders, E.O. 12612 (1987), E.O. 12866 (1994) and E.O. 12875 (1993) on matters of federalism and intergovernmental relations. Each of these was promulgated pursuant to consultation with elected state and local government officials and their associations. These executive orders have emphasized constitutional federalism and the need to preserve state authority, to avoid preemption, to avoid unfunded mandates, to promote administrative and programmatic flexibility, to expedite program waivers, to assess regulatory costs and benefits, and to ensure an effective consultation process. These executive orders have deferred to state and local government sovereignty, authority and capacity to address public policy matters other than those explicitly described as the federal government's powers in the U.S. Constitution. These orders have played a significant role in defining how officials from all levels of government should interact when determining how to implement public policy.

President Clinton signed a new executive order on federalism, E.O. 13083, on May 14, 1998. It changed two of its predecessors, E.O. 12875 and E.O. 12612. It was promulgated without any consultation with any elected state or local government official or their associations. E.O. 13083 promotes a regime of directives and guidance on preemption, mandates, balance of power and division of responsibilities and consultation woefully and disturbingly weaker than its predecessors.

Therefore, the National Conference of State Legislatures believes that E.O. 13083 should be immediately withdrawn.

The National Conference of State Legislatures further believes that the President and representatives of his administration should meet with elected state and local government officials and representatives of their associations to assess whether there is any need to amend or modify any part of E.O. 12612 and 12875.

The National Conference of State Legislatures further believes that any executive order on federalism and intergovernmental relations should explicitly acknowledge constitutional federalism as spelled out in the 10th and other amendments to the U.S. Constitution as well as the basic structure of the U.S. Constitution itself. These executive orders should, at a minimum, explicitly acknowledge that (1) federal action should not encroach upon authority reserved to the states, (2) preemption of state law should occur only when there is clearly a legitimate national purpose and federal law explicitly calls for preemption; (3) unfunded federal mandates should be both discouraged and avoided, (4) maximum program and administrative flexibility for state and local governments is needed to create effective public policy solutions and (5) federal regulatory policies and executive orders affecting the intergovernmental partnership should not be promulgated without effective consultation with elected state and local government officials and their associations.

Attachment 3

NATIONAL CONFERENCE OF STATE LEGISLATURES

444 NORTH CAPITOL STREET, N.W. SUITE 515 WASHINGTON, D.C. 20001
202-624-5400 FAX: 202-737-1069

June 16, 1998

The Honorable Pete Domenici, Chairman
Senate Budget Committee
United States Senate
Washington, D.C. 20510

Re: Conference on the Budget Resolution

Dear Senator Domenici:

Ten months ago, the National Conference of State Legislatures hailed the balanced budget agreement and budget reconciliation legislation passed by the U.S. Congress. The agreement balanced the federal budget while preserving the integrity of the intergovernmental fiscal system and strengthening the state-federal partnership. Proportionate spending reductions were achieved, with limited new cost shifts to states and without reliance on new unfunded mandates. As well, the agreement repaired existing cost shifts to states.

As you head to conference committee on the House- and Senate-passed FY1999 budget resolutions, NCSL strongly urges you to maintain the policy path you charted with your historic budget actions last year. To accomplish that, however, will require resisting several stated and implied recommendations that could easily unravel last year's accomplishments. Among the issues with which state legislators are most concerned are the following:

(1) **Preserving the full integrity of the Temporary Assistance for Needy Families Block Grant (TANF).** In 1996, state and federal policymakers agreed to forego the decades-old AFDC entitlement program in exchange for capped, guaranteed funding for TANF. This agreement also included a related commitment regarding the Social Services Block Grant. Both the Senate and House Budget Resolutions would break that agreement. Most egregious, H Con Res 284 calls for an unacceptable $10 billion dollar cut to income security programs--most likely in the form of a massive TANF reduction.

(2) **Preserving the funding levels for the Medicaid program agreed to in the Balanced Budget Act of 1997.** We oppose additional reductions in the Medicaid program. Through the enactment of the State Children's Health Insurance Program (CHIP), growth in Medicaid enrollment was both anticipated and deemed desirable by the Congress. States anticipate growth in Medicaid enrollment as a result of outreach effort states will implement as part of their children's health insurance programs. Reductions in the Medicaid program at this time would send a mixed message to states and the nation's children.

(3) **Preserving the state-federal administrative partnership regarding Medicaid and Food Stamps.** The House and Senate budget resolutions and the President's budget arbitrarily reduce federal funds for state administration of Medicaid and food stamps. These recommendations add up to an unfunded mandate. NCSL is more than willing to meet with you to explore administrative modifications if you are convinced that too much is being spent for these functions. Until that occurs, however, we must insist that any administrative funding reductions be accompanied by similar reductions in administrative responsibilities.

Denver Office 1560 BROADWAY SUITE 700 DENVER, COLORADO 80202 303-830-2200 FAX: 303-863-8003

Furthermore, states are just now embarking on implementing last year's state children's health insurance plan and a number of modifications to the Medicaid program enacted as part of last year's budget agreement. It is completely inappropriate to suggest reducing Medicaid administrative funds when it is the federal government's expectations for states to successfully implement these modifications and the new children's health program.

Additionally, recent enactment of S. 1150, the agricultural research legislation, concluded with Congress manipulating states' food stamps administrative monies, an unfunded mandate that NCSL vigorously opposed from the outset.

(4) **Preserving the funding levelsfor the Social Services Block Grant at the levels agreed to in federal welfare reform legislation or $2.38 billion per annum.** The recently concluded conference on transportation legislation (TEA-21) takes over $2 billion out of the Social Services Block Grant, despite our agreement. The transportation legislation also reduces state flexibility regarding transfer of funds between TANF and SSBG. This expanding menu of modifications is fanning a growing distrust of federal intentions regarding welfare reform.

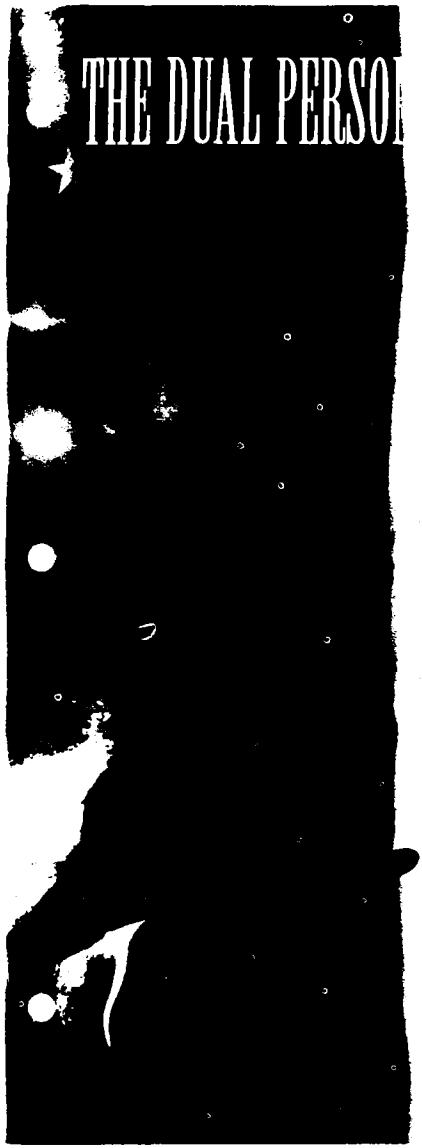
The ISTEA reauthorization conference agreement notwithstanding, the SSBG has provided states with flexibility to fulfill a wide array of social services purposes. Its achievements are well documented. In many regards, it is the purest block grant on the books. To tamper with its authorized funding levels, part of the welfare agreement we all shook hands on, is to confirm the deepest suspicions of those who are not favorably inclined toward block grants. NCSL is an ardent advocate for block grants. We believe block grants can serve national purposes by promoting efficiency and reducing administrative burdens. But, when actions are proposed to reduce the federal commitment to them, it certainly dampens our enthusiasm for seeking other program consolidations that would seem to have merit.

(5) **Preserving the level of domestic discretionary spending incorporated into last year's budget agreement.** In 1997, Congress agreed, on a bipartisan basis, to a five-year spending plan that put you on the path to balance. That agreement produced savings from a wide variety of sources. It met NCSL's major test that savings be achieved on a proportionate basis. H Con Res 284, in particular, deviates dramatically from the balanced budget agreement by seeking deep cuts in both domestic discretionary and state-federal mandatory programs. S Con Res 86, with which we have more modest disagreements as described above, essentially adheres to the bipartisan consensus reached on future spending. We urge you to honor last year's agreement and follow the outline established in S Con Res 86 in conference.

As always, we are willing to work with you as you seek to reconcile differences between S Con Res 86 and H Con Res 284. We again urge you to take a strong stand for retaining the full integrity of the state-federal fiscal and program partnership exemplified in the points we raise. For additional information, please have your staff contact Michael Bird or Gerri Madrid in NCSL's Washington, D.C. office.

Sincerely,

Richard Finan
Senate President, Ohio
NCSL President



Attachment 4

"The Dual Personality of Federalism"

States may be the laboratories of democracy, but the federal government thinks that it knows best. It hardly ever does.

By Carl Tubbesing

This has been a Dr. Jekyll and Mr. Hyde decade for state governments. The Dr. Jekyll side of the 1990s has gotten more publicity. This is the side of the decade's personality defined by devolution, flexibility and more responsibility for state legislatures. Dr. Jekyll has presented the states with landmark devolution legislation: most prominently, welfare reform, a new safe drinking water act, the children's health program and Medicaid reforms.

The Mr. Hyde aspect has received less attention. Preemption of state authority and centralization of policymaking in the national government characterize this half of the decade's dual personality. It restricts state options and promotes uniformity. The Mr. Hyde half has preempted state authority over telecommunications policy, federalized criminal penalties and given the federal government more responsibility for regulation of banks.

Dr. Jekyll is devolution. Mr. Hyde is counter devolution. Devolution trusts state officials and relies on them to be responsive and responsible. Counter devolution says state boundaries are archaic. Devolution subscribes to Justice Brandeis' premise that states are laboratories of democracy. Counter devolution raises the question, "Are states really necessary?"

The devolution trend may have lost momentum. (Only new legislation on work force training and surface transportation pending this year would continue devolution.) On the other hand, there are at least a dozen proposals before Congress this year that have the potential for more preemption and greater centralization in Washington of policymaking.

Is there something about the last decade of the 20th century that is accelerating the trend toward preemption? Yes and no. There are five primary explanations of why federal officials propose to preempt state activity. Two of these are more or less unique to the 1990s. Three, however, are permanent components of the preemption debate.

PREEMPTION BECAUSE OF TECHNOLOGY

There is no doubt that technological advances have altered the way the country conducts its business and the way people communicate. The Internet, computer networks, cellular phones and all of their technological and telecommunications cousins have shrunk the world. They ignore state boundaries, present daunting challenges to state regulatory schemes and tax structures, and tempt federal officials to supplant state regulation

Carl Tubbesing is NCSL's deputy executive director.

and taxation with national approaches.

Turn on your computer. Get on the Internet. Access the Barnes and Noble home page. Type in your Visa number. Order a hundred dollars worth of books. Do you pay your state and local sales tax? Probably not. Get in your car and drive to the mall. Go into Barnes and Noble and buy the same books. Do you pay your state and local sales tax? Absolutely.

Sign up with America Online. Pay the monthly fee. Do you pay a local government Internet access tax? Maybe, but probably not. Decide that you want to be the first in your neighborhood to use on-line telephony. Do you pay the telecommunications tax? Now, that's a really tricky one.

"Electronic commerce poses a long-term threat to the current tax system. The threat is that consumers will increasingly use electronic media for purchasing goods and services—circumventing conventional sales taxation," writes Thomas Bonnett in *Is the New Global Economy Leaving State-Local Tax Structures Behind?* State legislators are only just beginning to grapple with the tremendously complex and politically charged questions of whether and how to tax transactions on the Internet.

Federal officials are concerned about how state and local governments will tax the Internet. Some, like California Congressman Christopher Cox, Oregon Senator Ron Wyden and the Clinton administration, worry that any rush by state and local governments to tax it will stifle a burgeoning new industry and dampen economic activity. Senator Wyden argues that taxation of Internet activities would prevent "small high-tech businesses from prospering."

Wyden and Cox are pushing federal legislation that would prevent state and local governments from enacting new Internet taxes for six years. They argue that a lengthy moratorium is necessary to give the industry a chance to grow and to provide time for government and industry officials to work out a systematic approach. North Dakota Senator Byron Dorgan, a former state tax commissioner, strongly opposes the Cox-Wyden bill. "Federal preemption is inappropriate," he says. "The federal government should keep its nose out of the states' business."

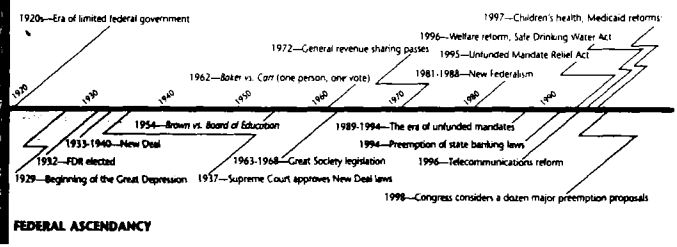
Technology, combined with a dramatically evolving economy, also explains federal attempts to preempt state regulation of the banking and insurance industries. State legislatures initiated the revolution in financial services industries in the 1980s when they began allowing interstate banking. In 1994, Congress approved the Riegle-Neal bank reform bill that largely substituted federal interstate branch banking rules for the ones states had developed. Legislation to modernize banking pending before this session of Congress would further erode state control of financial services. The bill, whose chief sponsor is House Banking Chairman Jim Leach, would limit states' regulatory authority over insurance and securities.

Iowa Congressman Leach argues that technology and the changing financial services marketplace make state regulation of the industry virtually obsolete. In a March, 1997 speech before the Institute of International Bankers, the Banking Committee chair argued: "The global financial services industry is evolving at a rapid pace, and legislation is needed in part to reflect marketplace changes, in part to set the ground rules for the next generation of change."

The Office of the Controller of the Currency, an executive branch agency, has made similar arguments in a series of recent rulings that have eroded the ability of states to regulate banking and insurance.

Despite the changing financial marketplace, defenders of state banking and insurance laws argue that state regulation is necessary to ensure a financial system that makes the most sense for each state. "Banking needs in Arkansas are just not the same as they are in New York," says Arkansas Representative Myra Jones. She fears that "continued nationalization of banking will prompt the exodus of investment capital from certain states, especially rural ones."

Since 1932 American federalism has largely been an era of predominance of the federal government as establishing domestic policy. The 1990s, marked by passage of legislation devolving some responsibilities to state governments, have seen some reversal of this trend. At the same time, the federal government also has taken authority away from the states in several key areas.



PREEMPTION AND POLITICS

Congressional politics have changed over the past decade. There are more competitive congressional districts. And congressional campaigns are becoming more and more expensive. It is plausible to argue that both of these developments have exacerbated the congressional tendency to propose legislation that would preempt state authority.

According to American Enterprise Institute scholar Norman Ornstein, congressional elections have become more competitive in the 1990s. More seats are changing parties from election to election. There are greater fluctuations in election margins. (An incumbent may win with 60 percent of the vote one year, then lose two years later.) And the number of safe seats has come down from the high mark of the 1988 election.

More competition presumably means that congressional candidates are actively on the lookout for issues that will appeal to voters. They need popular ideas that set them apart from their opponents. What better place to look than state legislatures?

For several years, legislatures have responded to consumer concerns about managed care. According to NCSL's Health Policy Tracking Service, 32 states have adopted legislation that gives patients in managed care direct access to OB/GYNs. Twenty-six legislatures have passed laws requiring that insurers cover emergency care. Recognizing the popularity of these and similar laws, Georgia Congressman Charles Norwood has introduced comprehensive legislation to regulate a variety of managed care practices. If approved, Norwood's bill would preempt all state legislation in this area.

The 1997 gubernatorial race in New Jersey drew national attention to consumers' concerns about the costs of automobile insurance. Since the 1970s, 15 state legislatures have attempted to control insurance costs by adopting no-fault laws. Kentucky Senator Mitch McConnell, asserting that "the nation's auto insurance system desperately needs an overhaul," has introduced legislation in the 105th Congress that would preempt state laws and impose a national no-fault system.

State legislatures have responded in various ways to consumer complaints about fees that banks charge for using automatic teller machines. A few have banned the fees altogether. A few others have required banks to inform customers that they will be assessed a fee for using the machine. Bills currently pending in Congress copy these two approaches. New Jersey Congresswoman Marge Roukema takes the warning message approach. New York Senator Alfonse D'Amato would ban the fees. Either would preclude state regulation and variations among states.

The cost of running for Congress has continued to rise in the 1990s—substantially more than the rate of inflation. A cynic might link the increase in preemption proposals to an incumbent congressman's nearly insatiable need to raise campaign funds. Some legislative and regulatory proposals, which almost coincidentally preempt state authority, are worth billions of dollars to companies. The companies naturally marshal their lobbying resources in support or opposition to the bills and favor their congressional allies with political donations.

A cynic might link the increase in preemption proposals to an incumbent congressman's nearly insatiable need to raise campaign funds.

In 1995, the New Hampshire legislature became the first in the nation to restructure electric utilities. Since then, nine other legislatures have approved similar legislation. In 1996, Colorado Congressman Dan Schaefer introduced legislation that proposes to impose national deregulation and to preempt state efforts. Such a massive change in the electric industry would be worth millions, if not billions, of dollars to companies affected by restructuring. For example, the Edison Electric Institute, a trade association for investor-owned electric utilities, opposes federal mandates that would require states to restructure. Enron, a power marketing company, supports such federal action.

It is not surprising, therefore, that campaign contributions from companies in this fight have increased dramatically since Congressman Schaefer first introduced his bill. For example, Enron and its PAC in 1993 reported soft money contributions to the various congressional campaign committees and the two national parties of $47,000. By 1995, this figure grew to $120,000. And in 1996, the year the deregulation bill was filed, Enron's soft money contributions totaled $286,500—a sixfold increase in three years.

Contributions to individual congressmen also increased in this period. Congressman Schaefer chairs the Energy and Power subcommittee of the House Commerce Committee. Campaign contributions from energy companies to Congressman Schaefer, for example, went up following introduction of his bill. In 1993-94, Schaefer reported contributions from energy companies and associations of $25,806. They increased by almost $10,000 for 1996-97—once the bill was introduced.

Comprehensive national legislation to reform telecommunications, which passed in early 1996, also attracted substantial donations to congressional campaigns and the national political parties. A 1996 Common Cause study found that "local and long distance telephone companies gave their biggest political donations ever during the last six months of 1995." The bill, which South Dakota Senator Larry Pressler called "the most lobbied bill in history," preempts state authority over the telecommunications industry and sets the conditions for entry of Bell companies into the long distance telephone market.

Certain congressional committees may be popular among members because of the issues with which they deal and their link to campaign contributions. Membership on the House

Banking Committee has grown by five since the beginning of the current biennium. The Bureau of National Affairs attributes this to the committee's jurisdiction over financial modernization legislation—proposals that would preempt state authority. "It is a bonanza in terms of PAC funding," says an unnamed source for the BNA story. "The issue before the Banking Committee pits the banking lobby against the securities lobby, the insurance lobby. It's a committee that naturally attracts major PAC funding. This is one of the richest PAC mines." And apparently a rich source of preemption.

PREEMPTION AND DIVERSITY

In the late 1970s, the National Conference of State Legislatures and the State Government Affairs Council cooperated on a project on "purposeless diversity." Legislators and private sector representatives attempted to identify policy areas in which uniformity among states was desirable. The project's premise was that some kinds of diversity impose costs on the private sector and, therefore, have a dampening effect on the economy. Like many things, though, purposeless diversity is in the eye of the proverbial beholder. Debate in the federal government over preemption often centers on whether uniformity is warranted in order to reduce private sector costs.

For a decade or more, Congress has considered legislation that would preempt state product liability laws. Proponents of preemption in this area argue that a national product liability law would reduce business costs and, therefore, improve the competitive position of American businesses. In testimony before the Senate Commerce Committee in 1993, Alabama Representative Michael Box asserted that these arguments are "specious" and lauded the advantages of a civil justice system that allows states to fine-tune their laws in response to changes within each state. Representative Box summarized by saying that "uniformity has no greater intrinsic value than the value of self-government by states."

In 1996, Congress approved product liability legislation. President Clinton vetoed it, however. During 1997, West Virginia Senator Jay Rockefeller shuttled between the White House and Capitol Hill in an attempt to find a compromise. New product liability legislation could surface again during the 1998 session.

THE TOP TEN PREEMPTION PROPOSALS FOR 1998

There are at least 10 proposals pending in Congress and the administration this year that would preempt state authority.

Electric Utility Deregulation Since 1995, 10 legislatures have chosen to deregulate the electric utility industry. Many others have considered restructuring and have rejected it or decided to defer it. Proposed congressional legislation would impose a national solution.

Tobacco Settlement The agreement reached between state attorneys general and the tobacco industry would preempt state law in several areas—product liability, smoking in public places, sales to minors and others. Preemption in the agreement is viewed as a concession state officials would make in exchange for settlement funds—and to achieve a national goal of reducing smoking, especially among teenagers. Most of the bills introduced in Congress as versions of the settlement would also substantially preempt state authority.

Juvenile Justice Last spring, the House passed juvenile crime legislation, sponsored by Florida Congressman Bill McCullom, that continues a trend toward federalizing crime and criminal penalties. For example, it would force states to try as adults juveniles accused of violent crime. Similar legislation is pending this year in the Senate.

Tax Reform All of the major proposals to revamp the federal tax code—whether a national sales tax, a flat tax or changes to the income tax—have consequences for state tax systems. The consequences include explicit or implicit preemption of state tax laws and a significant impact on state revenues.

Internet Taxation Bills offered by California Congressman Christopher Cox and Oregon Senator Ron Wyden would place a moratorium on state and local taxation of activities conducted over the Internet. Early versions of the legislation might have rolled back many existing and traditional taxes, including those on sales and property. Later rewrites would preclude only imposition of new taxes on Internet activities.

Child Care President Clinton wants to make affordable child care available to more people. He has resisted calling for national standards that would govern child care providers. Children's advocates want national standards, which would preempt state control. So far, they have not garnered much support in Congress.

Product Liability For at least a decade, Congress has considered bills that would substitute federal rules of law for state product liability laws. In 1996, Congress, for the first time ever, was able to agree on federal product liability legislation. After lengthy debate in the White House, President Clinton vetoed the bill. Congress was unable to override the veto. Several members of Congress, led by West Virginia Senator Jay Rockefeller, tried during 1997 to find a compromise acceptable to both the president and Congress.

Takings Many state legislatures have wrestled with the complex and controversial questions associated with property rights and the taking clause of the Fifth Amendment to the Constitution. The U.S. House last year passed legislation that would remove certain aspects of property rights matters from the purview of the states. The Senate is taking up similar legislation in 1998, sponsored by Georgia Senator Paul Coverdell and Utah Senator Orrin Hatch.

Financial Services Financial modernization legislation, whose chief advocate is Iowa Congressman Jim Leach, would remove firewalls between banks and other financial services, such as insurance and securities. In the process, it would preempt all state laws that currently govern the relationship between banks, insurance companies and the securities industry.

Managed Care Georgia Congressman Charles Norwood is the principal sponsor of legislation that would regulate a wide range of managed care practices—for example, the length of maternity stays, access to emergency services and access to specialists. If approved, the bill would preempt state activity in this area.

THE FIVE HALLMARKS OF DEVOLUTION IN THE 1990s

The election of Bill Clinton, a former governor, to the White House in 1992 and the Republican takeover of Congress in 1994 created an atmosphere congenial to turning responsibilities over to state legislators and governors. The phenomenon known as devolution funds programs through block grants, rather than categorical funding. It gives state officials greater flexibility for designing programs. It loosens some of the strings that the federal government traditionally has attached to grant money. And it substitutes options for cumbersome, "father knows best" federal waiver processes.

Unfunded Mandate Reform Act Ohio Senate President Richard Finan has called unfunded mandates "the most powerful symbol of the imbalance in the federal system." Unfunded mandates, he said in a 1997 speech, "represented the exact opposite of how our federal system is supposed to work. Decisions were being made at the national level and paid for one or two levels below that."

Passed in early 1995, the Unfunded Mandate Reform Act marked the beginning of the devolution era. The act has three key elements. It set up a unit in the Congressional Budget Office to develop cost estimates on mandates. It has a strong point-of-order procedure, which gives any member of Congress the right to question an unfunded mandate on the floor. And it requires all federal agencies to prepare an analysis of any new regulation that will cost more than $100 million.

Welfare Reform The sweeping 1996 welfare reform law is the centerpiece of devolution. It substitutes a block grant, called Temporary Assistance for Needy Families, for the old entitlement program, Aid to Families with Dependent Children. State officials accepted lower and constrained funding levels for flexibility in designing and running programs. The law stresses moving welfare recipients into jobs. It eliminates the onerous federal waiver process that state officials formerly had to follow to experiment with their own approaches. It is not totally lacking in mandates and penalties. (State legislators have especially railed against its very prescriptive child support enforcement section.) Yet its key elements form the mantra of devolution: more flexibility, more responsibility and more choices.

Safe Drinking Water Act The old Safe Drinking Water Act epitomized the "command and control" approach to federal-state relations common in the 1980s. The old law was an effective rallying point for the campaign against unfunded mandates. Why, cried legislators, mayors and governors, must a city in Nebraska test its water for a pesticide that is used only on pineapples in Hawaii? State legislators, governors and local officials were instrumental in passage of the new Safe Drinking Water Act, which removed many of those unfunded mandates. Approved in 1996—at almost the same time as the welfare reform law—the new drinking water law also establishes a state revolving loan fund for construction of drinking water capital projects.

Medicaid Reforms The budget bill approved last August codified an agreement between congressional leaders and the president to balance the budget by 2002. (Current predictions are that the budget may be balanced by FY 1999.) The act is a comprehensive combination of tax cuts, spending increases, spending cuts and program changes. Among the program changes are two that continue devolution. The first is a set of alterations to Medicaid that give state officials greater flexibility in running this expensive program. State legislators can now decide to use managed care in their Medicaid programs without applying to the federal Health Care Finance Administration for a waiver—waivers that formerly might be approved, might be denied, but without fail took many months, and sometimes years, to process. Legislators also now have more flexibility in determining cost reimbursement. The new budget act repeals the Boren Amendment, which Medicaid providers had used in court to compel states to reimburse them at higher rates.

Children's Health Insurance The budget balancing act also initiated the most significant change in national health policy in a decade or more. The children's health insurance program allocates $24 billion over five years to states to provide coverage to children who are currently uninsured. State legislatures have considerable flexibility under the new law for choosing among coverage options and setting benefit levels.

PREEMPTION AS A CATCH-22.

Some advocates of specific preemption proposals argue that states have not done enough in the area. Proponents of others point out that most states have already acted, so why shouldn't the federal government step in and finish the job? State legislatures are damned if they do, damned if they don't.

In the damned-if-they-do category are some of the federal proposals to regulate managed care. If 41 states already ban the use of so-called gag clauses in communications between managed care doctors and patients, then, proponents ask, what's the harm in having a national law? But federal intrusion precludes additional experimentation and the adjustments that legislatures make as they gain experience with new laws.

In the damned-if-they-don't category this year is child care. President Clinton has made new child care legislation one of his top four or five initiatives for 1998. The administration so far has resisted pleas from some children's advocates to fight for national standards. The advocates argue that these standards are necessary because they believe

many current state laws and regulations are inadequate to protect the safety of children.

PREEMPTION AND NATIONAL IMPERATIVES

Occasionally, achieving a national goal overrides concern for state authority. In these instances, preemption is nearly a coincidental effect of the desire to accomplish a compelling national objective. The Voting Rights Act of 1965, for example, substituted federal law for state laws in order to end discrimination. Federal air quality law supplants state laws and regulations because air does not recognize state boundaries, and states, acting on their own, cannot reduce pollution.

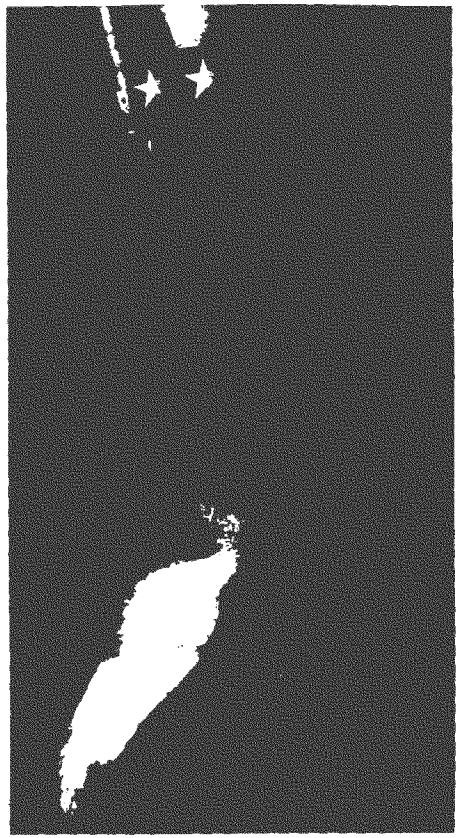
The national tobacco settlement and proposals to reform the federal tax system are good current examples. The tobacco agreement, reached among 41 state attorneys general and the tobacco industry, is intended to accomplish several objectives. It would reduce smoking, especially among children and adolescents. It would reimburse states for past and future medical costs for patients with smoking-related illnesses. And it would limit the tobacco companies' liability from at least some financial and legal claims. At the core of the agreement is a trade. The companies agreed to pay $368.5 billion over 25 years, $193.5 billion of which would go directly to the states. States, in turn, would accept federal preemption of state tort law. The attorneys general also agreed, in part to satisfy anti-smoking activists, to preemption in several other areas, including laws regarding smoking in public places, a minimum smoking age, vending machine sales and other retail practices. The settlement must be codified with federal legislation.

Several members of Congress, including Massachusetts Senator Ted Kennedy, Utah Senator Orrin Hatch, North Dakota Senator Kent Conrad and Arizona Senator John McCain, have introduced bills offering their versions of the settlement. Each would preempt state authority.

Proposals to reform the federal tax system have received more attention in the past several months, especially now that it appears the federal budget will be in balance within the year. Some would change elements of the current income tax structure. Others would scrap the income tax in favor of entirely different taxes. Texas Congressman Bill Archer, House Ways and Means chair, and Louisiana Congressman Billy Tauzin have different national sales tax proposals. House Majority Leader Dick Armey advocates a flat tax. The goals of these reformers include simplifying taxes, mitigating inequities and eliminating an unpopular tax. Any of the proposals, however, have consequences for state revenues and state tax codes, including preemption.

THERE ARE SOLUTIONS

State legislators and governors are working to find ways to draw attention to the problems posed by preemption and to minimize the number of federal bills and regulations that supplant state authority. Meeting in November 1997, representatives of NCSL, the National Governors' Association, the American Legislative Exchange Council and the Council of State Governments agreed to a set of "federalism statutory principles and proposals." The proposals are patterned in part after elements of the Unfunded Mandate Reform Act and are designed to place procedural obstacles in the way of attempts at preemption. The groups are now working to generate support in Congress and the administration for such a measure.



Current controversies over preemption and centralization reach back to the drafting of the Constitution, to the early days of the United States, and the debates between Alexander Hamilton and James Madison—differences that led to the formation of the first political parties in this country. They no doubt will continue into the next millennium.

Mr. MCINTOSH. Thank you, Mr. Blue. Certainly we will look at that and put that into the record.

Our next witness is Philadelphia Councilman Brian O'Neill, who is president of the National League of Cities.

Mr. O'NEILL. Good morning, Mr. Chairman. I am a council member from Philadelphia, but I am here today as president of the National League of Cities, representing over 17,000 municipalities, over 90 percent of which are less than 10,000 in population, and also their elected officials. I am here this morning also as the only authorized person to testify before this committee on behalf of the National League of Cities to discuss the relationship between the Federal Government and State and local governments.

I want to begin by thanking you and the committee, first of all, for holding this hearing. We believe we are in the midst of fundamental changes affecting the relationship of the Federal Government to State and local governments, and we are grateful to you for your recognition of the importance of this issue, not just to us, but to all Americans.

We especially thank you for opening up the dialog, both on the legislative level at the Congress and with the administration on these very important issues. We believe the new Executive order calls into question fundamental principles of federalism. We are concerned all references to the 10th amendment, identification of new costs or burdens, and reduction of mandates are revoked.

Part of the greatness of federalism has been the flexibility of our great system to allow any city, county or State to develop new ideas and also approaches that confront us as local governments. The laboratory of democracy is really what we are and the will of the people at each level of government in America. Through that model, we have well served our citizens.

The tradition and spirit of federalism ought to, especially on this of all issues, lead us to work together, to shape and reshape the future of our country and our traditional relationships. We stand ready and look forward to an opportunity to do just that together.

Unlike previous federalism Executive orders, the new order signed by President Clinton while he was in Manchester, England, would revoke both former President Reagan's Executive order on federalism, as well as an earlier order by President Clinton in 1993. Similarly, unlike the two previous orders which were put together only after extensive consultation with the seven groups represented here, there was no consultation at all, nor is there any explanation for the unprecedented efforts to eliminate Presidential directives with regard to unfunded mandates and preemption.

The President's own previous Executive order called for more cost analysis and risk assessments for all government regulations, recognizing that Federal actions can and do impose significant costs and liabilities on State and local government. The requirement for those cost analyses and risk assessments would now apparently be abolished.

While an Executive order is different than a Federal law and carries no endorsement from the Congress, it provides directions from the President of the United States to all cabinet agencies and departments. In this instance, once the new order were to go into effect, it would provide new guidelines for all Federal officials to con-

sider in determining when a rule, regulation or law had Federal implications. That is, the order will create direction for Federal bureaucrats about how to address issues of municipal sovereignty and when and under what circumstances it will be OK to preempt traditional municipality authority and responsibilities.

Each of the three Executive orders are about setting guidelines for when and how it is appropriate for the Federal Government to intrude upon or interfere with State or local authority.

The new proposal emphasizes the justification for Federal action on matters of national or multi-state scope. It would eliminate previous references to the 10th amendment, the key amendment reserving to States the rights not expressly delegated by the Constitution to the Federal Government.

The contrast between the revoked orders and the new orders is most significant with regard to the fundamental principles of federalism. Where the order originally issued by former President Reagan focused on the preservation of State and local authority, the new proposal focuses on the supremacy of the Federal Government. Perhaps the most telling difference between the new version and the earlier two is the insistence upon an expanded list of situations where Federal action is justified.

We would hope that as an outcome of this set of hearings, the committee would consider the following recommendations: No. 1, a moratorium on new Federal preemptions by the House and Senate; two, codification of the original two Executive orders on federalism with judicial review. That would make it bipartisan and hopefully get a consensus within the Congress; three, the adoption of legislation to require a fiscal impact analysis on all Federal legislation and Federal regulations, including regulations from independent agencies, such as the Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Internal Revenue Service, on State and local governments.

Next the introduction of a Federal Preemption Relief Act to act as a followup to the Unfunded Mandates Reform Act of 1995. And, last, the issuance of a joint report on generation fiscal concerns and disparities and their implications for the Federal system.

We are grateful for the opportunity to be here with you today to share our views that stem from discussions and commitments made more than 200 years ago in my own city. Perhaps we ought to reconvene. We certainly believe a concerted bipartisan effort is critical if we are going to be credible in our efforts to make the government of the next century effective, efficient, and responsive to our joint constituents.

Thank you. I will be pleased to answer any questions.

[The prepared statement of Mr. O'Neill follows:]

Good morning, Mr. Chairman, my name is Brian O'Neill. I am a councilmember from Philadelphia—one of the oldest cities in the nation and one of the cradles of our federal system I serve as the President of the National League of Cities, the largest and oldest organization representing municipalities and their elected officials. I am here this morning, with my colleagues, to discuss the relationship between the federal government and state and local governments.

We want to begin by thanking you and the committee for holding this hearing. We believe we are in the midst of fundamental changes affecting the relationship of the federal government to state and local governments. We are grateful to you for your recognition of the importance of this issue—not just to us, but to all Americans. The changes - both those ongoing and pending in the Executive branch, on the Hill, and by regulatory agencies - could have long term impacts on state and local governments. We believe those changes ought not to be premised on a fundamental change in policy direction. We appreciate your interest, and we hope to provide a series of recommendations for changes to rebuild our federal system.

Mr. Chairman, there are some 36,000 thousand cities and towns in the United States. Most have small populations, few professional staff, and small budgets. 91 percent have populations of less than 10,000. This is a time of great change for all of them. The fiscal trends are significant with consequences for the future. For the most part, the current changes involve the assumption of significantly greater responsibilities - offloaded from the federal government - and significant federal preemption threats to historic and traditional local fiscal, land use and zoning authority.

We are in the middle of enormous and rapid changes in the federal-state-local relationships with long-term consequences for the nation's cities. The changes, if anything, are re-emphasized by the President's Executive Order on Federalism and concurrent proposal to revoke two earlier Executive Orders that we were involved in putting together. They are highlighted by legislation in the Senate Finance Committee this morning to interfere with the rights of states and local governments to regulate and tax sales and services provided over the Internet as comparable sales and services are taxed—but the limitations would not apply to the federal government. They are emphasized by the House action last week to preempt state and local authority to challenge securities fraud in state courts and the action in the Commerce Committee around the corner to preempt local authority with regard to the siting of towers and antennas on federal property. In no instance have we been invited to the table even though the most significant impacts will be felt at home.

For that reason, this morning we join the nation's governors and leaders of other national organizations representing state and local elected leaders in requesting the rescinding of the new Executive Order on Federalism. We urge this action to provide adequate time for meaningful consultations with our levels of government with regard to proposed changes that were made with no prior consultation, notice, or warning. We believe the changes and the manner in which they were made raise serious questions with regard to the Administration's perceptions of the balances of power between the three levels of government. Before revoking the two previous Executive Orders, we urge consultation with leaders of the organizations of state and local

elected officials. We make this request because we believe the new changes give an entirely different and inappropriate thrust to federalism as guidance to executive branch officials.

We believe this hearing this morning marks an important opportunity to broaden this dialogue—so that it includes the Congress as well as the administration. For, while the Congress does not have the authority to issue Executive Orders, it does have the authority to recommend and pass laws that have the effect of preempting historic and traditional rights and authority of the nation's state and local governments. Therefore, we would hope that today could be the start of a genuine commitment to mutual respect between our three levels of government.

Last March we overwhelmingly adopted halting the new trend of major federal preemption of historic and traditional state and local roles and responsibilities as our highest priority. The proposed executive order revokes all references to this key issue. In contrast, the new order proposes a renewed preeminence of the federal government with an emphasis on mandating uniformity. It focuses on nine reasons for this reversal of more than two decades of federal policy and deference to state and local authority. This morning ought to be a good opportunity to begin—all of us—to commence a serious effort to restoring authority to the levels of government closest to the people.

It has become increasingly clear that despite White House and Congressional claims of an intent to turn back greater power and authority to the level of government closest to the people, those words bear less and less relationship to actions. The preemption or taking away of historic and essential authority of local governments over activities such as franchising, zoning, taxing, and regulating—fundamental responsibilities of state and local governments for the protection of public health, safety and property is less important to larger corporate and federal interests than uniformity and the elimination of state and local rules, laws, fees, and taxes.

Pending proposed federal preemptions, if adopted as a regulation or enacted as a new federal law, will have far-reaching consequences and impose greater liabilities on cities and towns. They would curtail the rights of citizens in cities and towns to make the key decisions about the future of their own communities.

No issue in 1998 is likely to more affect the bottom line for local budgets and services, and for the rights of citizens in cities and towns across the nation than federal efforts to preempt historic and traditional municipal authority. This is an issue city leaders will confront in the federal courts, the Congress, the Administration, and at independent federal regulatory agencies. Preemption of local authority is not just a measure that Congress and the Administration seem interested in pursuing. Federal agencies, such as the Federal Communications Commission (FCC), are also, at the request of industry, proposing rules--often under intense pressure from Congress and industry—which seek to limit local authority over the siting of cellular and broadcast towers.

The key aspects of the current status of federalism are:

- the trends away from federal grants to local governments and shifting to direct payments to individuals - either through entitlement benefits or tax expenditures. The federal government is making the decisions about what is in the best interest of the citizens of a community.

- there is an ongoing significant decline in federal capital investment at the local level. The disinvestment as a percent of the federal budget is aggravated by Congressional legislative threats to the ability of states and local governments to finance public capital investment through tax-exempt municipal bonds.

- the portion of the federal budget going to entitlement spending is consuming ever greater proportions, leaving less and less of the budget to invest in the nation's future. As the U.S. competes in the fields of technology and information in the global economy, disinvestment in the next generation will be reflected in local economies.

- the proportion of the federal budget going towards the elderly is leaving less and less to invest in the next generation. With juvenile crime in cities at high levels, and the nation's local economies facing major demographic shifts, disinvestment in kids could have severe consequences for the nation's cities' economies.

- while local governments have traditionally been responsible for bricks and mortar, as well as public safety; federal actions to reduce federal responsibility and liability for welfare recipients, immigrants, and public housing tenants leave an ever-increasing liability on local governments. Increasingly, the burden transfer will aggravate disparities between local governments.

- while the trend in imposing direct federal, unfunded mandates is clearly on the decline, there has been an unprecedented increase in federal efforts to preempt state and local tax and revenue authority, threatening to undercut state and local revenue systems as we know them. Pending efforts in the Congress on takings, preempting state and local authority to levy or collect existing taxes and revenues on goods and services provided over the Internet, preempting local authority with regard to the sighting of group homes, and proposals on telecommunications, federal tax reform, railroad safety, and electric utility deregulation all would have harsh consequences on municipal authority and revenues.

Federalism

What brings us here this morning is a Presidential order to alter fundamentally the relationship of the federal government and state and local governments. The Executive Order on Federalism, #13083, issued by President Clinton, would rewrite the distribution and balance of power away from the direction established under the last three Presidencies. It would set the federal

government and its many agencies that affect cities and towns on a very different policy course--revoking earlier commitments to oppose unfunded federal mandates and federal preemption, and replacing them with expanded guidelines and justifications for preempting historic and traditional municipal authority.

We believe the new Executive Order calls into question fundamental principles of federalism. We are concerned that all references to the Tenth Amendment, identification of new costs or burdens, and reduction of mandates are revoked. Part of the greatness of federalism has been the flexibility of our great system to allow any city, county, or state to develop new ideas and approaches to confront problems affecting Americans—the laboratory of democracy and the will of the people at each level of government in America. Through that model we have well served all our citizens. The tradition and spirit of federalism ought to—especially on this of all issues—lead us to work together to shape and reshape the future of our country and our traditional relationships. We stand ready and look forward to an opportunity to do just that--together.

Unlike previous federalism Executive Orders, the new order, signed by President Clinton while he was in Manchester, England, would revoke both former President Reagan's Executive Order on Federalism, as well as an earlier Order by President Clinton in 1993. Similarly, unlike the two previous orders which were put together only after extensive consultation with state and local leaders, there was no consultation at all on the pending order. Nor is there any explanation for the unprecedented efforts to eliminate Presidential directives with regard to unfunded mandates and preemption. The President's own previous Executive Order called for more cost analysis and risk assessments for all government regulations, recognizing that federal actions can and do impose significant costs and liabilities on states and local governments. Those cost analyses and risk assessments would now, apparently, be abolished.

While an Executive Order is different than a federal law and carries no endorsement from the Congress, it provides direction from the President of the United States to all Cabinet agencies and departments. In this instance, once the new order were to go into effect, it would provide new guidelines for all federal officials to consider in determining when a rule, regulation, or law had "federalism implications." That is, the order will create direction for federal bureaucrats about how to address issues of municipal sovereignty, and when and under what circumstances it will be okay to preempt traditional municipal authority and responsibilities. Each of the three Executive Orders are about setting guidelines for when and how it is appropriate for the federal government to intrude upon or interfere with state or local authority.

The new proposal emphasizes the justification for federal action on matters of national or multi-state scope. It would eliminate previous references to the 10th Amendment—the key amendment reserving to states the rights not expressly delegated by the Constitution to the federal government. The contrast between the revoked orders and the new order is most significant with regard to the fundamental principles of federalism. Where the order originally issued by former

President Reagan focused on the preservation of state and local authority, the new proposal focuses on the supremacy of the federal government. Perhaps the most telling difference between the new version and the earlier two is the insistence upon an expanded list of situations where federal action is justified, including the:

- need for uniform national standards;
- reluctance of state and local governments to impose necessary regulations themselves for fear of business relocation;
- increased costs to governments because of decentralization;
- compliance with international treaties and other agreements; and
- excessive costs of specialized expertise which would put the costs of regulation beyond the capacity of state and local governments.

Recommendations

We would hope that as an outcome of this set of hearings, the committee would consider the following recommendations:

- a moratorium on new federal preemptions by the House and Senate.

- the adoption of legislation to require a fiscal impact analysis on all federal legislation and federal regulations, including regulations from independent agencies such as the Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Internal Revenue Service, on states and local governments.

- the introduction of a federal Preemption Relief Act, to act as a follow-up to the Unfunded mandates reform Act of 1995.

- the issuance of a joint report on generation fiscal concerns and disparities and their implications for the federal system.

Background

As cities have realized an ever smaller share of their budgets from federal grants-in-aid, the importance of the health of local economies has increased. Today, cities realize the greatest portion of their revenues to balance their budgets from local taxes and fees. It is, in large part, for that reason that balancing the federal budget and controlling federal entitlement spending have been our highest federal priorities for the last five years. We have worked especially closely with the National Conference of State Legislatures on both fronts. Spending less to pay interest on the national debt and more to prepare for tomorrow has been a guiding policy of the organization.

In some ways, the decision in the budget seems part and parcel of the growing tendency in Washington, D.C. to take away the authority of state and local leaders to make decisions that reflect the will and interest of the citizens they represent - that somehow federal officials know far better what is in the best interests of citizens in a community than their own local leaders.

Last July, the NLC Board of Directors adopted a motion to carry out a study of federal spending trends, the changing economy and demographics, and emerging economic disparities. The action came after a major discussion by the Board with regard to the impact of federal fiscal policies and their impact on disparities in the nation's cities. The Board also provided input to a joint initiative with the National Governors' Association and the National Conference of State Legislatures to examine emerging trends affecting state and local revenues.

The nation is witnessing totally new emerging technologies transforming the country and its cities - perhaps in ways totally different than in previous cycles. These changes have implications for state and local revenues as they radically redefine old concepts of nexus, and as the economy moves to the future against a backdrop of state and local tax systems adopted for another era. Because today's new technologies are not as capital-intensive, or labor-intensive, or heavily industrial as the ones which used to drive the American economy, NLC adopted a proposal to create a joint endeavor with the National Governors' Association (NGA) and the National Conference of State Legislatures (NCSL) to produce a report intended to provide information to elected state and local leaders about the changing nature of the national economy, with an analysis of the potential impacts on state and local revenues and the flexibility of current structural capacities to respond to these changes. We are following up this year with a new report looking at the impact of the global economy, deregulation, and information technology on the structure of state and local governments.

Economic, technological, telecommunication, demographic, and legislative changes are altering the federal system, perhaps beyond recognition. Our purpose last year was to examine the equity and responsiveness to changes in the economy of State and local revenue systems in today's global economy. What are the factors eroding state and local authority: federal pressure, changing demographics, globalization of the economy? Designed during the smokestack age, are state and local tax systems obsolete, inequitable, and unresponsive to changes in the economy? Have changes in the American economy, the population, and federal policies undercut the ability of states and local governments to assume greater demands and ensure equity in their revenue systems?

The most significant fiscal trend over the past twenty years has been the declining share of federal support to state and local governments, which has placed a much greater burden on current state and local taxes. Federal grants-in-aid to state and local governments averaged 21.5 percent of their total spending over the 1990-95 period. This is well below the 26.5 percent peak that occurred in 1978. Consequently, state and local governments have had to rely much more on their own tax revenue sources to generate sufficient revenue to provide services required by the public. Further,

the recent trend of Congress pushing more responsibilities to state and local governments will place additional burdens on the current state-local tax structure.

· *Deregulation of the telecommunications and electric industries.* Allowing competitive entry in these regulated industries will force state and local governments to experience substantial tax shifting. Substantial hardship is expected for taxing jurisdictions that rely heavily upon existing electric generating facilities to pay local property taxes.

· *Federal tax reform.* Congressional proposals for a flat tax and a national retail sales tax would force states to undertake major revisions of their sales and personal income tax systems. Both proposals would eliminate state and municipal authority to issue tax-exempt municipal bonds—affecting more than $1 trillion in outstanding bonds used to finance virtually every school, jail, road, airport, and bridge in the nation. It would be difficult to overstate the havoc caused to the state-local tax structure if federal tax law eliminated deductions for mortgage interest, state personal income taxes, and local property taxes.

We are grateful for the opportunity to be here with you today to share our views that stem from discussions and commitments made more than 200 years ago in my city. Perhaps we ought to reconvene. We certainly believe a concerted, bipartisan effort is critical if we are to be credible in our efforts to make the government of the next century effective, efficient, and responsive to our joint constituents.

Thank you. I would be pleased to respond to any questions.

State & Local Preemption

ISSUES	LOCAL PREEMPTION	STATE & LOCAL IMPACT
FINANCE & ADMINISTRATION		
Takings	• Legislation would allow developers to pursue takings claims in federal court without first exhausting state judicial procedures.	• Would result in far greater federal court involvement in local land use disputes. Would interfere with the resolution of essentially state and local issues within the state court system. Would encourage developers to bring suits in federal court, rather than work out their disputes with local governments.
Bank Powers	• Legislation would render state legislative authority to determine state bank powers null and void.	• Could create unlevel playing field for bank branches depending upon their state of chartering - rather than the state law where they are conducting business. Could create some competitive disadvantages for home-based state-chartered banks.
State Securities Regulation	• Preempt ability of state and local governments to challenge securities fraud in state court and preempt requirement for securities dealers to make only suitable investment recommendations to pension funds and state and local governments.	• Would remove current legal rights to suitable investment advice and right to recover damages for fraud from securities dealers.
COMMUNITY & ECONOMIC DEVELOPMENT		
Municipal Annexation	• The consolidated Farm and Rural Development Act of 1961 preempts state and local governments from providing a full range of infrastructure and services in an annexed area if a rural utility service has a protected federal loan or loan guarantee on a facility in the area.	• This makes it difficult for localities to carry out growth and economic development plans under state law.
Homeownership Campaign	• The National Conference of States on Building Codes and Standards (NCSBCS) claims that the cost and effectiveness of laws that regulate the construction of residential, commercial, public and factory buildings make building too costly. As part of HUD's Homeownership Partnership, NCSBCS is leading a working partnership to set preemptive, national building and regulatory process.	• The goal is to achieve up to a 60 percent reduction in the state and local land use, zoning and permit regulatory authority. This would preempt historic and traditional state and local responsibilities in the areas of land use, zoning and building codes. However, there has been little progress with this initiative.
Fair Housing Zoning Authority	• Current law preempts municipal authority over the siting of group homes.	• Leads to federal investigations and actions when city refuses permit for group home siting.

PUBLIC SAFETY		
Juvenile Justice	• Federalization of certain juvenile crimes.	• Threatens state and local authority regarding punishment for crimes. Would allow federal and state prosecutors unprecedented opportunities to circumvent state law.
Natural Disaster Insurance	• In the name of disaster mitigation, the Federal Emergency Management Agency and the insurance industry are considering requiring in federal legislation the creation and enforcement of building codes which will reduce loss of life and physical damage resulting from catastrophic natural disasters.	• Would mandate that localities pass and enforce certain building standards, not withstanding state law.
TRANSPORTATION & COMMUNICATIONS		
Railroads	• Under the ICC Termination Act, cities and towns have been preempted from zoning authority and implementation of environment, health and safety statues.	• Does not allow local governments to carry out local laws in relation to railroad company decisions.
Tow Truck Regulation	• Under the ICC Termination Act, municipalities were told what they could regulate in relation to tow trucks.	• Courts in CA and TX have ruled that municipalities can only regulate those activities specified under the ICC Act.
Telecommunications Taxing Authority (A)	• Preempts local taxes on broadcast satellite services.	• Would force higher taxes and fees on all other businesses and residents.
Taxing Authority (B)	• Congressional proposals to preempt state and local taxes and fees on Internet transactions.	• Would force higher taxes and fees on all other businesses and residents.
Zoning Authority: Cellular Towers	• Industry petition before the FCC that would preempt state and local authority over the siting of cellular towers and broadcast transmission facilities. Bipartisan House and Senate leaders set to introduce NLC-supported bill to give cities greater siting authority.	• Would lose ability to make land use and zoning decisions, to preserve the integrity of local neighborhoods, protect property values, protect public health and safety.
Zoning Authority: Satellite Dishes	• FCC rule preempting local ordinances that restrict the use of broadcast satellite antennas.	• Interferes with local ability under state law to ensure that the siting of antennas is safe, consistent with traditional zoning, height and land use practices.
ENERGY, ENVIRONMENT AND NATURAL RESOURCES		
Electric Utility Deregulation	• Legislation potentially jeopardizes state and local authority in many areas, including control over the public rights-of-way	• State and local governments could lose policymaking and revenue-raising capacity. Would lose ability to make decisions regarding the use of public streets, lose compensation in the way of franchise fees.

For more information contact: Barrie Tabin or Frank Shafroth at NLC (202) 626-3020 or E-mail Tabin@nlc.org & Shafroth@nlc.org

Mr. MCINTOSH. Thank you, Mr. O'Neill. We will come back to you on questions, because there are a couple of things I do want to explore in that list.

Our final witness on today's panel is the commissioner from Wake County, Betty Lou Ward. Thank you for coming here today. I appreciate your being here to represent county government.

Ms. WARD. Thank you, Mr. McIntosh. I appreciate it. Thank you, committee members, for allowing me to come and appear before you today. I am here in my capacity as president of the National Association of Counties, but I thought you guys might like to know also that Dan Blue and I represent the same people. We are both from Wake County and are long-time personal friends. So that is a real pleasure to be able to testify with him here today.

You have my written statement and you indicated that will be a part of the record. Thank you very much.

NACo is here today to express our concerns about the implications for Federal-county relationships presented by the possible implementation of Executive Order 13083 on federalism. Before addressing our concerns, I wish to emphasize to this committee that NACo has developed a good working relationship with this administration and appreciates the White House and the Federal agencies that have been open to hear the concerns of counties. In fact, officials from nearly all Federal agencies have attended NACo's last two annual conferences. We believe that the consultative process in developing Executive Order 13083 was flawed, but we also believe that these flaws can be and will be rectified through direct communication.

Having said that, I would like to make three points. One, this order effectively rescinds two previous Executive orders from two Presidents that have established solid relationships between Federal agencies and America's counties. This was done without any consultation with counties or other affected local governments, as you have already heard from my fellow witnesses.

Two, it serves to preempt local authorities and actions that may be serving the local communities more effectively than those generated in Washington, DC.

And, three, great strides have been made through the implementation of the Government's Performance and Results Act and the National Performance Review as Federal agencies have remade themselves in an effort to provide the American people with a more responsive and service-oriented government. Local government participation has significantly assisted in these efforts from public welfare to public lands.

Mr. Chairman, we see no need to reinvent the Federal Government's approach to federalism, particularly in light of the impressive success of President Clinton's 1993 Executive order that established important principles, such as the need to eliminate unfunded mandates.

We are particularly concerned that the administration would move so quickly without even cursory discussions or consultation with local and State governments that would be so fundamentally affected by the proposed changes. Not to have done so shows a disregard for the very concept of federalism.

Preemption is a concept local governments fundamentally oppose, as are unfunded mandates. We constantly have to fight efforts of the Federal Government to second guess local authorities in a variety of policy areas. From taking legislation to cellular tower siting policies, counties have had to stand firm against unnecessary Federal intrusion. Executive Order 13083 effectively opens the Pandora's box of opportunities for Federal agencies to attempt to supplant their wisdom for that of local elected officials. America's counties cannot stand by and allow such an order to go unchallenged.

Finally, Mr. Chairman, Federal agencies have spent the past several years reinventing themselves. Under the guidance of Vice President Gore, agencies have looked at their operations, their ways of doing business and their relationships with their clients, including counties.

In an effort to become more responsive and more effective, the Government Performance and Results Act and Gore's National Performance Review have provided the tools and the guidance necessary to make fundamental changes that have made significant differences for everyone doing business with the Federal Government. This new Executive order, however, sets these efforts back by years. It harks back to a time before President Reagan's federalism order of 1987, and once again potentially reduces the county's role in the decisionmaking that affects our local communities.

Mr. Chairman, we believe that there is a simple solution to this dilemma presented by the Executive Order 13083. The President should withdraw this order immediately and fall back on the positive message of his 1993 order. There is no need for this new order, and, while I will not speculate on the origin of the language, suffice it to say it was drafted without consideration for its implications for local government.

Our message is clear: This Executive order is a bad idea, poorly developed, without consultation with affected parties, and needs to be withdrawn immediately.

Thank you, Mr. Chairman and members, for the opportunity to share the concerns of America's counties.

Thank you.

[The prepared statement of Ms. Ward follows:]

GOOD MORNING. I AM BETTY LOU WARD, COUNTY COMMISSIONER OF WAKE COUNTY, NORTH CAROLINA AND NEWLY INSTALLED PRESIDENT OF THE NATIONAL ASSOCIATION OF COUNTIES (NACo)*. NACo APPRECIATES THE SUBCOMMITTEE'S INVITATION TO HEAR OUR VIEWS ON PRESIDENT CLINTON'S EXECUTIVE ORDER 13083 "FEDERALISM" PUBLISHED IN THE *FEDERAL REGISTER* ON MAY 19, 1998.

THERE HAS BEEN MUCH SAID ABOUT THE PROCESS UTILIZED IN PROMULGATING EXECUTIVE ORDER 13083, THE SUBSTANTIVE CHANGES MADE BY THIS EXECUTIVE ORDER AND THE NEED TO MAKE SUCH CHANGES.

BEFORE ADDRESSING THESE THREE IMPORTANT ISSUES, I WISH TO EMPHASIZE TO THIS SUBCOMMITTEE THAT THE NATIONAL ASSOCIATION OF COUNTIES HAS DEVELOPED A GOOD WORKING RELATIONSHIP WITH THIS ADMINISTRATION AND APPRECIATES THAT THE WHITE HOUSE AND FEDERAL AGENCIES HAVE BEEN OPEN TO HEAR THE CONCERNS OF COUNTIES. WE BELIEVE THAT THE CONSULTATIVE PROCESS IN DEVELOPING EXECUTIVE ORDER 13083 WAS FLAWED BUT ALSO BELIEVE

* The National Association of Counties is the only national organization representing county government in the United States. Through its membership, urban, suburban and rural counties join together to build effective, responsive county government. The goals of the organization are to: improve county government; serve as the national spokesman for county government; serve as a liaison between the nation's counties and other levels of government; achieve public understanding of the role of counties in the federal system.

THESE FLAWS CAN AND WILL BE RECTIFIED THROUGH CONSTANT AND CONTINUOUS COMMUNICATIONS.

I. NACo RESOLUTION

LAST WEEK, NACo CELEBRATED ITS 63RD ANNUAL CONFERENCE IN MULTNOMAH COUNTY (PORTLAND), OREGON. JUST PRIOR TO THE CONFERENCE, WE LEARNED OF EXECUTIVE ORDER 13083 AND ASKED THE ADMINISTRATION TO WITHDRAW THE ORDER IN ORDER TO ENTER INTO MEANINGFUL DISCUSSIONS CONCERNING ITS IMPLICATIONS. AS YOU KNOW, MR. CHAIRMAN, NACo CO-SIGNED THE JULY 17 LETTER BY THE BIG-SEVEN ORGANIZATIONS REPRESENTING GOVERNMENT OFFICIALS CALLING FOR A WITHDRAWAL OF EXECUTIVE ORDER 13083. NACo WAS THE FIRST OF THE ORGANIZATIONS TO CELEBRATE ITS ANNUAL CONFERENCE AND WE IMMEDIATELY ADOPTED A UNANIMOUS RESOLUTION CALLING FOR:

1. WITHDRAWAL OF EXECUTIVE ORDER 13083;
2. REVIEW OF THE NEED TO CHANGE EXECUTIVE ORDERS 12612 AND 12825;
3. MEANINGFUL DISCUSSION ABOUT THE NEED TO CLARIFY THESE EXECUTIVE ORDERS; AND
4. THAT DISCUSSIONS ON FEDERALISM INCLUDE ALL LOCAL AND STATE GOVERNMENT ASSOCIATIONS.

ATTACHED IS A COPY OF NACo'S RESOLUTION. I EXPECT THAT EACH OF THE SEVEN ORGANIZATIONS HAVING MEETINGS IN THE FUTURE WILL BE PASSING SIMILAR RESOLUTIONS.

II. SUBSTANTIVE CHANGES

NACo BELIEVES THERE ARE A NUMBER OF SUBSTANTIVE CHANGES MADE IN EXECUTIVE ORDER 13083 THAT ERODE THE PRINCIPLES OF FEDERALISM AND REDUCE THE OPPORTUNITY OF LOCAL AND STATE GOVERNMENTS TO BETTER ADMINISTER GOVERNMENT PROGRAMS AND INITIATIVES.

FIVE KEY PRINCIPLES HAVE BEEN DROPPED IN EXECUTIVE ORDER 13083 AND WILL NEED TO BE ADDRESSED. THESE ARE:

1. PREEMPTION -- ANY REFERENCES TO LOCAL PREEMPTION—NACo HAS A KEY POLICY ADOPTED A NUMBER OF YEARS AGO OPPOSING THE PREEMPTION OF LOCAL AUTHORITY. SECTION 4 OF NOW REVOKED EXECUTIVE ORDER 12612, SPEAKS DIRECTLY TO THIS ISSUE CALLING FOR PREEMPTIONS TO BE IMPOSED ONLY IN PROBLEMS OF NATIONAL SCOPE AND NOT COMMON TO STATES. THEY ARE ENCOURAGED TO BE USED AT A MINIMUM, LEVEL NECESSARY. THE NATION'S COUNTIES ARE CONCERNED THAT THE PREEMPTION ISSUE HAS NOT BEEN CLARIFIED SUFFICIENTLY IN EXECUTIVE ORDER 13083. WITHOUT MAKING REFERENCE TO THE WORD PREEMPTION,

NINE CIRCUMSTANCES ARE LISTED THAT COULD JUSTIFY FEDERAL ACTION. WE RECOGNIZE THE NEED FOR SOME OF THOSE LISTED BUT OTHERS, SUCH AS: "WHEN DECENTRALIZATION INCREASES COSTS" OR "WHEN THERE IS RELUCTANCE TO IMPOSE REGULATIONS THAT AFFECT BUSINESS ACTIVITY", OR "WHEN THE MATTER RELATES TO FEDERALLY OWNED OR MANAGED PROPERTY" NEED TO BE EXPLAINED FURTHER. DEFINITIONS FOR TERMS SUCH AS "HARM" "NEED" "COSTS" AND OTHER WORDS ALSO NEED TO BE CLARIFIED.

2. FEDERAL ASSESSMENTS – EXECUTIVE ORDER 13083 HAS DELETED REFERENCES TO THE NEED TO MAKE FEDERAL ASSESSMENTS OF FUTURE POLICIES UPON LOCAL AND STATE GOVERNMENT. WE ARE PARTICULARLY CONCERNED WITH THE POTENTIAL EXTENT TO WHICH A POLICY MAY IMPOSE ADDITIONAL COSTS AND BURDENS ON LOCAL AND STATE GOVERNMENT. SECTION 4(B) SPEAKS TO THIS ISSUE BUT SHOULD BE EXPANDED TO ENSURE THE CONTINUATION OF AN AGENCY DESIGNEE RESPONSIBLE FOR ENSURING THE IMPLEMENTATION OF ASSESSMENTS ON LOCAL AND STATE GOVERNMENTS.

3. CONSULTATION – SECTION 4(A) CONSULTATION THE NEW ORDER SHOULD INCLUDE A REFERENCE TO ORGANIZATIONS REPRESENTING LOCAL AND STATE GOVERNMENTS.

4. ORDER TO REDUCE THE IMPOSITION OF UNFUNDED MANDATES – COUNTIES ARE CONCERNED THAT THE NEW ORDER DOES NOT

CLEARLY CALL FOR REDUCTIONS OF UNFUNDED MANDATES. ALTHOUGH SECTION 4 CONSULTATION DOES INCLUDE A PROCESS TO EITHER PROVIDE THE FUNDS NECESSARY OR JUSTIFY THE NEED FOR A MANDATE, IT MOVES AWAY FROM PRESIDENT CLINTON'S PREVIOUS EXECUTIVE ORDER (SECTION 1 OF EXECUTIVE ORDER 12825 TITLED "REDUCTION OF UNFUNDED MANDATES") BY NOT CLEARLY INDICATING TO FEDERAL AGENCIES THAT UNFUNDED MANDATES SHOULD BE AVOIDED.

5. SPECIAL REQUIREMENTS FOR LEGISLATIVE PROPOSALS -- THE PRESIDENT'S NEW EXECUTIVE ORDER DOES NOT INCLUDE REQUIREMENTS TO FEDERAL AGENCIES TO ABSTAIN FROM PROPOSING TO THE CONGRESS ANY LEGISLATION THAT IS DIRECTED TO INTERFERE WITH ESSENTIAL STATE AND LOCAL FUNCTIONS OR SERVE TO PREEMPT STATE AND LOCAL LAWS, UNLESS CONSISTENT WITH FUNDAMENTAL FEDERALISM PRINCIPLES. NACo RECOMMENDS THAT SECTION 5 OF NOW REVOKED EXECUTIVE ORDER 12612, TITLED SPECIAL REQUIREMENTS FOR LEGISLATIVE PROPOSALS SHOULD BE INCLUDED IN ITS ENTIRETY.

III. THE NEED FOR CHANGE

MR. CHAIRMAN, SINCE NO CONSULTATION PROCESS WAS USED IN THE DRAFTING OF EXECUTIVE ORDER 13083, NACo IS AT A LOSS TO UNDERSTAND THE NEED FOR MODIFYING THE FEDERALISM

RELATIONSHIPS DEVELOPED THROUGHOUT THE PREVIOUS THREE PRESIDENTIAL ADMINISTRATIONS AND EMBODIED IN THE NOW REVOKED EXECUTIVE ORDERS. WE HOPE TO ENTER INTO MEANINGFUL DISCUSSIONS WITH THE ADMINISTRATION AS TO WHY A NEW EXECUTIVE ORDER IS NECESSARY AND HELP TO SHAPE MODIFICATIONS TO OUR RELATIONSHIP WHICH IS DEEMED SUITABLE TO ALL CONCERNED.

I WISH TO REITERATE TO THE PRESIDENT THAT THE NATIONAL ASSOCIATION OF COUNTIES FEELS THAT EXECUTIVE ORDER 13083 SHOULD BE WITHDRAWN IMMEDIATELY AND THAT WE ENTER, TOGETHER WITH OTHER ORGANIZATIONS REPRESENTING LOCAL AND STATE GOVERNMENTS, INTO DISCUSSIONS ON THE NEED TO FURTHER ALTER THE FEDERALISM RELATIONSHIP.

IV. LEGISLATIVE ACTIONS ON PREEMPTION

THE NATIONAL ASSOCIATION OF COUNTIES IS ALSO CONCERNED WITH CONGRESSIONAL ACTIONS TO PREEMPT STATE AND LOCAL GOVERNMENT AUTHORITY AND INITIATIVES. TWO WEEKS AGO, THE U. S. SENATE VOTED ON "TAKINGS" LEGISLATION, AN ATTEMPT TO PREEMPT LOCAL AUTHORITY OVER LAND USE DECISIONS. THE HOUSE OF REPRESENTATIVES PASSED SIMILAR LEGISLATION LAST YEAR. THIS WEEK, POSSIBLY TODAY, THE HOUSE WILL VOTE ON AN AMENDMENT THAT WOULD DENY, FEDERAL FUNDS TO LOCAL GOVERNMENTS THAT HAVE

ADOPTED LEGAL LOCAL CONTRACTING GUIDELINES. I HOPE THIS HEARING SERVES AS AN OPEN DOOR TO CONSTRUCTIVE DIALOGUE WITH THE CONGRESS ON THESE IMPORTANT ISSUES.

AGAIN, I WANT TO THANK THE SUBCOMMITTEE FOR THE OPPORTUNITY TO EXPRESS THE VIEWS OF THE NATIONAL ASSOCIATION OF COUNTIES ON THIS VERY IMPORTANT MATTER.

NACo National Association of Counties

RESOLUTION ON EXECUTIVE ORDER ON FEDERALISM (13083)

WHEREAS, collaboration of the three levels of government has improved in recent years with examples, such as: the Unfunded Mandates Reform Act, the reauthorized surface transportation legislation, welfare reform, health care reform, the balanced budget agreement and safe drinking water; and

WHEREAS, President Reagan issued Executive Order on Federalism (12612) in 1987, with the stated purpose of restoring the division of governmental responsibilities between federal and state governments that was intended by the Framers of the Constitution; and

WHEREAS, President Clinton issued Executive Order 12875 in 1993, with the stated purpose of reducing the imposition of unfunded mandates, streamlining the application process for and increasing the availability of waivers, requiring for more cost analysis and risk assessments for all Federal government regulations, and establishing regular and meaningful consultation with state, local and tribal governments; and

WHEREAS, the President issued Executive Order 13083 which revokes Executive Order 12612 and Executive Order 12875 and appears to reverse the past collaborative efforts proposing renewed preeminence of the federal government; and

WHEREAS, neither the National Association of Counties (NACo) nor any local or state government official was consulted in the drafting of Executive Order 13083:

THEREFORE, BE IT RESOLVED that NACo requests that the President withdraw Executive Order on Federalism (13083); and

BE IT FURTHER RESOLVED that NACo calls upon the Administration to review any need for changing Executive Orders 12612 and 12875; and

BE IT FURTHER RESOLVED that NACo stands ready and willing to begin meaningful discussion with the Administration about the need for further clarification of Federalism and Executive Orders 12612 and 12875; and

BE IT FURTHER RESOLVED that such discussions on Federalism include all local and state government associations.

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Mr. MCINTOSH. Thank you, Ms. Ward. I appreciate that very clear message.

Let me now proceed with questions and really ask the same question I asked the Governor and the mayor of each of you.

Do you think we should consider legislative codification of that Executive order? As I understood your testimony, Mr. O'Neill, you indicated you thought we should.

Mr. O'NEILL. I think you should for two reasons. One, it would be the best leverage that we, as local elected officials, State elected officials, and the Congress would have to convince the administration to do the right thing, which is withdraw this. And, second, the question on whether we should go back and just rescind the two good ones as well as the current one that is before us, I don't think so. I think that would be a mistake, because the bureaucratic mentality is that if you take something away that you have told them they had to do, you might as well revoke it, as this one does, because it is going to be, well, we have the 10th amendment, but we had this interpretation that was very specific on us. Whether we totally agree with it or not, as Governor Leavitt said, we lived with it, we have not had a problem, never been before the Congress on it, it hasn't been an issue.

Mr. MCINTOSH. Mr. Blue.

Mr. BLUE. I would add to that, Mr. Chairman, a couple of things. First, the 10th amendment itself, that, the 11th amendment and the decisions talk about federalism arising from the basic structure of the Constitution have to be considered as living things, so even if we codified it, we would know there is still some room for judicial interpretation.

But I do think that is a good direction in which to proceed, but I would suggest that we ought to think about codifying both of the Executive orders, previous Executive orders, the 1987 one as well as the 1993 one, and as part of that codification we ought to look at the other things I recommend in my written comments, and specifically we ought to pay specific attention to the concept of preemption, which is one of the greatest challenges facing States now. But if those kind of things were incorporated into deliberation about codification of the Executive orders, I think it is the kind of thing that NCSL would certainly be very interested in.

Mr. MCINTOSH. We conceivably could set out a standard for interpretation of statutes, where, if it is not expressly stated that it is the will of Congress to preempt the States, then it would not be done. The courts sometimes now try to read and discern the intent of Congress where we are not very clear in the legislative process. Did they intend to preempt States with this, did they not? So, your message there on the question of preemption could serve a very good purpose to give guidance to the courts that in general we don't intend to preempt unless we are very specific and clear on it. That is what the Executive order said, and perhaps we can apply that into the legislative branch as well.

Mr. BLUE. I think also one of the things that ought to be considered, Mr. Chair, if we look seriously at codification, I do believe that the consultation process has great value, and the consultation process, even with the Congress, is something that is of tremendous value.

We initiated a process in my State, I used to be the presiding officer in the House, we initiated a process to consult with local governments because we had the same complaints about unfunded mandates, and basically taking over their territory, although it wasn't as firm in our State Constitution as it is in the Federal Constitution. But we found that the consultation not only with administrative agencies but with us lawmaking bodies proved to be very valuable. I think that it would be very valuable in this process as well.

Mr. MCINTOSH. Let me take the opportunity to ask you one other question, and then I want to ask Ms. Ward about the statute. You mentioned the history with this administration is a fairly good record of consultation with at least the State legislators group and the other groups representing local government.

Why do you think they didn't consult with you on this Executive order?

Mr. BLUE. Mr. Chairman, I have been trying to figure out an answer to that, and I have talked extensively, and I think that that is one of the things that would come from the consultation, because the administration has been very straightforward and forthcoming in offering to sit down and talk with the representatives of our seven organizations, as well as the principals themselves, their officers, to go through the details of this Executive order. If in fact what is represented, and that is it is simply to modernize it, update it, based on recent Supreme Court decisions, and if that is the reason, then we could sit down and discuss it and figure whether that is the reason.

I have to give you a direct answer. I have no real knowledge of why we were not consulted. As I said, it is atypical, it is the only instance that I am aware of on an issue of this magnitude that NCSL has not been consulted with.

Mr. MCINTOSH. I take it you would share the comments earlier that they should use as the base the two previous Executive orders, not the new one?

Mr. BLUE. Yes, I think that we ought to start with where we are, and the new one is not in effect yet, so we ought to start with the 1987 order and the 1993 order, to determine the need, assess where we are and determine the need to update it. That is what consultation ought to be about from a negotiating standpoint. I understand all the implications, but we would certainly rather start with the Executive orders as they exist right now rather than having a new draft to start discussions from.

Mr. MCINTOSH. Let me mention, the plan would be that Representative Barr went over to vote on the quorum vote so he could take over the chair and we could continue the hearing, so any of the Members who want to go to the quorum and come back, we will continue the hearing, hopefully without interpretation, if Mr. Barr comes back.

Let me ask unanimous consent for 1 minute and I will ask Ms. Ward the same question about the statute.

Ms. WARD. I will just make a quick one in reference to the question that you asked, is I feel very strongly that amendment to deny funds to implement the Executive order is full of potential problems. I feel very strongly about that. NACo would really prefer to

resolve this matter through consultation and not confrontation, which I can see that coming if you went in the direction that perhaps you were pointing.

Such an amendment could strengthen the administration's resolve to retain the order. So I would encourage you, do let's see if we can't go back and have some consultation and avoid the confrontation.

Mr. MCINTOSH. All right. Thank you. Let me turn now to Mr. Tierney for questions.

Mr. TIERNEY. Thank you, Mr. Chairman. Ms. Ward, I think you may be on to something here, the idea of trying to resolve something without trying to jump immediately to confrontation. You are familiar with the process in the Executive order where there is a 90-day period of discussion. Anyway, the fact is, it is that period that brings us all here today from which actually arose all of the concerns that we are now addressing. So at least in one sense, something seems to be working. Before the order was implemented, there was a period for people to express opinion, and here we are, the opinion being expressed, we are not happy with the order, there wasn't enough consultation, we want to go back and readdress it. Before we jump to legislation or try to codify it in that sense, we ought to at least make that effort, I think, to try and look at this.

What are your opinions about instead of looking at codifying specific Executive orders, instead, looking to address the situation of preemption, both at the legislative level and the administrative level? I would think that would be a concern for county and local and State governments more so than just trying to do it piecemeal.

Ms. WARD. It is of great concern to counties and the preemption legislation was something that obviously there has been a lot of conversation about and a lot of requests to go back and revisit some of the decisions that have been made. So I think it is very important to go back to the consultation part of the whole thing and sit down together, because we all represent the same people, depending on where we come from, and look at the opportunities that we have to work together. I think that really is an important thing. We have tied all these things together, but, by the same token, a lot of them do connect.

Mr. TIERNEY. Thank you. Mr. Blue, do you have a feeling about that?

Mr. BLUE. I do, and I think Commissioner Ward is absolutely right. One of the other suggestions that I make, and it is one that I have played with since the early 1980's, at least conceptually, and that is that one way to start addressing the preemption issue is to have a point of order on preemption as we have a point of order on unfunded mandates. I think that that may call Congress' attention a little bit more to the facts that it is acting in a preemptive way without setting forth clear standards for the action. I agree totally with Commissioner Ward that this is the last thing that needs to be confrontational, because the administration, as does every administration, has the authority to issue Executive orders. But we think that if we can talk about it, as we should have, and if we can talk about it over the 90-day period, or whatever the appropriate period, to see exactly what it does and to see that it address-

es our concerns, we may take a different view of it. But as it stands right now, we have a feel for what the prior two Executive orders mean and what they do, and that is why we are comfortable with them.

Mr. TIERNEY. Am I correct to assume that the administration has reached out to each of your respective organizations now in an effort to discuss your concerns?

Mr. BLUE. Extensively to ours.

Ms. WARD. Yes, I would concur with that. They have indeed reached out to us. We are hoping they will listen to us.

Mr. O'NEILL. There is no question that in response to us finding out about this, as was stated earlier, and letting them know that we are against it in its entirety, and there really isn't a whole lot of negotiating between the two priors and this one. What we have gotten is we will delay the implementation for 90 days.

Mr. TIERNEY. So you could discuss it?

Mr. O'NEILL. The same reason in my opinion, and I think it is a fair evaluation, the same reason there wasn't any consultation. If this were an administration that did not consult, that is another example of them not consulting, I think whoever was doing this within the executive branch, and I don't want to pin this on the President himself. I know it is an Executive order, but things happen in reality below that level. There was clearly an intent not to consult, and I think there was clearly an understanding that State and local governments would be objecting to every difference between the prior two and these. There isn't a lot of negotiating room here. They have pretty much taken what was good out and put in what we object to.

The easy consultation is let's start from scratch, this is a flawed document.

Mr. TIERNEY. To this point in time, that has not been precluded? That is still an ongoing conversation?

Mr. O'NEILL. Where we are starting to work from is just totally wrong, and the seven organizations have agreed——

Mr. TIERNEY. We have all come to the conclusion that the consultation would have been the preferred path here. My interest right now is knowing whether or not that is occurring within the context of the 90 days and now the additional 90 days, in making sure all of you feel you are being listened to and the administration reached out to give you an opportunity to express your range of views from rescinding it and starting again to dealing with specific aspects of it?

Mr. O'NEILL. That is the range of our views, is rescinding it and starting again.

Mr. TIERNEY. They are discussing that with you?

Mr. O'NEILL. They have said they will not rescind it, there will be a 90-day period before implementation.

Ms. WARD. May I comment on that?

Mr. TIERNEY. Sure. I have to ask for another minute.

Mr. BLUE. I was going to add one comment, and that is in fact probably as we speak this morning, there have been consultations with our staffs, and our position has been that we would discuss the prior two Executive orders, we will discuss this Executive

order, of whatever you bring before us, as long as everything is laid out on the table and we are proceeding from that position.

Not that we start negotiating or discussing or consulting based on specifically this new Executive order. We have been informed that everything is up for discussion, whatever that means. So we are comfortable that if we engage in consultation, that we will express our true opinions about all of this. If that doesn't work, then we are pretty vocal as a group. We will let the administration as well as the Congress know what our further concerns are.

Mr. TIERNEY. As Mr. McIntosh did, I would ask for unanimous consent for one additional minute to allow Ms. Ward to answer that.

Mr. BARR [presiding.] We will allow that, but let's let Mr. Scarborough go first. He needs to go register his attendance on the floor.

Mr. SCARBOROUGH. Give him a minute. That is fine.

Mr. TIERNEY. Go ahead.

Ms. WARD. Just very quickly, we have just consistently said to the administration that we indeed want the Executive order rescinded, that we would like for them to withdraw it. We haven't had that response "yes, we will" yet. It is the 90-day period that has been already mentioned.

Mr. TIERNEY. Thank you.

Mr. BARR. The gentleman from Florida is recognized for 5 minutes.

Mr. SCARBOROUGH. I want to begin by doing something I don't usually do, and that is concurring with the comments from the gentleman, the former mayor of Burlington, VT, on his statement that Republicans have done as much violence recently to this as Democrats in the past. I think that is something we need to be mindful of. I have heard the statement as goes Burlington, so goes France. But in this case, as goes Burlington, so goes the panhandle of northwest Florida. I think that is something we in the majority need to be mindful of.

I want to get some guidance. You all keep talking about a 90-day extension. From my understanding, I was told that only Jack Lew has suggested there is a 90-day extension. Has anybody heard of an official policy that is actually binding that will take this beyond August 14th, which is our drop dead date before this is implemented?

Ms. WARD. Well, I had a message this morning from Erskine Bowles, who has a staff person I think that may still be here in the room, that indeed the 90 days was still being offered. So I guess that is as close to being official, not from the President, but certainly from him.

Mr. SCARBOROUGH. Right. So you got that from Erskine Bowles.

Mr. BLUE. We have received it in a letter indicating that its implementation would be put over 90 days.

Mr. SCARBOROUGH. Is that from Jack Lew?

Mr. BLUE. No, that is from Mickey Ibarra.

Mr. O'NEILL. That is our understanding.

Mr. SCARBOROUGH. We will hopefully nail that down to make sure that is official, because obviously I agree it would be great to have everybody concurring about a process to sit down and work

through this. But, obviously, if our deadline is still August 14th, if we don't get anything official from this White House, then obviously we would have to move more quickly. The reason I say that is because we really are getting three different statements on the possibility of successful negotiations on this issue.

Mr. O'Neill, it is my understanding that your position is, from testimony today, that there is very little common ground. You want the order rescinded and you want to go back to the President's 1993 order, is that correct?

Mr. O'NEILL. That is correct, the two orders combined.

Mr. SCARBOROUGH. The two orders, the Reagan 1987 and the 1993. So you don't find much common ground.

Mr. Blue, I wrote down—and also, Mr. O'Neill, I believe your testimony suggested that the White House has stated that they are not going to move from this position?

Ms. O'NEILL. Well, their response to the request to rescind was a 90-day extension offer.

Mr. SCARBOROUGH. But nothing substantive?

Mr. O'NEILL. No.

Mr. SCARBOROUGH. Mr. Blue, you quoted an administration official as saying "everything is up to discussion." Can you tell me who you spoke with there, and is it your feeling that there is some common ground between the President's 1993 Executive order and the 1998 Executive order?

Mr. BLUE. Let me reiterate our official position from NCSL's standpoint, and it is a position that, at least as far as I am informed, is shared by the other six organizations of the Big Seven, and that is that we would ask that 13083 be revoked, be rescinded, that that is our official position, and that its two predecessor Executive orders remain in effect. Third, that there be consultation with us and the other State and local elected officials.

Now, if I may in response to your broader question, each of the seven organizations received a letter. I received it on behalf of NCSL, I have before me the one Governor Voinovich received on behalf of the National Governors, dated July 20, where Mr. Mickey Ibarra, the Assistant to the President and Director of Intergovernmental Affairs, stated that in response to concerns raised by the Big Seven at their July 14th meeting with me, the administration agreed to delay the implementation of Executive Order 13083 for 90 days. During that extended period, the other two Executive orders will remain in effect.

Mr. SCARBOROUGH. The question that I would like answered here is, where do you find the common ground? Because your position sounds like Mr. O'Neill's position, which is we don't like your Executive order, we want the 1993 and 1987 Executive order issued. I don't think the White House would find that to be very appealing as an alternative. So the question is where is the common ground?

Mr. BLUE. The issue that I raise though with the consultation, maybe there is something that they can show us, and this is part of what the consultative process is, maybe there is something they can show us that would convince us that the 1993 order needs updating or needs some changes.

If in fact after deliberation and discussion it is determined that an Executive order needs to be updated, we would be part of that process. That is where I see some potential common ground.

Mr. SCARBOROUGH. So you are hopeful of just a general discussion, but at this time—and I don't want to put words in your mouth. Let's start this dialog somewhere though. Do you today, can you foresee any possible common ground between the White House and yourself, where we could start a constructive process of negotiations?

Mr. BLUE. If they will talk with us about preemption and some other issues that may be part of it, I clearly see some areas for additional work.

Mr. SCARBOROUGH. Once again, Ms. Ward is left. If I can have unanimous consent from you, Mr. Chairman, that I talk to Ms. Ward for 1 minute to get her opinion, input, that would be great.

Ms. WARD. I would just like to basically reiterate what Representative Blue has already stated, and that is that we have heard from Mickey Ibarra, from the Intergovernmental Office at the White House, and while I have not spoken directly with Erskine Bowles in the last week, I believe Representative Blue did have that opportunity. He was tied up when I was attempting to reach him. So it would seem to me given those two people and their relationship with the President, that perhaps the indication is there that there is reason to hope for movement and to be able to hope that we would be able to work out something as we talk together.

Mr. SCARBOROUGH. Can you identify any common ground between the Reagan order of 1987 and the President's order of 1993 and the current one?

Ms. WARD. No, I cannot.

Mr. SCARBOROUGH. Thank you. Thank you, Mr. Chairman.

Mr. BARR. Thank you, Mr. Scarborough. Let me make very clear to the witnesses, both on this panel and if there is any of the witnesses coming up, if they also have problems with this Executive order, the only way to change any portion of an Executive order is with a new Executive order, and that includes the operative date language. The language of Executive Order 13083 directs that it go into effect 90 days from May 14th, which according to my calculations would be on or about August 12th. The administration can engage in all sorts of hand holding and saying nice things and sending letters and making calls and having meetings, and so on and so forth, which all administrations are very, very adept at. That is why they are administrations. But all of that is absolutely meaningless. I would caution all of you not to rely in any way, shape or form on those entreaties. They mean absolutely nothing, legally speaking. The only way that that date can change is through a subsequent Executive order.

So, I would urge all of you to continue your efforts to have the administration take that one and only step that has any sort of legal effect at all on Executive Order 13083, the date which it goes into effect, and that is through a new Executive order.

I would ask each of you if you would, please, consultation is always fine, and Washington is a very consulting town. People consult constantly. Whether that means anything is certainly open to

discussion. Sometimes it can be a smoke screen for not doing something, make people feel good that things are happening when in fact they aren't.

But a more fundamental question is, is there any reason to consult on this issue? Is there anything wrong with the prior existing Executive orders laying forth the basis and the approach with which the executive branch of our government, Republican or Democrat, deals with issues such as are of concern to you as local and State government officials? In other words, is there any reason at all to reopen the prior two Executive orders?

The basis that White House counsel, Mr. Ruff, provided to the chairman of this subcommittee when Chairman McIntosh asked him for some justification as to why they were issuing Executive Order 13083 was well, they need updating.

I don't see any reason, and I am reading with what you all are saying that you don't see any reason either, to update these prior Executive orders. They seem very, very sound. But maybe I am missing something. Is there any reason at all to reopen these Executive orders, to update them or to change them in some other way? Ms. Ward?

Ms. WARD. I would say no. I feel very strongly, I would just reiterate what has already been said by I think each of us this morning, the fact that our relationship from the National Association of Counties with the administration that is currently in office has always been, certainly in the last 3 or 4 years has been excellent, and they have listened to us and worked not only with us as the counties, but with the other governmental agencies. This is so foreign to anything we have dealt with before, it is very puzzling to me. I would think if there is an opportunity to talk, continue to talk.

Mr. BARR. OK. So you think that there is some defect in the prior two Executive orders?

Ms. WARD. No, I did not say that. I think with the opportunity to talk about the current Executive order that we are concerned about, that there is an opportunity to continue the dialog.

Mr. BARR. But, in your view, are there any defects in the prior two Executive orders so that there would be a need to reopen them?

Ms. WARD. No.

Mr. BARR. Thank you. I appreciate the clarification. Mr. Blue.

Mr. BLUE. My position is that the consultation could very well, if we look at the prior two Executive orders, lead us to conclude that some congressional action is justified because of the additional items that were recommended in my written comments. For example, an additional Executive order could perhaps explore issues of preemption, broaden it somewhat and look at some of the other issues. But if you are just talking about blending the two orders, I don't know that they can be blended any more smoothly than the existing Executive order of 1993 did, because it borrowed concepts from the 1987 Executive order.

Mr. BARR. Did not the 1987 Executive order deal expressly with the issue of preemption?

Mr. BLUE. It did not. We have been working at least in NCSL with the concept of preemption that sets forth specific things that

Congress ought to consider a little more broadly than the existing 1987 order, a specific list of things that Congress ought to set for, a little more broadly than the 1987 order.

Mr. BARR. Would that really be advisable from the standpoint, for example, of legislative construction, if you set forth a very specific list than the preemption, that in other areas the same principles of preemption would not apply? Is that preferable?

Mr. BLUE. To some degree, I think. But what I was addressing is an earlier answer that I gave to the chairman, and that is if there is congressional action contemplated, then you always are dealing with the interpretation of the 10th amendment, the general structure of the Constitution and the 11th amendment, and determining how far federalism goes. And if we are going to reopen it for congressional action, there ought to be further action on preemption.

I understand the Chair's point with respect to items not included or considered to be excluded in any normal interpretation of what it means.

Mr. BARR. Thank you, Mr. Blue. Mr. O'Neill.

Mr. O'NEILL. Yes, I would have to conclude that the other two Executive orders are fine. We have lived with them, we haven't had a problem with them. Were this Executive order to be withdrawn and the administration asked us to sit down and discuss possible revisions or amendments or changes to those, there may be a good idea out there that we haven't thought of, but to answer your question specifically, nothing wrong with them, anything might be improved if somebody brings it to the table. But nothing on our plate.

Mr. BARR. OK. Thank you. On behalf of the chairman and all members of the subcommittee, I would like to thank all of you for being here today, for taking your very valuable time from your constituents to be here today to make your views known and to answer questions, all of which information is very valuable to us as we begin and then move through this process.

To reiterate also what the chairman said earlier, all of your complete statements as well as any additional materials you would like to submit for the record will be included in their entirety in the record, and we wish you all Godspeed and thank you very much.

Before we invite the members of the next two panels, we will break for half an hour. I apologize to the members of the next two panels, but there will be a viewing at which all Members are requested to attend in the Rotunda of the Capitol on behalf of the two officers who were slain last Friday. At this point we will break and reconvene at 12:30.

[Whereupon, at 12 noon, the subcommittee was recessed, to reconvene at 12:30 p.m.]

Mr. MCINTOSH. The subcommittee will come to order.

I appreciate the witnesses on this second and third panel, now that we're going to combine them, waiting for us to be able to participate in the viewing of the two officers. And, what I'd like to now do is proceed with this new combined panel.

As I mentioned earlier, it is the policy of each of the—of the full committee chairman, Dan Burton, to have each of the witnesses sworn in. So, if all of you would please rise and take the oath.

[Witnesses sworn.]

Mr. MCINTOSH. Thank you. Let the record show that each of the witnesses answered in the affirmative.

Our witnesses on this panel are now five gentlemen. First would be Michael Horowitz, who is former general counsel of the Office of Management and Budget, now with the Hudson Institute; second, Gene Hickok, who is former Special Assistant in the Office of the Legal Counsel, Department of Justice; Mr. Edward DeSeve, who is the Acting Deputy Director for Management at the Office of Management and Budget; Lieutenant Governor of Vermont Douglas Racine; and Oklahoma City Councilman Mark Schwartz.

Let's start, and again, let me repeat, we will put all of your written testimony into the record in its entirety, if you would like to summarize that for us and expand on any of the points. Also, you're welcome to address any points that were raised in the earlier panel. What we'll do is ask each witness to confine these remarks to five minutes and then have a questioning period.

Mr. Horowitz, would you share with us a summary of your testimony?

STATEMENTS OF MICHAEL J. HOROWITZ, SENIOR FELLOW, HUDSON INSTITUTE, AND FORMER GENERAL COUNSEL, OFFICE OF MANAGEMENT AND BUDGET; EUGENE HICKOK, SECRETARY OF EDUCATION, STATE OF PENNSYLVANIA, AND FORMER SPECIAL ASSISTANT, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; EDWARD DeSEVE, ACTING DEPUTY DIRECTOR FOR MANAGEMENT, OFFICE OF MANAGEMENT AND BUDGET; DOUGLAS RACINE, LIEUTENANT GOVERNOR OF THE STATE OF VERMONT; AND MARK SCHWARTZ, COUNCILMAN, OKLAHOMA CITY, OK

Mr. HOROWITZ. Thank you, Mr. Chairman. First I want to thank you for trying to focus this hearing on where it belongs—on issues of regulatory federalism. There's a lot of hypocrisy on both sides of the aisle when legislation, when Federal legislation is involved, but there's no question about broad Federal authority to legislate under the Commerce Clause.

We're talking about something radically different and anti-Democratic in character that's dealt with by the recent action of President Clinton. Under the Supremacy Clause of the Constitution, any Federal regulation can repeal State law. Indeed, unelected bureaucracies can supercede State constitutions and legislative acts of elected officials of State and local governments. That, Mr. Sanders, is the issue that I think needs to be addressed, on which there can and must be and should be a great deal more consensus.

And frankly, I think legislation is in order to go further than the Executive order to deal with the kind of preemption of when a regulation repeals, effectively, State laws and State constitutions, as regulators are at least empowered to do under the Constitution.

The second thing I'd like to talk about is process, but in a different sense. Clearly there's no way of blaming President Clinton for signing an order written in turgid legalese, as I'm sure he did, along with a large pile of orders put before him. But I do think that there is an issue that goes directly to the Clinton administration, the Clinton Presidency, and President Clinton himself, that is implicated here, and that has to do with the signals that have been

sent out in the White House by this President on issues of federalism.

I deem those signals to be signals of indifference, if not hostility, to the structural issue of federalism. I chaired the Reagan administration's Domestic Policy Council Federalism Working Group. And let me tell the members of this committee that if I had processed an Executive order dealing with federalism on a pro forma basis, without consulting State and local officials, I'd have been fired the day the President realized what had been in that pile that he was asked to sign. Summarily dismissed.

As indeed I think would be the case in this White House, had somebody processed an Executive order for the President dealing with issues of race or sex or health care or welfare or a whole host of other issues that this White House cares about. As to what Woodrow Wilson called "the cardinal question of our constitutional system," the structural issue, the federalism issue, the question not of whether there's consultation on a particular issue or deal, be it welfare reform or anything of the kind, where this administration on a deal by deal basis is the most consultative, the most skillful of any in my memory in all the years that I've lived in Washington, but on the underlying structural question of the balance of powers, this is as about as far from being a matter of interest and legacy to the Clinton administration as it is possible to be. And that's why White House staff, who are always sensitive to which way the wind blew and blows, was able to do what could not have happened in the Reagan administration.

Now, the Reagan administration—and let me add one other thing, that—well, let me get to the Reagan administration's record. You mentioned it, Mr. Chairman. I'm proud of that record.

Observers like Fred Nathan, others, liberals, conservatives, Democrats, Republicans, looked to our record in federalism and indicated that the legacy was a lasting legacy of the Reagan administration federalism—far more than the budget cuts that were talked about. There was less of that, I can tell you, than met the eye. Federalism was one of the sustaining legacies, and President Reagan felt it and cared about it in a personal way. It is inconceivable that anybody who lacked a suicidal impulse, as I said, would in that White House have taken any action on his own, without consulting or without involving the President personally on a matter having to do with federalism.

Now, let me say why I think it's important, in the time that I've got, in this brief time. I was involved as the point man in deregulating the block grants. What we did, as some of you may remember, was we took 57 Federal categorical programs and we moved it into a single block grant proposal. At that time the categorical programs had 905 pages in little agate print of Federal regulations. My job was to radically ramp it down, and we did, finally, to 31 pages, quite an accomplishment.

But here's the surprise, and here, Mr. Chairman, is why your hearing today is of such significance, such importance. I expected when we went into those battles that there would be yells and screams from the Federal agencies, but I expected that State and local officials would be allies in the effort that, after all, took away

Federal powers and gave them powers. The reverse turned out to be the case.

That was my great surprise, and that's what I want to really bring here, because when we came into office, State and local officials found it profitable not to have power because it meant that they weren't accountable. It meant that when things went wrong, they could blame Washington. Their role when they came to Washington was to lobby for higher appropriations as agents of the Federal program officials. They had to be pushed to become policymakers and to take the great leap into being accountable officials.

I'm pleased at the vigor of the reaction against this Executive order, and it bespeaks that we did something right in starting that federalism revolution going. But I'm here to tell you, Mr. Chairman, that it's a fragile revolution because it's off the radar screen. It's not a sexy topic. And yet, as Wilson and others have said, it's at the heart of what makes us a society.

So let's not—let's get beyond killing the order. It's dead. The Senate unanimously called for its ending. I think the White House is playing games before it revokes this order. There's no more chance of this order being kept alive than the man in the moon landing here. We've got to get beyond it to understand why there is this indifference to the issue in the White House, and I think this hearing is a wonderful start in getting to that structural issue.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Horowitz follows:]

TESTIMONY OF MICHAEL HOROWITZ
SENIOR FELLOW, HUDSON INSTITUTE

BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS
OF THE
HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

JULY 28, 1998

Mr. Chairman and Members of the Committee: I am grateful for the opportunity to appear before you this morning to testify about the Federalism Executive Order, E.O. 13083, issued by President Clinton on May 14, 1998. Specifically, Executive Order 13083 revoked Executive Order 12612, a 1987 Reagan Administration policy document that was the product of intense discussion and collaboration between Federal officials and representatives of State and local governments. Critically, the Reagan Executive Order was a synthesizing, culminating expression of one of the most deeply held visions of President Reagan, and one of his principal domestic policy legacies.

It is highly fitting that this Committee should be addressing the Clinton Administration's revocation of Executive Order 12612, for the issue of Federalism is one that calls the highest degree of Congressional scrutiny and oversight.

I am in a position to offer to the Committee some of the background history that led to the now-revoked Reagan Executive Order. This is so because even though the Order was issued after I left the Reagan Administration, I had earlier served it, while General Counsel of the Office of Management and Budget, as the first Chairman of the Reagan Administration's Cabinet Council on Federalism. (I was succeeded in that job by Charles Cooper, Assistant Attorney General for the Office of Legal Counsel, whose Deputy, Eugene Hickock, appears with me on this panel.)

The Working Group received unambiguous marching orders from the President:

- Few matters are as important to the country's health and well-being and the American constitutional order as the need to strike an appropriate balance between the powers and duties of the Federal government and those of State and local governments; striking such a balance requires a strong presumption in favor of ceding decision-making authority to State and local governments.

- The need to preserve State and local decision-making authority is greatest when dealing with Federal regulations and the unelected agency officials who write and administer them; nothing more undermines the vitality and independence of State and local government, and its ability to act in democratically accountable fashion, than for State and local officials to be become subordinate middle managers who take their orders from Federal agency officials.

- No decisions regarding issues of Federalism are to be made without full discussion, consultation and collaboration with representatives of State and local governments; decisions regarding important issues of Federalism policy are to be made by the President, no one else.

I believe that few things were closer to President Reagan's heart or to the legacy he wished to create than to make State and local governments genuine partners of and not subordinate supplicants to the Federal government. I know that few things angered him as much as when there was a lack of respect or deference shown by Federal agency officials to the knowledge, experience or authority of State and local officials.

* * *

The Chairman's letter to the President of June 8 sets out a powerful critique of Executive Order 13083 which I fully share and will not rehearse. I believe that my testimony can be of greatest value to the Committee by describing how Federalism matters were dealt with in the Reagan

Administration, and by using that experience to evaluate the effect of Clinton Administration's Executive Order.

The Reagan Administration's Decision-Making Process: As indicated, issues of Federalism were assigned a high and personal priority by President Reagan, and decisions on those issues were at all times required to be made only after full consultation and collaboration with State and local officials. Thus, reports that Executive Order 13083 was largely handled by mid-level OMB staff officials *and that* it was issued without meaningful input from State and local officials raise issues as important as the Executive Order itself. I can tell the Committee that my head would have rolled in the Reagan Administration – *rolled* – had I drafted an Executive Order on Federalism and sent it on for the President's pro forma signature without having consulted at great length with a broad range of State and local officials and organizations. For that reason, I very much hope that the Committee will explore the *process* by which Executive Order 13083 was issued – and will thereby examine the full record of the Clinton Administration on the issue of Federalism. Because Presidents are compelled to examine and approve many documents, it may be hard to criticize President Clinton personally for having signed his name to an Executive Order that was written in dense legalese. On the other hand, the fact that Executive Order 13083 could have been so routinely and cavalierly processed by mid-level Clinton Administration officials *does* tell much about the low priority that President Clinton himself has assigned to the issue of Federalism. It tells much about the signals he has almost certainly sent (and not sent) to officials of his Administration about the need to respect State and local officials and to defer to their authority whenever possible. Executive Order 13083 is so indefensible, so happily under attack by both Democrats and Republicans, so clearly subject to the scrutiny of this Committee that it would be surprising in the extreme were it not withdrawn. What the Order directs attention to, however, and what will not be cured without the active and ongoing attention of this Committee, is the Clinton Administration's overall Federalism record. I believe that the President himself can and must be strongly taken to account for having created an environment of indifference and hostility to Federalism that clearly gave mid-level Administration officials a sense of freedom to routinely move Executive Order 13083 through the decision-making process. I therefor respectfully urge the Committee to not to treat the Executive Order 13083 debacle as an end itself but rather as a signal of the need to examine the Clinton's Administration's overall record on the issue of Federalism.

The Reagan Administration's Substantive Record: As Executive Order 13083 is little short a rejection of President Reagan's basic approach to Federal-State-local relations, it may be in order to examine a representative few of the Reagan Administration's actual decisions and initiatives on the subject.

Executive Order 12372, issued before the Reagan Executive Order whose revocation is the subject of today's hearing, was a characteristic expression of President Reagan's approach. Reforming an OMB Circular that had created a formalistic, bureaucratic, paper-heavy and easy to ignore "Clearing House" mechanism for resolving Federal-State disputes over Federal grants and expenditures, Executive Order 12372 deliberately gave State officials greater stature and visibility than the Federal officials whose decisions they critiqued. Under the Executive Order, decision-making leverage was also reversed, for Federal officials were flatly directed to "accommodate to" a single, designated "Point of Contact" official or to "explain, in writing" why they could not do so. Executive Order 12372, that gave State and local officials a timely, meaningful and generally determinative say on decisions regarding Federal aid and direct development, stands in direct contrast to the Clinton Administration's Executive Order 13083.

A series of Block Grant proposals were among the first legislative initiatives of the Reagan Administration. Under that initiative, President Reagan sought to merge a large number of Federal categorical grant programs into a small number of block grants *and* to radically increase State authority over how to spend the grant money. Opposition to the block grant proposals was intense, but President Reagan prevailed and, in August, 1981, 57 categorical grant programs were consolidated into nine block grants. As a result, the number of Federal staff officials administering the former categorical programs were reduced from 3,000 to about 600. Paperwork and administrative burdens on State and local officials were reduced even more radically – by over 5.9 million hours per year. This was accomplished by reducing Federal regulatory overreach in a determinedly radical fashion – so that the number of Federal Register pages covering the former categorical programs was reduced from 905 pages to 31 pages. Under the block grants, State and local governments almost never needed to ask permission, clearance or waivers from Federal officials to act as they deemed best; their

principal responsibility was to report, after the fact, on what they had done. In addition, indeed *because* the Reagan block grant initiative honored Federalism principles, significant dollar savings were achieved. Thus, even though Federal support for the block grants was reduced by 25% from levels previously appropriated for the categorical programs, the General Accounting Office reported that services had not been diminished to any degree. The Reagan block grant initiative was extended the following year with the Joint Training Partnership Act, in which States were again given far greater authority over the program area, thanks to further, radical reduction of the previously great powers held by Federal agency officials. This was what the Reagan Federalism revolution was all about: converting State and local officials from dependent supplicants and bureaucratic paper pushers to real-world policymakers, and in a manner that, at lower cost, strengthened the popularity and success of the once Washington-based programs.

The "Grand Swap" and "Turnback" initiatives of the Reagan Administration reflected a culminating effort by President Reagan to achieve a Federalism revolution. Under that proposal, set forth in the FY 1983 Reagan budget, revenue sources such as Federal telephone and highway taxes were proposed to be turned back to the States, who were then given full authority over Federal highway and other construction programs. In addition, and even more radically, President Reagan proposed that the Federal government assume 100% of the costs of Medicaid in exchange for State assumption of full responsibility and authority for Food Stamps, AFDC and related welfare programs. The initiative failed because of a monumental miscalculation on the part of the National Governors Association, who failed to accept President Reagan's assertion that the built-in expansionary potential of Medicaid was greater than that of welfare programs, and by orders of magnitude. It reflected a Reagan Administration "grand design" on Federalism that stands in sad contrast to the subject of today's hearing.

In all, a study conducted of President Reagan's Federal reforms by Richard Nathan and Fred Doolittle of the Woodrow Wilson School of Princeton University concluded that his reforms were "structural" in character, literally revolutionary and highly successful. Nathan and Doolittle described President Reagan's Federalism initiatives as great "sleeper" reforms and believed that, unless later reversed, they would become a major legacies of his Administration.

* * *

Based on my experience in dealing with Federalism questions at the White House, I believe that there are two particular respects in which President Clinton's revocation of the Reagan Federalism Executive Order raise grave danger signals. They are:

- the Clinton Administration's apparent commitment to using its waiver authority as a preferred means of resolving Federal-State-local issues; and

- the ease with which State and local officials can lapse into a supplicating, dependent relationship with the Federal government and its regulatory officials.

Waiver-Based, "Let's-Make-a-Deal" Government: As the Committee is aware, President Clinton's Executive Order 13083 not only revoked President Reagan's Executive Order 12162, but also revoked the earlier Clinton Administration Executive Order 12875, which had ratified and supplemented the Reagan Order. Executive Order 12875 contained a particularly useful feature -- a section that enhanced the flexibility of the Federal waiver process. In the context of its endorsement of the Reagan presumption that major Federalism disputes were to be resolved against the exercise of Federal authority, Executive Order 12875's enhanced waiver processes represented net enhancements of State and local powers.

Tellingly, while Executive Order 13083 revoked many of the provisions and presumptions of the Clinton Administration's first Federalism Executive Order, it retained a latter's that Order's waiver provisions. In the context of the Executive Order's reversal of the Reagan Federalism presumptions in favor of State and local autonomy, its retention of the section dealing with enhanced waiver processes takes on a wholly different cast. Under Executive Order 13083, an enhanced waiver process is not to be seen as a supplement to other broad powers given to State and local governments vis a vis the Federal government. Rather, it becomes a (if not the) prime means by which Federalism questions are to be resolved from now on. As such, it difficult to imagine a decision-making process less

structural, more ad hoc, more open to day-by-day politics, more consistent with the vision of the Federal government as parent and State and local governments as children than the decision-by-waiver regime contemplated by Executive Order 13083. Such a case-by-case "let's make a deal" regime was precisely what all Reagan actions and Executive Orders on Federalism sought to do away with. As earlier noted, I hope that this Committee will take steps to ensure not only the revocation of Executive Order 13083, but that it will take on and negate the centralizing, Washington-knows-best mindset that produced it.

Unaccountable, "Blame Washington" Conduct by State and Local Officials: Perhaps the greatest contribution I can offer this Committee comes from my experience as the Federal point person who was charged with reducing Federal regulatory control over the categorical programs placed in the Reagan Block Grants. While, as noted, we ultimately succeeded in reducing the number of Federal Register pages for those programs from 905 to 31, the howls, threats, screams and cries of anguish that accompanied that outcome were great as I had expected.

But here's the surprise: The loudest protests against reducing the Federal regulatory role often came from State and local officials. Those officials had become comfortable with being passive supplicants to Federal agency officials, had used their powerlessness to immunize themselves from blame when the programs they administered were operating inefficiently or failed to achieve their stated objectives.

Thinking as I did that State and local officials would welcome the enhanced authority that the Reagan Administration had sought to give them, and thinking that they would be our allies in struggles against entrenched Federal bureaucracies that had long managed the Federal categorical programs, I was stunned to discover that the reverse was often the case. The fact was that many (but, thank goodness, not all) State and local officials had grown comfortable with doing a little but coming to Washington to demand higher appropriations for categorical programs– a process that made them agents and allies of the Federal bureaucracies that regulated them.

From that experience, I came to recognize that a healthy Federalism is fragile in character. I came to see that many State and local officials had to be affirmatively compelled to take responsibility for the programs they ostensibly administered, had to be compelled to act as policymakers. I came

to see that the accountability which accompanies authority was frightening to many State and local officials, who took personal and political profit from the anonymity, shorter hours and dependency that went with Federal control.

That the issuance of Executive Order 13083 has met with such outrage from State and local officials is healthy – in many ways a testament to the still-continuing effects of the Reagan Federalism revolution. But Members of this Committee need to realize that this reaction is not innate. Based on my experience, I believe that matters can easily return to the days of an all-controlling Federal government – with the support of State and local officials. A critical means of ensuring a genuine partnership in governance between Federal, State and local officials is vigilance of Congress and the press like that being exercised today.

It is for such reasons that I take such pleasure in this Committee's leadership. Knowing as I do that the bureaucratic impulse can be comfortable to many State and local officials, I believe it vital for there to be constant Congressional oversight in support of a healthy system of Federalism. This is particularly urgent because, on the record of Executive Order 13083, neither the White House staff appears to strongly care about it nor have any signals to do so been sent by the President.

The importance of today's hearing would be difficult to understate. Dealing as it does with the issue described by Woodrow Wilson as "the cardinal question of our constitutional system," I hope that this Committee will ensure that our constitutional system is moved back to its intended future.

Mr. MCINTOSH. Thank you, Mr. Horowitz.

Mr. Hickok, would you share with us a summary of your testimony, please?

Mr. HICKOK. Yes, I would be glad to. Thank you, Mr. Chairman, I must confess, sitting here this morning and during the day listening to the conversation about federalism, it's really quite stunning. Before I took the job I have now as secretary of education in Pennsylvania, I was an academic. Most of my writing is on the Constitution, the framers, a lot of it on federalism. And for a certain period of time, I had the privilege of serving in the Reagan administration on the federalism Working Group, succeeding Michael Horowitz.

And so as I listened to the debate and the discussion, it is certainly a testimony, I think, to the individuals who served on that working group and the individuals in this chamber that we are quoting Madison and Wilson and Jefferson and talking about a political principle and a constitutional principle which for more than 200 years has not received the kind of attention that it has deserved, and that's federalism.

I return to the quote you started these hearings with, from James Madison in Federalist 45, because I think it captures the essence of what at least the framers felt they were all about when they wrote the principle of federalism into the Constitution.

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, foreign commerce; with which the last, the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and in the internal order, improvement and prosperity of the state.

The notion was then, and should be now, that States matter, that States as political entities matter. That's why we have the Senate the way it is structured, to represent the States. And that very principle has for so long been at odds with much of what goes on in official Washington, in every branch of official Washington.

And that is why the Executive order that President Reagan signed was an attempt, we think an important one at that time, to try to reassert that important principle in the way the executive branch conducts its business. There's been talk about the way Congress operates, the way the courts interpret the Constitution. Those are separate questions, and to me they're very important questions with regard to federalism. We can explore that. But the Executive order is all about how the executive branch operates.

One of the things I would point out about President Reagan's Executive order was his statement of federalism principles that really introduces the Executive order. We spent a lot of time on that, because what we were trying to do is up front articulate in very bold and explicit terms what federalism actually does mean in the 20th century, not just how it's a political principle with regard to the role of the States, but how it also helps to nurture citizenship, protect individual liberties, and create another check on the power of the central government. Federalism, if it doesn't exist, means there are no checks on the power of the national government, and that certainly is contrary to what the Constitution is all about and what we envisioned, what the framers envisioned. If you look at the lan-

guage of 13083, it includes language justifying national action "when there is a need for uniform national standards." Who would determine whether such a need exists or not is not discussed in the Executive order. I would presume probably some unelected bureaucrat.

In President Reagan's Executive order, the President, while recognizing such a need may exist under certain conditions, states that setting uniform national standards for programs should not be encouraged and that when possible, Washington should "defer to the States to establish standards."

President Clinton's Executive order states that national policy may be necessary "when States have not adequately protected individual rights and liberties." Again, there is no language discussing just what constitutes adequate protection of rights and liberties, nor who would determine that.

President Reagan's order explicitly recognized the pivotal role federalism plays in protecting individual liberties, while arguing that national action should be taken only "where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope."

President Clinton's order would call for a process "to permit elected officials and other representatives of State and local government to provide meaningful and timely input in the development of regulatory policies that have federalism implications."

President Reagan's order asserted that a State should have maximum discretion in the administration of national policies, and that Federal oversight of State administration is neither necessary nor desirable.

Under President Clinton's order, States can apply for waivers of regulations, suggesting, therefore, that some exceptions can be made to accommodate States.

President Reagan's order subscribed to the idea that any exceptions made would be regarding national action, and national action was not preferable to action taken by States.

President Clinton's order makes no reference to Federal executive preemption, a major concern of the States, as was discussed earlier today. Moreover, President Clinton's order does away with the federalism assessment created by the Reagan order.

While Executive Order 13083 does invoke the framers of the Constitution and refer to the principle of federalism they embraced, in my opinion it does precious little to ensure that principle lies behind the actions of the national government, and even less to ensure that the authority of the States is protected and the national government remains limited. It is not truly a federalism Executive order. It is in many ways a management directive telling the bureaucracy to go through the federalism motions and to do whatever they deem necessary to implement national policy, whether or not that policy tramples upon the constitutional authority of the States.

So I would join with the others in these panels today recommending that the Executive order not proceed. Thank you.

[The prepared statement of Mr. Hickok follows:]

Testimony of Eugene W. Hickok Regarding Executive Order 13083 and Federalism

Thank you Mr. Chairman for the opportunity to appear before you today to discuss Executive Order 13083, signed by President Clinton, and the constitutional principle of federalism.

I should preface my comment by admitting that I come to this table with my own biases. During my term of service in the Department of Justice, during the Reagan Administration and under Attorney General Edwin Meese III, I spent a great deal of time working on federalism issues with the White House Working Group on Federalism. Indeed, the executive order on federalism issued by President Reagan in 1987 – the executive order revoked by President Clinton – was the product of President Reagan's Federalism Working Group. So it should come as no surprise to the members of the Committee that I think the initial executive order got it right, and President Clinton's executive order does not.

It is hard to imagine a more maligned, misunderstood, or distorted political principle in the United States than federalism. For far too long, federalism has been dismissed by advocates of centralized power as a codeword for "states' rights" and all that it symbolizes. For many, if not most students of American politics, federalism means nothing more than intergovernmental relations. As a political principle, federalism has, until relatively recently, been something of a constitutional orphan before the federal bench. The courts have paid lip service at best to the Tenth Amendment to the Constitution, and aided and abetted the expansion of national power at the costs of the sovereignty of the states.

While it is something of an overstatement to characterize the Constitution of the United States as nothing more than a "bundle of compromises," the fact is that the Constitution was indeed a product of compromise. The men who gathered in Philadelphia during the summer of 1787 were keenly aware of the fact that they were delegates sent by their respective states to do whatever might be necessary to improve upon the hopelessly flawed Articles of Confederation. The document that emerged from their deliberations called for a new national government of limited and enumerated powers. It called for a bicameral national legislature in which one chamber would represent the citizens of the States while the other chamber would represent the States themselves. It called for a system of separation of powers and checks and balances to ensure that the new national government would remain a limited government. Before the Constitution could take effect, it would need to be ratified by at least nine of the then thirteen states. And any change in the Constitution, subsequent to its ratification, would require the support of a supermajority of the States. Within a few years of ratification, the Constitution was amended to include an explicit recognition of the powers reserved to the States: The Tenth Amendment.

I mention all of this because it is very important to remember that the political security of the States was very much on the minds of the men who wrote the

Constitution. They sought to create a national government, surely, but a national government that would not threaten the political health of the States. Federalism as we know it was created at the Constitutional Convention of 1787. Up until that time there were generally recognized to be two ways of structuring government: decentralization of power and centralization or consolidation of power. Under the Articles of Confederation, political power was decentralized among the thirteen States. There was not national authority. That approach was not working. The alternative, consolidated national authority over and above the States, was too extreme for the Framers, threatening the very sovereignty of the States. So they fashioned a compromise, creating a national authority with some absolute powers over a limited number of issues, while simultaneously securing the sovereignty of the States. As a Constitutional principle, federalism is about the proper relationship of the States to the national government. And the Framers of the Constitution felt there was indeed a proper relationship to be achieved and maintained. James Madison, in **Federalist 45** explains the nature of federalism.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, foreign commerce; with which the last the power taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and in the internal order, improvement and prosperity of the State.

Much has transpired since Madison wrote that passage. The nature of federalism in the United States, especially during the twentieth century has changed dramatically from what the Framers of the Constitution envisioned. Indeed, it can be argued that the Framers' understanding of federalism has been turned on its head. Today, the national government touches the lives of every individual and daily shapes the political landscape of every community. And the political authority of the States is challenged constantly through legislation passed by Congress, executive and bureaucratic decision making and fiat, and judicially imposed mandates.

When President Reagan assumed office he rightly understood that something needed to be done to try to redirect American politics and government so that it might move toward the sort of federal balance originally sought by the Framers. Being a former governor, he recognized how the States were mistreated by Washington. Moreover, he understood that federalism, properly understood, could reinvigorate not only State government, but citizenship itself. Perhaps most importantly, President Reagan saw the inherent injustice created when non-elected public officials create policies through regulation that undermine the governing authority of States.

With this in mind, the President created a White House Working Group on Federalism under his Domestic Policy Council. That Working Group issued a report,

documenting in detail the evolution of federalism and calling for action to curb the national government and reinvigorate federalism as a Constitutional principle. That report led to Executive Order 12612, issued by President Reagan in October 1987. That order places the burden on the national government whenever it acts to demonstrate constitutional and statutory authorization for the action, and states that "Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a **specific provision of the Constitution**, there is no provision in the Constitution prohibiting Federal action, and the **action does not encroach upon the authority reserved to the States.**" Moreover, the order established special requirements governing executive preemption for State laws in order to limit the degree to which federal executive agencies can displace State policies with their own. The order also established a procedure for conducting a federalism assessment anytime a proposed national policy might have sufficient implications for undermining the sovereignty of the States.

Perhaps the most unique aspect of Executive Order 12612 is the statement of federalism principles that introduces the order. Those principles were intended to set the Constitutional record straight by setting forth in bold terms the nature of federalism as envisioned by the Framers and how that vision should direct the actions of the executive branch of the national government. The principles assert the importance of federalism to the operation of a limited national government, the vitality and sovereignty of the States, and the protection and exercise of political liberty. The rest of the executive order is premised upon this statement of principles, as a reaffirmation of the fundamental importance of federalism to the proper operation of the national government.

It is nothing short of ironic – and I would assert very troubling – that President Clinton, a former governor and a former leader among governors, would sign an executive order that undermines the very constitutional and political principle he says in the order he seeks to protect and promote. Executive Order 13083, on the surface, seems to uphold the division of national and State authority envisioned by the Framers. But the order itself does little to promote federalism while providing ample room for the further diminution of State authority through national executive action.

In the provisions relating to criteria for federalism policymaking, Executive Order 13083 includes language justifying national action "when there is a need for uniform national standards." Who would determine whether such a need exists or not is not discussed; presumably some Washington bureaucrat. In President Reagan's executive order, the President, while recognizing such a need may exist under certain conditions, states that setting uniform national standards for programs should not be encouraged and that, when possible, Washington should "defer to the States to establish standards." President Clinton's executive order states that national policy may be necessary "when States have not adequately protected individual rights and liberties." Again, there is no language discussing just what constitutes "adequate protection " of rights and liberties, nor who would determine that. President Reagan's order explicitly recognizes the pivotal role federalism plays in protecting individual liberties while arguing that national action should be taken only "where constitutional authority for the action is clear and certain

and the national activity is necessitated by the presence of a problem of national scope." President Clinton's order would call for a process "to permit elected officials and other representatives of State and local government to provide meaningful and timely input in the development of regulatory policies that have federalism implications." President Reagan's order asserted that the States should have "maximum discretion" in the administration of national policies and that "federal oversight of State administration is neither necessary nor desirable." Under President Clinton's order, States can apply for waivers of regulations, suggesting some exceptions can be made to accommodate the States. President Reagan's order subscribed to the idea that any exceptions made would be regarding national action and that national action was not preferable to action taken by the States. President Clinton's order makes no reference to federal executive preemption, a major concern in President Reagan's order and a major concern of the States. Moreover, President Clinton does away with the federalism assessment created by President Reagan.

While Executive Order 13083 does invoke the Framers of the Constitution and refer to the principle of federalism they embraced, it does precious little to ensure that principle lies behind the actions of the national government and even less to ensure the authority of the States is protected and the national government remains limited. It is not truly a federalism executive order. It is, instead, a management directive to the bureaucracy to go through the federalism motions and then do whatever they deem necessary to implement national policy, whether or not that policy tramples upon the Constitutional authority of the States.

There has been much discussion in Washington in recent years about the appropriate role and scope of national governmental power. We hear of "redefining" government, "downsizing" government, "devolution" of government, and "decentralization" of government. At a time when citizens are questioning the role of government more than ever, a national discussion about the proper relationship between the States and Washington might inspire greater interest in the overall health of our polity, a renewal of citizenship and civic awareness, and a heightened understanding of the limits of government in solving many of the problems this nation faces. Rather than issue an executive order that undermines federalism, I would encourage the President to reaffirm Executive Order 12612 and engage the nation and this Congress in a thoughtful discussion of federalism and the role of government in the twenty-first century. But in any event, I encourage this Committee to convey to the President their concern about Executive Order 13083 and the threat to federalism it represents.

Eugene W. Hickok
Secretary of Education
Commonwealth of Pennsylvania

Mr. MCINTOSH. Thank you, Mr. Hickok.

Mr. DeSeve.

Mr. DESEVE. Thank you, Mr. Chairman. I'm here today to discuss with you the issuance of Executive Order 13083 on federalism. Executive Order 13083 combines elements of Executive Orders 12612, "Federalism", and 12875, "Enhancing the Intergovernmental Partnership", into one directive.

This Executive order updates the previous Executive order on federalism to take into account recent Supreme Court decisions and unfunded mandates legislation. For example, section 2(c) of Executive Order 12612 states that "the constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment in the Constitution." Recent Supreme Court cases, however, make it clear that State sovereignty is also protected by the 11th amendment and by the structure of the Constitution itself.

The statement of federalism principles set forth in section 2 of Executive Order 13083 reflects the Supreme Court's recent statements concerning the constitutional sources of federalism principles. Executive Order 13083 was updated not only to reflect recent Supreme Court decisions, but also to account for legislative enactments occurring after the previous federalism order.

Section 6(b) in Executive Order 12612 called on agencies to prepare a federalism assessment. Since the promulgation of Executive Order 12612, the Congress passed, and President Clinton signed, the Unfunded Mandates Relief Act of 1995. UMRA, as it's known, now governs the formal analysis of the federalism implications of agency initiatives. It includes a judicially enforceable requirement that Federal agencies prepare written statements identifying and analyzing the federalism implications of certain rules, and demands that each written statement contain "a qualitative assessment of anticipated costs and benefits" to States affected, to affected State, local and tribal governments, and a description of consultations with representatives of affected State, local and tribal governments.

UMRA also eliminated the ambiguity in Executive Order 12612 as to when a federalism assessment was required. Section 6(b) in Executive Order 12612 called on agencies to prepare a federalism assessment when, in the judgment of the agency's designated federalism compliance official, a proposed policy had sufficient federalism implications to warrant the preparation of a federalism assessment. UMRA, in contrast, explicitly sets forth the standard for preparation of a written statement addressing federalism concerns. Section 202 of UMRA directs an agency to prepare such a statement for any regulation that "may result in expenditures by State, local and tribal governments in the aggregate of $100 million or more."

UMRA, in short, enacted into law and clarified the policy choices expressed in provisions of Executive Order 12612 pertaining to federalism assessments. Accordingly, Executive Order 13083 defers to Congress for its policy conclusions on this issue. It accepts the congressional determination as to when a formal federalism assessment should be required, and it endorses the congressional evaluation of the tradeoff between competing objectives: efficient and

timely implication of Federal law on the one hand, and full understanding of federalism implications, documented through the publication of formal federalism assessments, on the other.

Moreover, the order reinforces the policy of not burdening States with undue costs or inappropriate mandates by assuring that agencies have an effective process that permits "elected officials and other representatives of State and local governments to provide meaningful and timely input in the development of regulatory policies that have federalism implications."

Executive Order 13083 retains the requirement in the previous orders that direct agencies to closely examine the constitutional and statutory authority behind any Federal action that would limit the policymaking discretion of State and local governments. To help agencies carry out that assessment, the authority sets forth Federal policymaking criteria that agencies shall consider, along with fundamental federalism principles, in formulating or implementing policies that have federalism implications.

In addition, Executive Order 13083 builds on earlier orders and recent legislation to protect States from expensive and onerous unfunded mandates. It instructs agencies to streamline their processes under which State and local governments apply for waivers of statutory and regulatory requirements, and directs agencies to consider waiver applications with a view, quote, with a "view toward increasing opportunities for utilizing flexible policy approaches at the State or local level."

In sum, Executive Order 13083 reflects the administration's strong commitment to promoting federalism principles. The administration has a proven record on federalism issues. It has worked and consulted extensively with States and local governments on regulatory matters. It has supported the Unfunded Mandates Relief Act of 1995. It has opposed, or sought to limit, on federalism grounds, legislation that would expand Federal law into areas traditionally reserved to States. At the same time, it has recognized the bedrock constitutional principles that postulate our Nation's commitment to federalism begins with the understanding that there must be a balance between Federal and State authority.

After hearing concerns from representatives of State and local governments, the administration 2 weeks ago announced it would delay implementation of Executive Order 13083 for an additional 90 days in order to consult thoroughly with those groups and others about the content of the order and to make changes where appropriate. This will be done through the existence of an Executive order before the effective date of Executive Order 13083. The effect of the new Executive order will be to suspend Executive Order 13083, and thus Executive Orders 12612 and 12865 will remain in effect during the period of consultation.

Thank you very much, Mr. Chairman. I'm happy to answer your questions.

[The prepared statement of Mr. DeSeve follows:]

STATEMENT OF G. EDWARD DESEVE
ACTING DEPUTY DIRECTOR FOR MANAGEMENT
AND
CONTROLLER
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

July 28, 1998

Good morning, Mr. Chairman and Members of the Committee. I am here today to discuss with you the issuance of Executive Order 13083, "Federalism."[1]

President Clinton built a strong record on federalism by making certain that major legislation was attuned to the needs of State and local government. He signed into law the Unfunded Mandates Relief Act of 1995, a top legislative priority for State and local governments that had languished in Washington for many years. This Act built on the Clinton Administration Executive Order 12875 which instructed agencies to "reduce the imposition of unfunded mandates upon State, local and tribal governments;". He signed into law the landmark new welfare bill in 1996 that gives States unparalleled flexibility to design and implement their own programs to move welfare recipients into the workforce. The Administration created a new 100,000 cops program that gives cities and towns help in beefing up their community policing forces without having to fill out an enormous amount of paperwork.

Executive Order 13083 combines elements of Executive Orders 12612, "Federalism,"[2] and 12875, "Enhancing the Intergovernmental Partnership,"[3] into one directive. This Executive

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[1] 63 Fed. Reg.27651 (May 19, 1998).

[2] 52 Fed. Reg. 41685 (October 30, 1987).

[3] 58 Fed. Reg. 58093 (October 28, 1993).

Order updates the previous order on federalism to take into account recent Supreme Court decisions and unfunded mandates legislation. For example, section 2(c) of E.O. 12612 states that "[t]he constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution." Recent Supreme Court cases, however, make it clear that state sovereignty is also protected by the Eleventh Amendment and by the structure of the Constitution itself.[4] The Statement of Federalism Principles set forth in Section 2 of E.O. 13083 reflects the Supreme Court's recent statements concerning the constitutional sources of federalism principles.

E.O. 13083 was updated not only to reflect recent Supreme Court decisions, but also to account for legislative enactments occurring after the previous Federalism order. Section 6(b) in E.O. 12612 called on agencies to prepare a Federalism assessment. Since the promulgation of E.O. 12612, the Congress passed, and President Clinton signed, the Unfunded Mandates Relief Act of 1995 (UMRA).[5] UMRA now governs the formal analyses of the federalism implications of agency initiatives. It includes a judicially enforceable requirement that federal agencies prepare written statements identifying and analyzing the federalism implications of certain rules and demands that each written statement contain "a qualitative assessment of anticipated costs and benefits" to affected state, local, and tribal governments and a description of consultations with representatives of affected state, local, and tribal governments.

UMRA also eliminated the ambiguity in E.O. 12612 as to when a Federalism Assessment was required. Section 6(b) in E.O. 12612 called upon agencies to prepare a Federalism Assessment when, in the judgement of the agency's designated Federalism compliance official, a proposed policy had "sufficient federalism implications to warrant the preparation of a Federalism Assessment." UMRA, in contrast, explicitly sets forth the standard for the

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[4] See, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Printz v. United States, 117 S. Ct 2365 (1997).

[5] P.L. 104-4, enacted March 22, 1995.

preparation of a written statement addressing federalism concerns. Section 202 of UMRA directs an agency to prepare such a statement for any regulation that "may result in expenditures by State, local, and tribal governments in the aggregate ..... of $100,000,000 or more."

UMRA, in short, enacted into law, and clarified, the policy choices expressed in provisions of E.O. 12612 pertaining to Federalism Assessments. Accordingly, E.O. 13083 defers to Congress for its policy conclusions on this issue. It accepts the Congressional determination as to when a formal federal assessment should be required and it endorses the Congressional evaluation of the tradeoff between competing objectives: efficient and timely implementation of federal law, on the one hand, and full understanding of federalism implications, documented through the publication of formal federalism assessments, on the other. Moreover, the Order reinforces the policy of not burdening states with undue costs or inappropriate mandates by assuring that agencies have an effective process that permits "elected officials and other representatives of State and local governments to provide meaningful and timely input in the development of regulatory policies that have federalism implications." (Sec. 4(a)).[6]

E.O. 13083 retains the requirements in the previous Orders that direct agencies to closely examine the constitutional and statutory authority behind any federal action that would limit the policy-making discretion of States and local governments, and to carefully assess whether that action is necessary. To help agencies carry out that assessment, the Order sets forth federal policy making criteria that agencies shall consider, along with fundamental federalism principles, in formulating or implementing policies that have federalism implications. These include:

"States and local governments are often uniquely situated to discern the sentiments of the

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[6] In addition, Sections 1(c) and 6 in E.O. 13083 make it clear that, while independent regulatory agencies are encouraged to comply with this Order, they are not required to do so. This change was made in deference to the Congressional intent that certain agencies were to be given a measure of independence from direct Presidential supervision.

people and to govern accordingly." (Sec. 2 (e)).

"Uniform, national standards can inhibit the creation of effective solutions to those problems." (Sec. 2 (f)).

In addition, E.O. 13083 builds on earlier orders and recent legislation to protect states from expensive and onerous unfunded mandates. It instructs agencies to streamline their processes under which State and local governments apply for waivers of statutory and regulatory requirements, and directs agencies to consider waiver applications with a "view towards increasing opportunities for utilizing flexible policy approaches at the State or local level." (Sec. 5(b)).

E.O. 13083, in sum, reflects the Administration's continued strong commitment to promoting federalism policies. The Administration has a proven record on federalism issues. It has worked and consulted extensively with states and local governments on regulatory matters. It supported the Unfunded Mandates Relief Act of 1995. It has opposed, or sought to limit, on federalism grounds, legislation that would expand federal law into areas traditionally reserved to the states. At the same time, it has recognized the bedrock constitutional postulate that our Nation's commitment to federalism begins with the understanding that there must be a balance between state and federal authority. As stated in Section 2(c) of the Order:

> Federalism reflects the principle that dividing power between the Federal Government and the States serves to protect individual liberty. Preserving State authority provides an essential balance to the power of the Federal Government, while preserving the supremacy of Federal law provides an essential balance to the power of the States.

* * *

After hearing concerns from representatives of State and local governments, the Administration two weeks ago announced it would delay implementation of E.O. 13083 for an additional 90 days in order to consult thoroughly with those groups about the content of the

Order, and to make changes where appropriate.

Thank you, Mr. Chairman. I am happy to answer your questions.

Mr. MCINTOSH. Great. Thank you, Mr. DeSeve, and we will get back to you. I've got several questions for you.

Our next witness is Lieutenant Governor of Vermont Mr. Douglas Racine. Would you share a summary of your testimony with us?

Mr. RACINE. Thank you, and good afternoon, Mr. Chairman and members of the subcommittee. My name is Doug Racine and I serve as Lieutenant Governor of the State of Vermont.

I come before the committee today to testify to President Clinton's long-standing support for and commitment to a true federalism partnership with the States. As a former Governor, President Clinton knows firsthand that the Federal Government must be sensitive to the prerogatives of State and local governments, and understands the needs for flexibility in designing bottom-up plans to address various issues.

The President has built a strong record on federalism by making sure major legislation is attuned to the needs of State and local governments. I am confident that with the extension of time for consultation agreed to by the White House, this Executive order will be balanced and sensitive to the concerns of State and local governments.

The President's record on federalism is strong and clear. In 1995 the President signed into law the Unfunded Mandates Relief Act, a top legislative priority for State and local governments that languished in Washington for many years. In 1996 the President signed into law the landmark new welfare bill that gives States unparalleled flexibility to design and implement their own programs to move welfare recipients into the work force. And the President created the new COPS programs that gives States, cities and towns help in beefing up their community policing forces without having to fill out an enormous amount of paperwork.

Let me outline three specific instances where I have personally witnessed this administration's commitment to States, and highlight the outstanding work the administration has done to make user-friendly key programs that are affecting the people of Vermont.

The first program is COPS, the Community Oriented Policing Services Program, an administration initiative that has offered over $10 million in resources to Vermont and has enabled local police and sheriffs' departments in my State to hire over 100 new police officers. COPS was designed to give localities the freedom and flexibility to set their own priorities and address problems in the way they think is best. They choose how many officers they want and what technology they feel can be helpful.

The Clinton administration has designed the program to be responsive to the needs of State and local governments by making it virtually free of bureaucracy. The application process is only a page and a half long. And when a local department wants to reapply, they just decide how many additional officers they want to request and notify the designated COPS grant advisor for Vermont.

And although we are small and our requests are small, the COPS office treats us as customers of the Federal Government and provides services in an efficient and prompt manner. COPS is responding to real needs and has made safer communities a reality in Vermont.

While I'm discussing crime control and criminal justice, I also want to mention the National Criminal History Improvement Program which was part of the 1994 Crime Act. Again, this is an area where there is a clear recognition of the preeminence of State and local governments in providing police protection to our citizens.

This program has allowed Vermont to automate our criminal records system, providing better and more timely information to police officers. This is critical in saving officers' lives and in successfully prosecuting criminals. In Vermont we have automated our State Police Department with $2.5 million in virtually no-strings-attached Federal funds, allowing us to develop a Vermont-style response to our most pressing police needs.

The second example of the Clinton administration's commitment to providing States unprecedented flexibility involves health care coverage. The Department of Health and Human Services, through its Health Care Financing Administration regional office in Boston, worked for over a year with Governor Howard Dean and his administration to design a program which is providing health care coverage for thousands of Vermonters who previously had been—who had very limited or no health care coverage at all. This waiver was a result of President Clinton's initiative to use section 1115 of the Social Security Act to allow States more flexibility under the Medicaid program.

Vermont's health care agenda is to provide universal coverage to its population. Under our waiver, Vermont embarked on an innovative program to move our Medicaid population into a managed care system. The resulting savings have been applied to our Vermont Health Access Plan, which, together with the usual State match, extends Medicaid coverage to working adults and others who are under 150 percent of the Federal poverty level.

This program is cost neutral to the Federal Government. Because of our ambitious agenda and the flexibility of the Clinton administration, we are showing that managed care can save Federal dollars. We've applied those savings to provide health care coverage to an additional 15,000 Vermonters. With a population of only 560,000, this is a significant improvement. Due in large part to this program, the rate of uninsured individuals in Vermont has been reduced from 11 percent down to 6.8 percent.

Additional savings are also being used to provide a pharmacy benefit for Vermont's Medicare population. This is a tremendous benefit to 7,000 mostly elderly Vermonters who previously had received no assistance for pharmaceuticals. Again, Federal flexibility is allowing us to help thousands of Vermonters maintain their health and their independence.

My third example is in the area of welfare reform. The President has a proven record of working with the States in this critical area of public policy. Vermont was the first State to receive a welfare reform waiver from the Clinton administration, 2 years prior to the enactment of Federal welfare reform. Thus, our demonstration project, called the Vermont Welfare Restructuring Project, was the first State-wide reform effort to take advantage of the Clinton administration's pledge to give States greater flexibility in testing welfare reform strategies.

With this flexibility, we have created a Vermont style of welfare reform with an emphasis on employment, work training in other skills, and day care assistance. We hope that our little State of Vermont can serve as a national model for family friendly and humane welfare reform.

I offer my experience and knowledge of the Federal Government's partnership with the State of Vermont to demonstrate the administration's commitment to State prerogatives. State officials in Vermont report a high degree of cooperation and support from Federal agencies. While we have not always seen eye-to-eye, we have always worked in close consultation and found an open door.

Just as in Vermont and the other States we work to find a proper balance between State and local government, so you too are struggling with similar issue of balance between the Federal Government and States' rights. This is not an easy issue.

I welcome the administration's decision to suspend the current Executive order on federalism while additional consultations take place, and I believe that good faith discussions will lead to a final Executive order that we can all be proud of and that we can support.

Thank you.

Mr. MCINTOSH. Thank you, Mr. Racine.

Finally, Mr. Schwartz, welcome, and if you would share with us a summary of your testimony.

Mr. SCHWARTZ. Thank you, Mr. Chairman. Chairman, members of the committee, my name is Mark Schwartz and I'm a member of the City Council in Oklahoma City. And I would first like to take note that as coming representing a city that has had significant tragedy as a result of terrorism against government and elected officials, on behalf of the city, our condolences and sympathy to the families and to the Members and the staff of Congress here. We understand that.

I currently serve as president of the Oklahoma Municipal League, and I have been past president of the National League of Cities. But let me make a note very clear, I am not here on behalf of the National League of Cities today. I am pleased to have this opportunity to be present.

I am here to focus on a few of these issues from a personal perspective regarding the issues on Executive orders on federalism that is the subject of this hearing. I also want to state that I by no means oppose the statements that have been made as contained in the writings by Councilman O'Neill from the National League of Cities in the context of consultation. Rather, I'm here to provide you with my personal insight between the administration and municipalities and the National League of Cities when I was president last years.

As we're all aware, the issue of consultation with State and local government is at the center of this debate to a great extent. I think most everyone here this morning sat and said that they think the Clinton administration has consulted time and time again, why didn't it happen this time? Well, the White House has stated that it did in fact make a mistake because they did not consult. To resolve the matter, as I think we've just heard from testimony from Mr. DeSeve that they're going to issue another Executive order to

delay this, suspend it for 90 days, so they can get the parties to the table and determine those appropriate perspectives from local governments, which I think is very appropriate.

I've had, for a number of years—I've been in office since 1987—dealings with the White House both under President Bush and under President Clinton. On April 19, 1995, one of the first phone calls that I received was from Marcia Hale, who at the time was Intergovernmental director, and her statement was, "We're here for any resources Oklahoma City needs, whatever it may be." Obviously we had the same concerns and expressions from Members of Congress, and the Senate as well.

That really has continued on through this date with the new director, with Mickey Ibarra, in terms of consulting with Oklahoma City and to assist us on any matter. During my tenure as president of the National League of Cities, Intergovernmental Relations was there to coordinate anything that was necessary in terms of administration or Cabinet folks for meetings and questions or other issues that may come up.

I find it helpful when people like to talk. I've had the same ability with Members of Congress and Members of the Senate, my delegation in particular, obviously, in terms of when I served in that capacity. From my perspective, Mr. Chairman, I think that the Intergovernmental Office does a pretty good job. I think Mickey's outreach to staff and his staff to local government officials really has been pretty good. As I said, this time they made a mistake, but that happens.

And I would like—you know, I think most of us from time to time have made mistakes, and the real critical issue is whether or not they have taken the necessary steps to correct the situation. And, in my opinion, they have stated very clearly today, in writings to the Big Seven and then again today in testimony that they're going to do that.

I serve in a nonpartisan capacity as a member of the Oklahoma City Council. I have tried to maintain this perspective when I represent my city with Members of Congress and the administration. And in this capacity, I do want to state that when President Bush was in and Bill Canary head of the Office of Intergovernmental Affairs, I think that he did a wonderful job too.

Nobody ever gets full agreement in Washington, DC, when we come here. But as long as the door is open to talk, I think that's the critical and important step, because if you can't talk you're never going to reach an accord or any agreement.

Since there's going to be a 90-day period for these discussions to take place, it would seem to be that surely during this period, if not sooner, and I'm hopeful, to be honest with you, that this can be resolved in the next 3 weeks or the first month of those 90 days, to get this issue put to rest and resolve it. I anticipate that is going to happen.

I would say, and I want to make a quick comment on a comment made by Mr. Horowitz, and I have to give you purely the municipal official's perspective, whether a preemption comes about through legislation or it comes about through a regulatory matter, when you're sitting at city hall and you increase the taxes to the utility

bill or whatever it may be to your taxpayers, a preemption is a preemption no matter what you call it.

And I think in terms of this committee addressing issues of preemptions, I would suggest the committee consider ways to remedy some of these issues and the preemption problems that have occurred in the Telecommunications Act of 1996 when it came to siting of cell towers; to the issue of takings which has been raised; and very importantly, the Internet Tax Freedom Act, in terms of what may happen to municipalities and their tax base. Oklahoma exists on sales tax.

I think those issues need to be addressed in Washington, DC, a tremendous perspective. I do think that the recommendations made by the National League of Cities in Councilman O'Neill's written comments on page 5 for a moratorium on new Federal preemptions by the House and Senate, along with the other four items, I concur with them. I think they make sense, and I think that the position of NLC to sit there and negotiate is critical.

All I'm saying is, I think the White House has acknowledged that and they're going to sit down and they're going to do it, and we're going to resolve—they're going to resolve this matter, working with local governments.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Schwartz follows:]

STATEMENT OF MARK SCHWARTZ
CITY COUNCILMEMBER
CITY OF OKLAHOMA CITY
AND
IMMEDIATE PAST PRESIDENT
NATIONAL LEAGUE OF CITIES
BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

July 28, 1998

Good morning Mr. Chairman and Members of the Committee. My name is Mark Schwartz. I serve as a member of the City Council in Oklahoma City, a position I have held since 1987. I also currently serve as the President of the Oklahoma Municipal League, and as the Immediate Past President of the National League of Cities. I am pleased to have the opportunity to testify before your committee today.

I am here today to focus on certain issues relating to the Executive Orders on Federalism which are the subject of this hearing. Let me state first that I am not here to oppose the position of the National League of Cities in the context that consultation with state and local governments should be held in connection with the drafting of Executive Order 13083. Rather, I am here to provide you with my personal insight as to the relationship between the Administration and local government as well as the relationship between the Administration and the National League of Cities during my service as President of NLC during 1997.

As we are all well aware, the issue of consultation with state and local governments is at the center of this debate. The White House has stated that it should have discussed the proposals

contained in Executive Order 13083 with state and local government representatives prior to its issuance. To resolve this matter, the White House has advised the Big Seven that it going to delay the implementation of the Executive Order so that all interested parties can be at the table to assure that appropriate perspectives from local government can properly been obtained.

For the past several years I have had extensive dealing with the White House, in particular the Office of Intergovernmental Affairs. One of the first phone calls that I received on April 19, 1995, was from then Director of Intergovernmental Affairs, Marcia Hale. She was calling to assure me that all resources of the Federal Government would be available to assist my community in the aftermath of the Murrah tragedy. This attitude and desire to render assistance continues through today under the leadership of Mickey Ibarra, current Director of Intergovernmental Affairs

During my tenure as NLC President in 1997, members of the administration were always responsive to my calls for assistance and the opportunity to meet over various issues. While we did not reach agreement on all issues, the opportunity for discussion and debate was always present. Mickey Ibarra, along with Lynn Cutler, addressed local officials from across the nation at the NLC Annual Conference in December, 1997, at my request. When local officials at that particular meeting requested an additional meeting in March 1998 at the White House during the Congressional City Conference, they made it happen. In March of 1997, Vice President Gore addressed the National League of Cities Conference, along with various members of the President's Cabinet.

For the most part, they do a pretty good job. I believe the outreach by Mickey Ibarra and his staff to local government officials has been outstanding. This time they made a mistake - it

happens. Who in this room has not made one from time to time ? The critical issue is whether or not they have taken the necessary steps to correct the situation – they have.

I serve in a non-partisan capacity as a member of the Oklahoma City Council. I have tried to maintain that perspective when I represent my city, when I speak with members of Congress or the Administration. In this non-partisan capacity let me also state that the outreach by Bill Canary, the former Director of Intergovernmental Affairs under President Bush, was also excellent.

As the administration has agreed to a ninety (90) day delay of the proposed Executive Order, the result is that both E.O. 12612 (October 26, 1997) and E.O. 12875 (October 26, 1993) remain in full force and effect.

Surely during the next three months state and local government representatives and the White House will be able to reach an accord on the proposed Executive Order on Federalism. We should not forget that President Clinton signed into law the Unfunded Mandates Relief Act of 1995, after its proper passage by the Congress.

The Memorandum for the Members of this Committee announcing this hearing stated "This hearing also will examine the need for a legislative solution to address the concerns of State and local governments". I would suggest that the committee consider ways to remedy the preemption problems which have occurred as a result of the Telecommunications Act of 1996 (in particular the siting of cell towers); the preemptions as contained in the Internet Tax Freedom Act, as passed by the House, and the "Takings" legislation. I imagine that all of my colleagues present today would concur if you were to agree to address these issues as well.

I agree with the National League of Cities that the White House should negotiate

revisions in consultation with leaders of organizations of state and local elected officials before revoking the previous Executive Order (E.O. 12875) or its predecessor (E.O. 12612). The irony, Mr. Chairman, is that the White House has agreed to do just that.

Thank you Mr. Chairman for this opportunity. I will be pleased to answer any questions.

Mr. MCINTOSH. Thank you, Mr. Schwartz.

Well, in fact, let me check with Mr. DeSeve now. I like your recommendation that it be settled in the next 3 or 4 weeks, because that will give us time in September, if it hasn't been resolved, to address it in Congress.

But is that a possibility, Mr. DeSeve, that we could see that happen?

Mr. DESEVE. We indicated to the representatives of the Big Seven that we're prepared to start immediately working with them to try to find that solution. I don't see any reason it has to take a long time.

Mr. MCINTOSH. Have you had any meetings with them since the July 17th announcement?

Mr. DESEVE. No, I think Mr. Ibarra's meeting last week was the only one we've held, but we've been in constant telephone communication with each of the individual groups.

Mr. MCINTOSH. OK. Let me ask you just to react to Mr. Begala's statement, do you think this is kind of cool that the President can make the law of the land with a stroke of the pen?

Mr. DESEVE. I think I would defer to Mr. Hickok and Mr. Horowitz, because I think they participated in what was to them a very exciting experience in getting 12612 out. And I think that any time you participate, work with the President to try to influence policy, whether it's by an Executive order or by legislation, I could associate myself with Paul's remarks and say it does feel kind of cool. Now the question is——

Mr. MCINTOSH. This Executive order was kind of cool?

Mr. DESEVE. No, I think in retrospect "kind of cool" is the wrong expression for any Executive order. I wouldn't use that, but I could understand how one would.

Mr. MCINTOSH. Let me ask you, then, turning to the other chart up there, President Reagan's Executive order required the federalism assessments. You've explained that President Clinton's new proposed Executive order does not, but that there is a fall-back provision in the Unfunded Mandates Act.

Are you suggesting that we should, in order to—see, that was passed with Congress having in mind that there was this protection for the other policies of less than $100 million—should we now take up legislation to extend that to all policy decisions?

Mr. DESEVE. We're not in favor of that. I think Mr. Barr testified that as soon as you do that—earlier spoke—as soon as you do that, you put yourself in a box, because what you put inside the box or put outside the box—not in legislation, he was really referring to Executive orders—is limiting. So as soon as you start to legislate on this matter, you will limit. If you go down to $50,000 or go down to $100,000, what's the right limit? We think this Executive order is expansive——

Mr. MCINTOSH. I'm thinking zero, so all policies.

Mr. DESEVE. That may be good. We certainly at this time don't support, don't see a need for legislation, but we'd be happy to talk to you about the nature of any legislation you might want to propose.

Mr. MCINTOSH. Will the revised Executive order reinstate the protections on requiring assessments for all regulations?

Mr. DESEVE. It could be. What we've said is everything is on the table. We want to be very clear that we're not starting with 13083, we're not starting with 12875, we're not starting with 12612. We're starting with the principles that govern federalism in our conversations with the Big Seven. So it's entirely possible that that kind of issue could be resolved in that way. I don't know the answer to that because we haven't begun.

Mr. MCINTOSH. So what you're saying is, with all of those four items listed there, there's no guarantee that you'll go back to the Reagan Executive order in this process?

Mr. DESEVE. But there's also no presumption that we will not have those principles reflected. What I'm saying is we're starting with essentially a clean slate, with all of the history before us.

Mr. MCINTOSH. Even though what you said in your testimony was the Reagan Executive order would remain in full force and effect during that time.

Mr. DESEVE. That is correct. That is correct.

Mr. MCINTOSH. But you don't want to start from there in figuring out where to go next.

Mr. DESEVE. I'm happy to start from there. I would be perfectly delighted to start from there.

Mr. MCINTOSH. Well, which is it? I mean, you were saying a clean slate——

Mr. DESEVE. My point is, I'm happy—I'm happy to start from—your question, I thought, and I may have misinterpreted it, was at the end of the day will we end up there. I said I don't know where we'll end up. I'm perfectly happy to start with 12612 as a basis of conversation and discussion.

Mr. MCINTOSH. That sounds promising. Let me clarify it, because it sounded different than where I thought you were going earlier. But the witnesses earlier said they would like to engage in a process where we started with the previous Executive orders, both of them, and then had a discussion with the White House about issues they felt needed to be updated because of recent Supreme Court cases, which they, by the way, thought might mean that they needed to be strengthened even further to reflect other provisions in the Constitution that guaranteed State prerogatives.

Are you saying that these discussions you plan to have will be formatted in that way, to look at the—start with the previous Executive orders and say we'll assume these are the basis of what we're going to do and what—now figure out what changes to be made?

Mr. DESEVE. What we'd like to—what I'm trying to say is, we'd like to work with the parties. What I've heard today is a full expression that they don't want to start with 13083 as the basis for a discussion. That's real clear to us. And I also heard today that there is a desire—Mr. Blue, for example—to get all of the principles on the table. I could start with principles. I could start with a document. I can start in a variety of different places.

What I would like to do is consult with them about where they'd like to start. I appreciate Mr. Horowitz's comment that we're called the most consultative and skillful. I'm not sure whether consultative was a compliment or not; I think skillful may have been, at least a backhand compliment. What we want to do is consult with them about where we start. For us to go in with a presupposition

that we'll start here or there is to violate the nature of that consultative process.

Mr. MCINTOSH. So you've had one meeting, and you plan to consult with them first about where to start a substantive meeting on how to write this Executive order?

Mr. DESEVE. That could certainly be an easy way to start. I can't set the ground rules.

Mr. MCINTOSH. It brings back visions of the days when Henry Kissinger had long negotiations about the shape of the table with the—to resolve the North Vietnamese conflict, that went on for months. My question would be, do you think you can get this done, and in what timeframe?

Mr. DESEVE. We're going to work as hard as we can to get it done. I've been involved in labor negotiations and consultations that have been resolved very quickly, and I've been involved in protracted negotiations. I can't tell you, starting. We'd like to get this done and get on and do other things. I know the Big Seven would like to get it done and get on and do other things. Until I sit down with folks, I can't tell you what the timing is likely to be.

Mr. MCINTOSH. So there's no guarantee you'll finish it before the election?

Mr. DESEVE. There's no guarantee we'll finish it before the election. We're committed to start at the beginning, get a full and free airing of all of the issues that are involved, resolve it as quickly as we possibly can. That's our commitment.

Mr. MCINTOSH. I have to tell you, given the track record of this Executive order, that that doesn't reassure me that Congress should defer action.

But my time has expired. I will have several other questions in another vein. Let me turn now to Mr. Sanders. Do you have questions for this panel?

Mr. SANDERS. Just a few, Mr. Chairman.

The issue that you're touching upon is a very fascinating issue. It's an issue probably that has been discussed in this building for decades and decades and decades, and there's always been a tension between local, State and Federal Governments.

Forty years ago, as you will well remember, there were Governors of the States proclaiming loudly and clearly, "Segregation now, segregation forever," and "Anybody in that terrible Federal Government who's going to tell us that black people have the right to vote or sit in the front of the bus, my God, they're ruining our way of life, and it's that big, bad Federal Government." Right? And fortunately the American people decided that ending segregation and apartheid in certain parts of our country was a proper role for the Federal Government, amid tremendous conflict.

Right now in my State of Vermont we have—we border New York State and we border New Hampshire. I think nobody thinks today that New York State has the right to pollute Lake Champlain and say, "Hey, that's our business, and we don't care where the pollution goes, even if it comes to the State of Vermont," nor can New Hampshire do what it wants to do. Environmental matters are of deep concern to the American people, and I think it is widely recognized that the Federal Government has an important role to play.

And what ends up being the proper role of the Federal Government, the proper role of the State government, the proper role of local government, is tough stuff. It is tough stuff. And I am glad to hear that the administration has, as I understand it, acknowledged that they acted in this case without proper consultation of State government, and they are now going to go forward and ask for the advice and consultation, and we think that that's a proper thing to do. I think everybody acknowledged that what the Clinton administration did was wrong.

I would simply repeat a point that I made earlier, Mr. Chairman, that while it may be fun to beat up on the Clinton administration today, I think we can argue even very recently that here in Congress there has been—and Mr. Schwartz mentioned some examples of it—outrageous acts, to my mind, of Federal preemption, but they took place from the Congress and not the Clinton administration.

The takings legislation, for example, that Mayor Rendell from Philadelphia talked about, expressing his strong opposition, it was his point of view, and I agree with it, stepped all over the rights of the cities and States to make their own land use regulations.

Mr. Schwartz mentioned the telecommunications bill and the towers issue, telecommunications towers, which has been a major issue in the State of Vermont. And in fact the Clinton administration and Chairman Kennard of the FCC has played a very good role in saying that he will do everything that he can to allow these decisions to be reached within the State government and not preempted by the Federal Government.

In the State of Vermont we take environmental regulations pretty strongly, maybe more strongly than many other States. And up until the telecommunications bill, a town and the folks in the town had the right to negotiate, had the right to say "No, we think that that tower is in a poor place from an environmental point of view," and Federal legislation passed by the Republican party would have taken away our right to do that, and we appreciate Mr. Kennard and the administration helping us out there.

Interstate banking, I'm a member of the Banking Committee. I believe I was the only member of the entire 51-member Banking Committee who thought that maybe it was not a good idea that the Federal Government take away the ability of States to make important decisions regarding the purchasing of banks.

I gave some examples a little while ago about the health care bill. The managed care bill that was just passed last week took away a lot of the prerogatives of the State of Vermont to protect our consumers.

Now, having said all of that, and recognizing in my view that this is a bipartisan problem, that it's been a historical problem, there is an issue, Mr. Chairman, that I think we should also touch and throw into the hopper, and I throw it into the hopper without giving you any solutions. And that is, in the election coming in November, about 37 percent of the American people are going to vote. Most people do not take what we do here terribly seriously anymore, don't think that what we do is relevant to their lives. I think one of reasons they correctly perceive that is the power that money and corporate influence plays over the political process.

So I want to throw into the hopper that when we talk about local, State and Federal initiatives and how they interact, it is to understand that here at the Federal level we cannot stop corporations who contribute huge sums of money to both political parties. We cannot stop the power of corporate mergers which are taking place, of corporate mergers in the media, so that a smaller number of folks now control what we see and hear.

As I throw into the hopper this issue, it is very difficult to imagine small States or even large States being able to cope with the very powerful monied interests and corporate interests which to my mind are influencing the agenda of this country. It is not an accident, starting—not starting but certainly accelerating under the Reagan administration, the growing gap between the rich and the poor in this country, the fact that working people are working longer hours for lower wages. Who is going to protect those folks? Do you think people in small States and medium-size States have the power to stand up to monied interests? I doubt it.

So I think, Mr. Chairman, I do really applaud you. I think this is an important hearing. There are a lot of dynamics that are going on. I am concerned that so many people are giving up on government, no longer believe they have the power to influence decisions which affect their lives.

So thank you, Mr. Chairman.

Mr. MCINTOSH. Thank you, Mr. Sanders.

I would just take up one thing that you mentioned there on the Federal—on elections. One of the things I hear from county clerks back in my State is they're frustrated that they can't update their voter rolls because of a well-intended act that Congress passed in terms of trying to expand access to voting in the Motor Voter Act. But I think it has perhaps been incorrectly interpreted to say you can't remove people from the voter rolls who no longer live in the district. And, so maybe that's an area where we can come back and get together on.

Mr. SANDERS. Well, Mr. Chairman, on that one I would respectfully strongly disagree with you. I don't think the motor voter bill went far enough. I would suggest to you that in the six States this country—Maine, North Dakota, and a few others—which basically have same-day registration, where people can walk in and register on that day, you know what? Their voter turn out is much higher than they are in other States. I believe the Federal Government does have a very important role in making sure that every American should be able to vote with as least obstacles, as fewer obstacles as possible.

Mr. MCINTOSH. Right, right. I think we're talking about flip sides of the problem, and just make sure the other municipalities or wherever the person lived before that can adequately update their records as well.

Let me get back to this. The question I've got now for Mr. DeSeve is, who was involved in the development of the Clinton Executive order, the 13083 version of the Executive order?

Mr. DESEVE. Primarily the executive offices and the President typically are involved in such things. The White House General Counsel's Office, the Office of Management and Budget, the Office of Information and Regulatory Affairs, within that, the NEC, the

DPC, all participated, and I think I said White House Counsel along the way.

Mr. MCINTOSH. And were you involved in that drafting?

Mr. DESEVE. I was not involved. At that time I was not involved.

Mr. MCINTOSH. Will you be involved in the consultation and negotiations?

Mr. DESEVE. I believe that I will.

Mr. MCINTOSH. OK. And I understand that there was an attorney in the White House Counsel's Office who has done a lot of work on federalism in his career, a Professor William Marshall. Do you know——

Mr. DESEVE. Bill Marshall, yes.

Mr. MCINTOSH. Was he involved in drafting the Executive order?

Mr. DESEVE. Yes, he was.

Mr. MCINTOSH. And one of the reasons—and I would like to ask unanimous consent to be put into our record some testimony that he gave to the full Committee on Government Reform and Oversight before, I believe before he was in the White House Counsel, when he was a professor at Case Western Reserve Law School, and he talked extensively about federalism.

[The prepared statement of Mr. Marshall follows:]

RESPONSE OF PROFESSOR WILLIAM MARSHALL TO QUESTIONS OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

JULY 25, 1996

Mr. Chairman and Committee members, thank you for providing me with the opportunity to respond to questions on federalism and federalization.

My responses to your questions are as follows.

Question 1. Throughout your testimony a majority of your examples on the need for federalism cite environmental problems. But should we assume that state and local governments are less able or less willing to protect their environment than is the federal government? What functions are most appropriately left to states and localities?

Response 1. For a number of reasons, environmental regulation is an area where state and local government are less able, and at times less willing, to protect the environment than is the federal government. It is also an area where placing regulatory power at the state and local level may actually increase the overall cost burden to the taxpayers because economies of scale argue in favor of a centralized authority. A prime reason for this is expense. Environmental regulation requires a great deal of scientific expertise and technical resources and the costs of maintaining an effective regulatory agency may simply be too expensive for many state budgets. For similar reasons, having states as the prime enforcer of environmental laws would be inefficient as it would require the maintenance of 50 regulatory bodies all employing highly skilled experts rather than one central body in which the need for maintaining overlapping areas of expertise would be eliminated. In this way centralizing regulatory authority over the environment will actually reduce the total costs of regulation. A second reason arguing in favor of federal enforcement is that environmental regulation is one area where the problem of externalities is readily apparent. In many environmental cases, the brunt of environmental harm is not suffered in the state which is the source of the environmental hazard. There is, therefore, little incentive for the state that holds the cause of the pollution to address the problem. A third reason is that environmental regulation is a classic area where problems involving, what the economists term 'the race to the bottom,' can easily occur. In a business climate in which the states are competing with each other to attract industry and business, a state might find it is easier to gain a competitive edge if it

refrains from environmental regulation within its borders. The end result of this competition is likely to be a lessening of necessary and appropriate environmental regulation -- at great health risks to the citizens.

This does not mean the states and localities should be out the of business of environmental regulation. For example, state and local control is particularly advisable for environmental issues that require extensive land use planning. For this reason, states and localities should determine the best uses for their surface and ground waters and should be given a free hand in the ultimate regulation of land uses in order to achieve these water quality goals including regulating various non-point sources of pollution. Similarly, in Superfund cases, the liability and clean up provisions of federal law should be applied only to the worst sites allowing states and localities significant leeway in determining the appropriate approaches to the clean up of less contaminated areas -- including the decision of how to apportion liability. Third, I agree with current policy which leaves most of the siting authority for solid waste and hazardous waste landfills within state and local prerogative. Last, I would suggest that if states or localities choose to provide greater environmental regulation than the minimal standards set by the federal government or if they choose to share regulatory authority, they should be free to do so. The problems of externalities and the race to the bottom which would normally argue in favor of federal intervention would obviously not be at stake in these circumstances.

Question 2a. In regard to the federalization that has occurred within the last sixty years, what problems do you foresee if this trend continues?

Response 2a. The problems created by a continued unchecked trend towards federalization are multi-fold. First states and localities remain the primary guarantors of citizens' rights and obligations (most law affecting the average citizen -- such as laws regulating contracts, torts, property, and crime remain at the local level); but if the federal government continues to usurp what it believes to be the most important matters for itself, the necessary respect and political commitment to the viability of state institutions will be eroded. Second, increasing the expansion of federal law will continue to have significant effects on the federal judiciary requiring either a major expansion in the number of federal judges, the number of federal courts and the number of federal prosecutors, etc., or the maintenance of dockets in which the business of the federal courts will come to a grinding halt. Third, the increased involvement of the federal government in matters left to the states undercuts the value of states as laboratories for experimenting in resolving pressing social issues. A single nationally-imposed solution to an issue does not allow for the investigation of alternative approaches. Fourth, retaining power in the states helps accomplish the Framers goal of not concentrating too much power in any one political entity. Enforcing federalism, like enforcing separation of powers, is an important aspect of protecting individual liberty. Finally, the distance that necessarily exists between the federal government and the public which it serves can also be problematic. Not only do local officials at times have a better grasp on how particular problems affect their community, but the distance between a central government and the people may also work to create an alienated (and therefore angry) electorate that no longer believes it has any effective power.

Question 2b. What strategies could be used in an effort to equitably disburse regulatory responsibility between federal, state, and local governments?

Response 2b. Regulatory responsibility between federal, state, and local governments should be allocated entirely on the basis of whether or not there are not legitimate reasons to place the matter in federal control. The allocation of authority should not be based on the merits of the legislative proposal itself. For example, there is clearly no more important criminal issue than murder but jurisdiction over murder should not be given to the federal government because they are no reasons implicating federalization concerns that call for making murder a federal offense. The problem now, as I see it, is that the perceived importance of the issue has become the over-riding legislative concern. (Was it really necessary to federalize car-jacking?) But if Congress' test for federalization continues to be based on its views of the merits of the substantive matter at stake, then virtually anything could be a subject of federal law -- depending only upon who controls Congress. The better strategy, as I see it, is for federal elected officials to exercise discipline in not always authorizing federal action in response to important matters (even when it is politically expedient) and to also educate the citizenry that public itself should not always demand federal action when a social or economic problem occurs.

Question 3. Do you advocate one position over the other or do you believe there is a necessity to have a balance of both federalism and federalization?

Response 3. Effective government requires a balance of both federalism and federalization. I would suggest, however, that a presumption be maintained in favor retaining power within the state unless reasons can be advanced why the matter is an appropriate subject for federal intervention.

Question 4. Please elaborate on your position with regard to the elimination of the following federal departments: Commerce, Energy, Education, and Housing and Urban Development.

Response 4. The testimonies of the representative from KeyCorp and the Presidents of Cleveland Cliffs, LTV, and TRW seem to me to offer a reasoned response to this question. Before agencies are eliminated, they should be closely examined in order to redefine and redetermine their appropriate role and functions. Undoubtedly, there are sound reasons to have some federal involvement in education, housing, commerce, and energy policy. Whether that involvement justifies a full Cabinet position, however, can only be determined after a thorough evaluation of the particular agency is completed.

Mr. SCHIFF. Thank you very much, Mr. Marshall. [Applause.]

Mr. SCHIFF. I have to say, before recognizing members for questions, that we are due to complete this hearing by about 3:30 because members have flights to catch. And so depending on the number of questions will determine the amount of time we have that we can go back to people in the audience from the lottery.

So let me start right on questions. Mr. Horn.

Mr. HORN. Thank you, Mr. Chairman.

I am not going to argue with you, Mr. Marshall, on tort law, but they are completely different questions. If you have health care you can have 50 different types of health care at the State level with State programs, but there ought to be one standard which is preventing the absolute, I would say criminal, rise in the cost of health care, caused by frivolous lawsuits. But I will not debate that today, that takes hours.

Mr. MARSHALL. Congressman, if I could respond for a second. I am in favor of tort reform.

Mr. HORN. Yes.

Mr. MARSHALL. But if we are serious about returning power to the States, let us let the States experiment.

Mr. HORN. They have.

Mr. SCHIFF. Will the gentleman yield for a moment?

Mr. HORN. Yes.

Mr. SCHIFF. I have to point out that maybe nationalization of tort law with respect to product liability makes some sense, that there be one standard to judge all products, but we went ahead and nationalized punitive damages if two neighbors get in a fistfight on their front lawns. And so I am in agreement with Mr. Marshall on that. I yield back.

Mr. HORN. Well, that is your committee, Mr. Vice Chairman, that is not——

Mr. SCHIFF. We have oversight of the whole——

Mr. HORN. You are right.

Mr. ZELIFF. Could I just ask a quick question?

Mrs. COLLINS. Well, could I be a referee here, if nobody minds?

Mr. SCHIFF. Wait, it is Mr. Horn's time, if he would like to yield to you. Mr. Zeliff, I think has requested to you, but——

Mr. ZELIFF. Just for a second on that same point and then I will not ask my questions and you can have my time. How is that?

Mr. HORN. OK.

Mr. ZELIFF. Just while he is on the subject of tort reform, if you do not like what we are doing on it, how would you do it?

Mr. MARSHALL. Oh, I like the idea of caps, I think those kinds of things ought to be experimented with. I like the idea of creating greater disincentive to frivolous suits. I think those are good ideas. The question is where do we enact them. Let us let the States experiment with them. It is the traditional province of the States. I think there are a lot of good things to do there, but rather than having one national solution which would prohibit the States from doing things or preempt what the States do, let us keep it where it is. This seems to be an example of the kind of area where the Congress is stepping in, in areas where the States have always been in. You know, the problem is, if you do not have objective set of criterion to decide when Federal intervention is, if that is your

TESTIMONY OF WILLIAM MARSHALL *
PROFESSOR OF LAW - CASE WESTERN RESERVE UNIVERSITY LAW SCHOOL
PRESENTED TO THE HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
JULY 14, 1995

Mr. Chairman and Committee members, thank you for providing me with the opportunity to discuss with you some of the issues regarding the reorganization and reevaluation of the structure and size of the federal government. My name is William Marshall, and I am a professor of law at Case Western Reserve University in Cleveland, Ohio.

The specific issues that I will address concern federalism and federalization -- that is the allocations of government power and authority between the federal government on the one hand and state and local governments on the other. My hope is to provide some insight on such current topics as when it is appropriate to return regulatory and program authority back to the states and when, on the opposite side, it is appropriate for the federal government to move into, or "federalize," areas that were in the traditional jurisdictions of the states.

A. Background -- the values of federalism

Before proceeding to current issues, it may be useful to provide some background on the values of federalism and decentralization. There are, of course, numerous problems created when too much regulatory and programmatic authority is concentrated at the federal level. First, the ability of states to serve as legislative laboratories experimenting with various types of solutions to address particular problems is lost when the federal government imposes its own uniform approach. Second, national uniformity also reduces the ability of states to compete with each other in creating better solutions to difficult economic and social issues. Third, centralized authority places decision-making in a place removed from the actual problems sought to be addressed; and local authorities often have a better, first hand understanding of the particular problems facing their communities. Finally, federalization also diminishes the role of the states as a check on the power of the federal government and cuts into the traditional role of the states as the primary source of the citizens' duties and obligations.

Notwithstanding these problems, the last sixty years have seen an enormous growth in the size of the federal government and the 'federalizing' of state law, by which I mean the increasing involvement of the federal government in matters previously left to the states. Of course, at one level this trend is not surprising. Historically, states and local entities have not always been responsible or adept in responding to pressing economic and social concerns. Moreover, an increasingly interdependent economy and an increasingly national culture, in which the importance of state ties and identities has tended to become diminished, have led to

* currently a white house counsel and drafter of E.O. 13083 6/14/98.

economic and social problems that are national in scope. National problems, in turn, tend to invite attempts at national resolution.

In many cases recourse to a central authority is quite desirable. State boundaries are often inadequate in rationally setting divisions of regulatory authority. Consider water pollution. It does not, for example, make sense to have the Vermont side of the Connecticut River governed by one set of environmental standards and New Hampshire's side governed by another. In other circumstances, however, recourse to a centralized authority may not be appropriate. Is a federal car-jacking law really necessary? Do we need national standards for the control of odometer tampering?

The task, then, is to develop a set of principles from which to evaluate whether governmental authority should be exercised at the state or at the local level.[1] With this in mind let me offer a few observations as to when exercising government authority at the federal level is appropriate.

B. Considerations in support of exercising government authority at the federal level

1. A first consideration is whether the problem to be addressed by regulatory or programmatic intervention occurs as an intrastate matter or whether it is contained within state boundaries. This is the problem raised by the Connecticut River example, noted above. If the regulatory concern crosses state boundaries, then federal jurisdiction over that problem is the most sensible course.

2. A second consideration (termed by economists as the question of 'externalities') is whether the source of the problem that is sought to be redressed occurs in a state different from the state (or states) where a significant amount of the harm occurs. This type of issue often exists in the environmental area where, as it so often happens, the state which is the source of pollution is often not the state which suffers the greatest effect of that pollution. In these circumstances the home state may not wish to address the regulatory issue because the harms fall elsewhere and there is significant advantage to the home state in leaving the matter unregulated. The state of Ohio, for example, might not want to impose environmental regulation on a factory on its side of the Pennsylvania-Ohio border because to do so might increase the operating costs of the factory threatening its competitiveness and possibly jobs even though that factory

[1] I should note that in developing this set of principles the United States Constitution will only be of little help. The Supreme Court has made it quite clear that, with very limited exceptions, the lines of demarcation between federal and state and local power are to be determined as a matter of policy by the Congress and not as a matter of constitutional law by the courts.

might be causing emissions causing pollution damage to those directly to its east -- Pennsylvania. Since Ohio is not suffering the harms of the pollution, it has no incentive to address the pollution concern. In these types of circumstances; i.e. when the costs of one state's activities are suffered by another, federal intervention is again appropriate.

3. A third consideration is whether there is a need for uniform standards. Often decentralized authority is extremely inefficient from an industry's standpoint and can threaten competitiveness by requiring that industry to adjust its operations to become in accord with fifty or more sets of standards. Similarly, at times differing regulatory requirements may be inconsistent making industry compliance virtually impossible. In these circumstances, the creation of one uniform, centrally enforced standard is again appropriate.

4. A fourth consideration that is often forgotten is that decentralization often increases the costs of government thus imposing additional burdens on the taxpayer. For example, in an increasingly technologically and economically sophisticated environment, regulatory intervention often requires the use of highly-skilled experts, analysts, and accountants; and the costs inherent in maintaining this type of regulatory task force are quite sizable. It is therefore less costly and far more efficient for there to be one regulatory authority incurring the costs of these analysts and experts, than to have fifty smaller regulatory task-forces throughout the country. In this sense, the need for centralized governmental authority echoes some of the forces at work in private industry. Economies of scale often demand that a company become larger in order to become more efficient. A similar principle also can apply to government.

5. A fifth consideration is whether there are reasons to distrust action at the state or local level. Most state and local governments, of course, act legitimately and with due concern to all the persons in their jurisdiction. But unfortunately, this is not always true nor has it always been true. There is no doubt, for example, that if anti-discrimination requirements had not been enacted and enforced at the federal level, they would not, in many states, have been enacted or enforced at all.

6. A sixth consideration is whether decentralized authority will lead to circumstances in which little or no necessary regulation will occur because a state will be reluctant to impose regulations on its industry for fear of losing that industry to another state. Let me provide an example. Assume for the moment that pollution control is a desirable goal. Whether a state chooses to actively enforce pollution standards, however, can be risky business. If the state chooses to impose stringent environmental regulations on its companies it may risk having those companies leave the state and move to a competing state

where regulation is much less effective or is non-existent. In these circumstances the state, if it wants to maintain its business climate, could be forced to deregulate. This phenomenon, often called a "race to the bottom," will frequently occur in the absence of national standards that would otherwise inhibit states from competing for jobs by undercutting necessary and valuable regulation of its business and industry.

7. A seventh and final consideration (although let me stress this list is not intended to be exhaustive), is whether placing regulatory authority at the state or local level will seriously undermine regulatory goals because enforcement costs will effectively place the regulatory matter beyond the reach of the state and local enforcement authorities. Let me provide an illustration from my own experience. When I worked in a state's attorney general's office we attempted to enforce a regulatory law against one of the largest corporations in America. We were unable to do anything more than obtain a nominal settlement. Why? It wasn't because the law was unfavorable to our position -- we clearly had the law on our side. Rather the problem was that we simply did not have enough resources to be able to take on a major corporation.

This is not an isolated problem. After all, the annual budgets of many corporations exceed the total budgets of many states, and within a state enforcement agency which has numerous responsibilities, the battery of lawyers representing a large multi-national does not have other distracting priorities. Accordingly before too quickly decentralizing, we must be aware that as industries expand in size and complexity and the dangers they pose to the society become more severe, the cost of monitoring and regulating their activities becomes greater. We, therefore must be wary that if we allow industry, simply on the basis of its size alone, to escape regulation, we are in effect placing them above the law and the public at great risk to potential abuse.[2]

This last consideration leads to the recognition of a dark side within the decentralization debate. We must be extremely concerned that decentralization, when it does occur, is based upon legitimate federalism policies and not based upon a strategy designed to end run legitimate regulatory policy by placing enforcement authority in entities that do not have the resources to effectively monitor and enforce sound and necessary legislative goals.

[2] Because of this concern, we should be wary of abolishing the private tort remedies which also serve as mechanisms to promote regulatory compliance.

C. The politics of the federalism/federalization debate

There is no question that there exists many federal laws and programs that can not be supported by reference to the considerations noted above. There is, in short, significant room to defederalize. But why has federal power expanded as it has? Understanding that issue may assist us in better addressing federalism concerns in the future.

This understanding, surprisingly enough, is not all that difficult. Quite simply, the expansion of the federal government is often as much a result of the dynamics of the political marketplace than a response to truly national concerns. Lobbyists, for example, have quickly learned that their most efficient place to do business is in Washington rather than the state capitols -- if only for the simple reason that is far easier to change one set of statutes than to change fifty state laws. Their own efficiencies, in short, lead lobbyists to Washington rather than to the fifty state capitols.

But federal elected officials also have not responsibly protected federalism's concerns. Again the reason is straightforward. Political pressure often demands that a federal elected official take action on a particular problem in order to demonstrate sensitivity to the concerns of his/her constituents. Consider for example the recent law making car-jacking a federal crime. As far as I know there is nobody who believes that the federal government is better equipped or more motivated to deal with car-jacking than are state and local authorities. But because of the public outcry against this crime, it became extremely difficult for elected federal officials to oppose making this crime a federal offense on the abstract grounds that enforcement is best left to the states. Federal office holders, like all office holders, are in the business of incurring voters' support, and if voters desire a particular type of action, the federal office holder will want to be seen as supporting that action even if the federal office holder honestly believes that the more optimum solution may lie at the state or local level.

Because of the political realities, in short, federalism concerns are likely to have only marginal effect in influencing whether statutes federalizing state law will be approved. The deciding factor will likely continue to be whether the proposed legislation itself is politically attractive in and of itself. Let me make myself clear. I am not suggesting that federalism concerns will never be of some influence to a federal elected official when considering proposed legislative action; but unless the political dynamic is somehow changing, it will seldom be true that popular measures will be defeated because they conflict with a representative's theoretical vision of federalism.

And unfortunately, that dynamic is not changing. Currently even as both sides are singing the praises of returning power to the states, Congress continues to propose legislation furthering the continued federalization of criminal law (including imposing criminal sentencing requirements upon the states) and most dramatically, has proposed the federalizing of state tort law, an area that has traditionally and solely been within state prerogative.

In sum, the time has come for us to seriously reexamine the trend toward federalization that has occurred in the last sixty years and to reverse some of that trend. But it should not be automatically believed that decentralization is always good and centralization is always bad. Rather we should begin to develop a coherent set of principles to begin to address federalization and federalization issues. We are not there yet. A cry to return power to the states while simultaneously pushing for increasing federal jurisdiction over crime and the nationalization of tort law does not reflect a coherent approach to the federalism/federalization debate.

Mr. MCINTOSH. But one of the things he noted was that the Constitution will only be of little help, that the Supreme Court has made it clear that, with very limited exception, the lines of demarcation between Federal and State and local power are to be determined as a matter of policy by Congress and not, as a matter of constitutional law, by the courts.

Now, I'm troubled by that. And I don't want to—you're not a lawyer, are you, Mr. DeSeve?

Mr. DESEVE. I am not a lawyer, no.

Mr. MCINTOSH. I don't want to ask you to make opinion about the law.

Mr. DESEVE. Thank you.

Mr. MCINTOSH. But does that reflect the administration's opinion? And if you want to ask your colleague from OLC if that's its opinion, or does OLC give greater weight to the Constitution?

Mr. DESEVE. I think I can answer that. I don't believe that that reflects the administration's position. I think that the final product in 13083 is a reflection of the administration's position. Mr. Marshall I think at that time was testifying as a private citizen, as a professor.

Mr. MCINTOSH. That's correct. And I'm glad to hear that, because I think that went far.

Does the gentleman from OLC want to—do you want to add anything to that?

Mr. MOSS. [Mr. Randolph Moss, Office of Legal Counsel, Department of Justice]. Well, I have not reviewed Mr. Marshall's testimony. But one thing I might note is there has been substantial development in the law in this area over the past few years, and the Supreme Court has really I think fairly remarkably changed the law in this area. And I don't have the date of his testimony, so I can't put it up against the opinions.

Mr. MCINTOSH. It was July 1995, so maybe some—you may be right. OK. Good. I'm glad to hear that, because I was troubled when I was looking through some of the earlier testimony.

Let me say also, and ask this question, if the Supreme Court has expanded the constitutional protections for the States in some of its decisions, which is the way I would read some of the recent ones, why would the administration decide in its Executive order to go the opposite way and weaken some of the protections that the States have?

Mr. DESEVE. I think the issue about whether or not there's a reference to the 10th amendment or the 11th amendment is dispositive there, and that—I don't think we felt it necessary to reference the constitutionality or the constitutional basis for federalism in the Executive order. We presupposed that and took it into account.

What we tried to do is to look at the recent Supreme Court cases and the Unfunded Mandates Act and bring the Executive order up to date. What we're hearing from many of our State and local government friends is that the language that we used and the way we did that is not something that they're satisfied with, and we do want to talk to them about that.

Mr. MCINTOSH. Well, I have to say, I think when you go—when you have cases that say we're going to defer to the States more than we have in the past, which is a layman's way of looking at

those Supreme Court decisions, to then have an Executive order that tells the regulators, as Michael Horowitz pointed out, "You don't have to offer as much protection, you have the option of preempting the States," seems to me to use those cases as an excuse for going in the wrong direction, and I think that would be unwise.

Whose idea was it to update the Executive order? Do you know, Mr. DeSeve?

Mr. DESEVE. I don't know that there was any one individual who had the idea. Sally Katzen, who was the head of Office of Information and Regulatory Affairs, and folks in the Counsel's Office in the White House had looked at a series of Executive orders. This was not an isolated case. I believe there was one on Indian tribal relations. I believe there was another on families. So it was really a broad look. And I don't think there was one individual who one day went out and said, "Let's do it this way." Sally was the point person within the administration for dealing with those.

Mr. MCINTOSH. And, did Ms. Katzen have the pen? Did she draft the order for that?

Mr. DESEVE. I think that's safe to say, that she was the coordinator. As you know, the way we work within the White House is, we share drafts and we circulate drafts within, so that anyone has an ability to annotate or put in place. I don't know that Sally would have rejected out of hand a particular suggestion or a comment.

And I honestly, I wish I could answer the question, who did the first draft. I think it was probably done by a committee that included OIRA staff, Office of General Counsel staff, DPC staff, NEC staff. It was a really—there really was a lot of coming together on that.

Mr. MCINTOSH. Would you—and you can do this for the record later—submit to us the names of the folks who were involved in that process——

Mr. DESEVE. Sure.

Mr. MCINTOSH [continuing]. Both the original subcommittee and then others who were consulted?

Mr. DESEVE. I will be delighted to. I can give you—you know, again, we certainly indicated that Mr. Marshall was involved. Ms. Katzen was involved. We had folks from NEC. And let me be very careful to check and give you the whole list. I can give you a partial list now. Let me give you the whole list of those who've been involved. I know you have made a document request as well, and may we package that with the document request so they both come up at the same time?

[The information referred to follows:]

The following people were a part of the working group on the "Federalism" Executive order.

Office of Management and Budget: Sally Katzen was the lead and Jefferson Hill was her primary support staff.

Office of the Vice President: Lisa Brown

Department of Justice: Randy Moss

White House Counsel's Office: Bill Marshall

Mr. MCINTOSH. That would be great. Are you able to do that fairly expeditiously?

Mr. DESEVE. I will have to talk to Bob Damus, the general counsel, who got the document request. He is going to try to respond to your deadline. You gave him a target date. He is going to try

to respond. If he does not, if there is any problem, he will contact staff to let them know what the issues are.

Mr. MCINTOSH. Let me ask you on that, one of the things that would be helpful is if you have a timeframe that you ascertained before that response is due, let us know so we can understand the timeframe in which you are working on.

Mr. DESEVE. I understand that. I will be happy to do that.

Mr. MCINTOSH. I have another round of questions. Bernie, do you have some?

Mr. SANDERS. I do, Mr. Chairman. Getting back to my concern about the Clinton administration's not consulting with State or local officials, let me ask the elected officials up here, Mr. Racine and Mr. Schwartz, if they have the same concerns about congressional action which did not perhaps consult with local or State government? For example, Mr. Racine, then Mr. Schwartz, there was legislation passed by a Republican controlled Congress that would preempt State law by removing securities fraud cases from State courts.

Do you recall any consultation on that issue?

Mr. RACINE. I do not.

Mr. SCHWARTZ. I do not, sir.

Mr. SANDERS. We talked a moment ago about the Telecommunications Act, which would preempt local authority with regard to siting towers and antennas on property. Doug, do you remember?

Mr. RACINE. I recall only that it happened, and then we had to respond to it.

Mr. SANDERS. We didn't even know it happened. We learned after the fact. This was a huge bill, this was not a major issue. Mr. Schwartz, do you recall any discussion on that?

Mr. SCHWARTZ. No, sir.

Mr. SANDERS. The Republican Contract with America, there were provisions there that would preempt State law by putting a cap on punitive damages. Anyone recall? Mr. Racine, Mr. Schwartz, do you recall discussion with the States on that one?

Mr. SCHWARTZ. Not to my recollection.

Mr. RACINE. No.

Mr. SANDERS. Abortion is a very controversial issue, which I don't want to get into right now. The State of Vermont has a liberal approach and believes that women and their doctors should be making those decisions. Recently in the last couple of years the Congress has passed legislation which would override State law with regard to late term abortions.

Mr. Racine, do you recall any discussion with Vermont doctors who might have a different opinion on that?

Mr. RACINE. Not that I am aware of, no.

Mr. SCHWARTZ. It is not a municipal issue.

Mr. SANDERS. I could go on and on. I guess the point I would make, not defending the Clinton administration in this action, is to say that I very often find that when people are ideologically motivated to pass something, they move very, very quickly. I very rarely, and I am not saying it does not happen, but I very rarely mind folks who are saying, you know, I really would like to push this thing throughout the country, but, you know, I respect local and State government and I am not going to do it. Sometimes that hap-

pens, but I have found that both Republicans and Democrats have felt that the idea they were fighting for was more important than the respect due to local and State governments.

Doug, you mentioned a little while ago that in fact despite the fact Vermont is a small State, that in fact you thought we got a pretty good hearing from the Clinton administration on a number of issues.

Mr. RACINE. Just based on the discussions I had to prepare my testimony today, I spoke with our commissioner of the Department of Social Welfare and the commissioner of the Department of Public Safety, and they both, without prompting, emphasized they felt they had a good working relationship with the people at their respective Federal agencies; that not only were they cooperative, they were actually very supportive and worked as partners with them to develop some of the Vermont initiatives I talked about here.

Mr. SANDERS. We only deliver three electoral votes, right?

Mr. RACINE. We only have three, but we feel our voice gets heard.

Mr. SANDERS. Thank you. Thank you, Mr. Chairman.

Mr. MCINTOSH. Thank you, Mr. Sanders. My local officials are glad they don't have to address the question of partial birth abortion, but maybe they would want to be consulted. I think it would be wise for us to do so.

Let me turn to Mr. Horowitz. You mentioned in your testimony a characterization of a waiver-based "let's make a deal" government, instead of principled federalism. Could you elaborate on that for us?

Mr. HOROWITZ. Yes, Mr. Chairman. That really gets to one of the things at the end of Mr. DeSeve's comment that he highlighted as something that indicated the Clinton administration's commitment to principles of federalism when he talked about section 5 of this Executive order that provides for expedited, more flexible waiver policies.

I think analysis of that provision is of great importance, because that provision was among the few provisions in the prior Clinton Executive order that was not revoked, but was carried forward.

In the first Clinton Executive order, which kept the presumptions in favor of States, as did the prior Reagan Executive order, adding a flexible waiver provision was a good thing. It was yet another mechanism that further empowered States to get their policies adopted.

But when the presumption was flipped, as indeed it was in the second Clinton Executive order, keeping the waiver provision in there really told what the game was about, where this Executive order was coming from. It was, gee, we will be very kind to you, we will be very flexible when you come petitioning us.

I noted, for example, Lieutenant Governor Racine gave us an example of terrific federalism, the waiver that the regional office gave to the State of Vermont. By the Reagan concept, by my concept, that is the reverse of federalism. Waiver federalism is big daddy getting importuned and being generous rather than not generous. That is not a structural kind of federalism. That is a "let's make a deal" kind of approach where Uncle Sam is more generous rather

than being less generous. That is not, it seems to me, what the subject of this hearing is about.

What the subject of this hearing is about is moving away from waivers as the mechanism of making decisions, it is moving away from this sort of "let's make a deal," case-by-case negotiation over particular matters, toward a structural redefinition of powers that says irrespective of the issue, Feds, you have less leverage. You must defer in maximum circumstances to what State government laws are or what State government policies are, and if you do not, you better explain it.

So restoring the presumption is terribly important. Repealing this God-awful, indefensible Executive order is, as I say, the easy part of the thing. But I do note that retaining the waiver provision gives away the game in terms of the kind of federalism that this small band within the White House thinks is appropriate.

I will say one other thing about Mr. DeSeve's testimony. I used to handle Executive orders and I found it striking when you asked about the players in the process, that he just talked about a few people at the White House. We used to consult with the Federal agencies as well. This was not only non-consultative to State and local governments, it may well have been non-consultative with respect to the rest of the Federal Government, another element that I find troublesome and striking.

Mr. MCINTOSH. Let me ask you this: What do you think should be done, including should Congress act to pass by statute the substance of the earlier Executive order?

Mr. HOROWITZ. I think you need to go further, is my point. I think first we need to confine ourselves to regulatory federalism, and again, Mr. Sanders, your comments are trenchant. To you, motor-voter as a legislative matter is not preemptive but ought to be passed because it enforces the Constitution. To other conservatives who look at the provisions of the Constitution that say you cannot take property without just compensation, the takings bill is enforcement of the Constitution. That is a debate that is not going to be resolved except on the floor of Congress.

But when you are talking about regulatory federalism, the power of unelected bureaucracies to override elected officials in State and local governments, there are structural things that need to be done, I would say legislation that really goes further, that defines when in the most careful terms, and doesn't leave it as vague as this Executive order. The Executive order was useful because it set a tone. But this administration has indicated it will only be dragged kicking and screaming back to that kind of regime.

I think we need to have legislation that helps undermine the capacity of unelected Federal bureaucracies to override the laws passed and the constitutions of individual States. I think a tougher legislative approach is very much in order.

Mr. MCINTOSH. Mr. Hickok, what do you think should be done?

Mr. HICKOK. I would tend to agree. When we issued the Executive order previous to that, there was a report put together by the Working Group on Federalism which went into great detail trying to talk about the status of federalism. At that point in time, it may seem hard to believe, but if you looked at 200 years of federalism history as interpreted by the courts, as acted upon by Congress and

the executive branch, quite literally you could not name anything a State could do with complete confidence knowing that it could not be overturned either by the courts or by Congress. The only thing we could come up with was they could choose where to locate their capital and be confident no one could stop them from doing that. Things are looking better, but the fact is because of the fact that federalism as a principle has not been the animating principle it should be for 200 years, it is very important that legislation be considered to make sure that there are limits placed on the executive branch, and indeed limits placed on Congress.

The whole idea of a written Constitution and a 10th amendment of that Constitution is to get in the way, to make it difficult to do whatever you want to do. Talking to your point, Mr. Sanders, it really is part of the reason you have a Constitution, so you cannot just pass a bill into law because you think it is a good idea. You have to pay attention to constitutional provisions. I would argue that is one thing we need to do.

Mr. MCINTOSH. Let me ask unanimous consent that we put that report into the record.

[The information referred to follows:]

The Status of Federalism in America

A Report of the Working Group on Federalism of the Domestic Policy Council

November 1986

[White House Seal appears here]

THE STATUS OF FEDERALISM IN AMERICA

A REPORT OF THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL

EXECUTIVE SUMMARY

The Working Group on Federalism was established by the Domestic Policy Council in August 1985. It is an inter-agency working group consisting of representatives of nine agencies and the White House. The central purpose of the Working Group is to develop strategies for ensuring that federal law and regulations are rooted in basic constitutional federalism principles. The Working Group meets regularly to identify and develop initiatives for restoring a proper federal balance to American government. In addition, the Working Group has become a forum within the Administration for the discussion of important issues relating to the proper relationship between the national government and the governments of the several States.

In keeping with its assigned mission, the Working Group has prepared for the Domestic Policy Council a comprehensive report analyzing the contemporary status of constitutional federalism in America.

Chapter I

The last 200 years have witnessed the evisceration of federalism as a constitutional and political principle for allocating governmental power between the States and Washington. The Founding Fathers' vision of a limited national government of enumerated powers has gradually given way to an expansive, intrusive, and virtually omnipotent national government. States, once the hub of political activity and the very source of our political tradition, have been reduced -- in significant part -- to administrative units of the national government, their independent political power usurped by almost two centuries of centralization.

Chapter I of the Report seeks to rescue federalism from the definitional confusion that has come to surround it. Federalism, as understood by the Framers of the Constitution, requires a recognition that the authority of the national government extends to a few enumerated powers only and that all powers not delegated by the States to the national government, nor denied to the States by the Constitution, are reserved to the States. James Madison in Federalist No. 45 stated:

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; . . .

> The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

This understanding of federalism is made explicit in the Constitution by the Tenth Amendment. Federalism is a constitutionally based, structural theory of government designed to ensure political freedom and responsive, democratic government in a large and diverse society.

Chapter I also provides an overview of the historical trend toward centralization of government in this country. The major thrust toward centralization has occurred during the twentieth century, with the Depression of the 1930s leading to a fundamental transformation in the nature of the relationship between the national government and the States. The national government emerged from the Depression as that government to which many Americans look for a response to their problems, its powers having been greatly enhanced through its virtually boundless power to condition a State's receipt of federal money on the State's conformity to national policy priorities. While the tendency toward centralization in American government has been shaped by a host of political, social, and economic trends, centralization could not have occurred to the extent it has without an expansive and in some cases erroneous judicial reading of the scope of national governmental powers.

Chapter II

The nationalization of state sovereignty can be traced in large part to the way the Supreme Court and the Congress have applied and interpreted the Constitution. Chapter II of the Report surveys the significant doctrinal developments in constitutional law and congressional action that have led to the erosion of federalism in this country. Congress, through grasping extensions of the Necessary and Proper Clause, the Commerce Clause, and the spending power, has increased the size and extended the reach of the national government far beyond the scope of the national powers enumerated and fairly implied in the Constitution. The Supreme Court, however, through the power of constitutional interpretation, has been the dominant force in the decline of federalism, either by ratifying actions taken by the political branches of government or interpreting (in truth, amending) the Constitution so as to place limitations on the States not expressed in the Constitution itself.

Perhaps the greatest blow to federalism has come from the Congress' and Supreme Court's interpretation of the Commerce Clause. Available evidence suggests that the Framers' principal reason for empowering Congress to regulate interstate commerce was to permit the national legislature to eliminate, or at least control, state-created trade barriers; power to regulate

intra-state commerce was not granted to the national government. By 1942, however, the Supreme Court had opined that Congress could use the commerce power to regulate purely local activities that, when considered alone, have no impact on interstate commerce, so long as the class of such activities might reasonably be deemed to have substantial national consequences. This "cumulative effect" principle opened the flood doors of federal regulation. Because virtually all the objects over which the States' reserved sovereign powers bear at least some theoretical relationship to commerce, it is not an overstatement to say that, given the Supreme Court's Commerce Clause jurisprudence, the States exercise their reserved powers only at the sufferance of the national government.

In addition, Congress' exercise of the spending power has essentially redefined the relationship between the national government and the governments of the States -- undermining the sovereign governing authority of the States (1) by intruding into areas of traditional state concern, (2) by transforming States into administrative units of the national government, and (3) by contributing to a gradual erosion in the States' control over their own subordinate political units. The expansive use of the spending power by Congress -- especially the practice of conditioning eligibility for federal grants on compliance with regulations having little or no relationship to the program being funded (e.g., the national maximum speed limit) -- has led to a major expansion in the practical power of the national government to dictate not only state budget priorities, but also the very provisions of state laws and constitutions.

The doctrine of "implied preemption" has been used by the Supreme Court to justify supplanting state regulations spanning the full range of state powers reserved under the Constitution. Under this doctrine, state laws and regulations have been invalidated under the Supremacy Clause not because they have been found to violate a specific constitutional prohibition, or to conflict directly with valid federal laws, but because the Court has "implied" a congressional intent to preempt state regulation in an entire field of activity. As a result of this doctrinal development, the validity of state regulation, in virtually any field, can be confidently predicted only when Congress has expressly stated that such regulation is not preempted.

The federal system of government established by the Constitution has also been undermined by the courts affirmatively exercising power not granted to the federal judiciary by the Constitution. In such cases as Roe v. Wade and the Reapportionment Cases, courts have imposed limitations on the States that are not created by the Constitution, but by the courts themselves.

Finally, the nadir in the decline of federalism was reached last year in Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, the Supreme Court rejected the proposition that

available alternatives should be closely examined and found wanting before an amendment to the Nation's fundamental charter is sought. An alternative approach is suggested by the Supreme Court's conclusion in Garcia that "the procedural safeguards inherent in the structure"[8] of the national government can serve to protect the sovereign interests of the States. Such an approach would call upon the political branches of the national government to reform their institutional processes to ensure that these processes reflect a serious regard for the sovereignty of the States and the principles of federalism established by the Constitution.

The last chapter of this report outlines a number of ideas for reform designed to impose such a discipline on the institutional processes of the political branches. The Federalism Working Group is prepared to study and to submit for the Domestic Policy Council's consideration specific measures for reform based on both the constitutional approach and the institutional approach to restoring the Framers' vision of a truly federal system of government. In keeping with the principles of federalism, the Working Group will, of course, seek to involve in its deliberations persons and organizations representing the interests of the States.

I. THE CENTRALIZATION OF GOVERNMENT IN AMERICA

A. Introduction

In order to understand what federalism is, one must first understand what it is not. Federalism is not just intergovernmental relations. Perhaps because a large measure of the national government's activity concerns the administration of programs among the various levels of government, many who work in government tend to equate federalism with administration. They therefore tend to view restoring federalism as an attempt at improving the management of federal programs. Certainly an important component of federalism is fluid and cooperative relations between the States and the national government. But it is not primarily a managerial concept.

Nor should federalism be confused with the Administration's initiatives regarding volunteerism and privatization. These important strategies are aimed at accomplishing the important goal of getting the national government out of certain ventures that can be better pursued through the energy and ingenuity of the private sector. And while one of the important goals of revitalizing federalism is to reduce national government activity through deregulation, it is important to remember that States would retain, under an authentic federal system, the public policy options of continuing, augmenting, or eliminating the type of regulations currently imposed by the national government.

Rather, federalism is a constitutionally based, structural theory of government designed to ensure political freedom and to ensure responsive, democratic government in a large and diverse society. It rests on political philosophy, experience, and an astute understanding of human nature. In a democracy as large as the United States, the government is responsive only to the extent that citizens can influence the formulation of public policy through the ballot box. This is only possible when the citizens have a working knowledge of the policymaking process and a close relationship to that process. The more distant the government, the less likely is the electorate to be adequately informed of the policies being debated, and the less likely is

the government to be fully informed of the electorate's sentiments. Federalism is critical to good government because it strengthens the tie between policy formulation and constituent desires.

President Reagan, in a "Statement of Federalism Principles" issued on April 8, 1986, provided a concise and forceful explanation of federalism. That statement follows in its entirety:

1. Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

2. The people of the states created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual states. All other sovereign powers, save those expressly prohibited the states by the Constitution, are reserved to the states or to the people.

3. The constitutional relationship among sovereign governments, state and national, is formalized in and protected by the Tenth Amendment to the Constitution.

4. The people of the states are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

5. In most areas of governmental concern, state and local governments uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Jefferson's words, the states are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

6. The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several states according to their own conditions, needs, and desires. In the search for enlightened public policy, individual states and communities are free to experiment with a variety of approaches to public issues.

7. Acts of the national government -- whether legislative, executive, or judicial in nature -- that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Founders.

8. Policies of the national government should recognize the responsibility of -- and should encourage opportunities for -- individuals, families, neighborhoods, local governments, and

private associations to achieve their personal, social, and economic objectives through cooperative effort.

9. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

10. These principles should guide the departments and agencies of the national government in the formulation and implementation of policies and regulations.

Like any theory, federalism can be misused, as it was during the tumultuous time of resistance to federal efforts to eradicate racial oppression in many States. But abuse of federalism in the past should not blind policymakers to its contemporary and more enduring virtues: promoting informed public policy decision-making; fostering public policy experimentation; providing competitive, timely accountability of public policy to the electorate; and preserving political liberty. The beneficiaries of federalism's virtues are the people. As the bicentennial of the Constitution approaches, it is not only appropriate but essential that the values underlying federalism be revitalized and restored to constitutional prominence.

B. The Origins of Federalism

Federalism emerged from the Constitutional Convention as the product of compromise. Assembled to consider ways of revising the Articles of Confederation, the delegates quickly moved toward reforms of a more fundamental nature. Gouverneur Morris had pointed out to his colleagues the distinctions between a federal or confederal government and a national or unitary government: "the former being a mere compact resting on the good faith of the parties; the latter having a complete and compulsive operation."[9] The fundamental flaw of the Confederation was that it was indeed nothing more than a "league of friendship" among the thirteen States, "a compact resting on good faith." As an alternative, Edmund Randolph of Virginia had introduced a plan that called for a strong central governing authority. The "Virginia Plan" included a "supreme Legislative, Executive and Judiciary" and

represented a radical departure from the system under the Articles.[10] Randolph's was a national or unitary plan. It became the primary focus of debate during the Convention. The fundamental issue -- a federal versus a national plan -- came up again and again.

The Virginia Plan succeeded in changing the terms of the debate during the Convention. While the delegates had originally squared off on whether the government should be federal or national -- as those terms had been traditionally understood -- they soon were debating just how national the new government would be. The opponents of a purely national system had been unable to defend successfully the purely federal principle. Instead they attempted to ensure that some federal features were included in any plan the Convention finally adopted. The compromise finally reached was one between the nationalists and the federalists, and the Constitution that was produced contained provisions to satisfy both. As James Madison (a nationalist at the Convention) would later argue: "The proposed Constitution . . . , even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a combination of both."[11]

During the ratification struggle, the character of the system of government to be established by the new Constitution -- whether it was national or federal -- became the focal point of extended debate. Madison himself argued that the new government, while certainly different from that which existed under the Articles of Confederation, was hardly national. After all, he said, the Constitution provided for a national government of limited powers only: "[T]he proposed government cannot be deemed a <u>national</u> one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[12] According to Madison, the new Constitution provided for a federal system of government: a system that combines States retaining sovereignty within a certain sphere with a central body possessing sovereignty within another sphere, and a third sphere where concurrent

jurisdiction obtained. But the great bulk of the power and responsibility for governing the society continued to reside with the States. In Federalist No. 45 Madison states:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States.[13]

Under the federal system contemplated by the Constitution, the States would "form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority than the general authority is subject to them, within its own sphere."[14] Elsewhere in The Federalist Papers, Alexander Hamilton, an ardent advocate for a national system of government, argued that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States."[15] The balance of power among the various States and the new national government under the proposed Constitution was such that Hamilton opined that "there is greater probability of encroachments by the members upon the federal head than by the federal head upon the members."[16]

Opponents of the Constitution were not easily persuaded. James Winthrop, for example, believed "[i]t is a mere fallacy . . . that what rights are not given are reserved."[17] Samuel Adams warned that if the proposed national government was established, "the Idea of Sovereignty in the States must be lost."[18] So great was the fear that the new national government would eventually consume the States that proponents of the Constitution were compelled to make assurances that a bill of rights, including a provision explicitly reserving to the States

all nondelegated powers, would be considered by the First Congress. Eight States voted for the Constitution only after proposing amendments to be adopted after ratification. All eight of these included among their recommendations some version of what later became the Tenth Amendment.[19]

Proposed in 1789, and ratified as part of the Bill of Rights in 1791, the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Amendment was intended, as Chief Justice Harlan Stone stated, "to allay the fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[20]

Federalism at the time of the framing and ratification of the Constitution thus meant that the States would continue to occupy an important place in American government. Indeed, according to those who supported the Constitution as well as those who opposed it, the States were considered essential to the proper functioning of government because most of the activities of government would take place in the States. The new national government was limited, exercising enumerated powers only. The States retained sovereignty in all areas not delegated to the national government.

For the generation of men and women who lived during the founding years of the republic, States mattered. After all, the States preceded the Constitution. The delegates who wrote the Constitution were delegates from the States and votes at the Constitutional Convention were cast by States. The Constitution was ratified by delegates in conventions in the States. The States provided the primary source of identification and political loyalty for most citizens. The federal character of the Constitution was designed to ensure that the States continued to matter.

For the Framers, federalism was important to the design of the new Constitution for several reasons. By ensuring that the activities in public life most directly affecting the people take place in the States and in local governments, federalism fosters

custom-made laws to fit the special characteristics of particular communities. Further, the people will be more lively and informed participants in the process of lawmaking at the local and state level.

According to the plan of the Constitution, active state and local government is essential to the successful functioning of society. The principle of federalism ensures the continued strength of the States vis-a-vis the national government. It is a fundamental component of constitutional government. The following are the primary ways in which the Constitution establishes and promotes federalism:

> -- The principle of federalism is reflected in the structure of the Constitution. The powers of the national government are enumerated. The States retain a designated sphere of sovereignty to be exercised exclusively, or concurrently with the national government.
>
> -- Federalism is also reflected in the system of checks and balances created by the Constitution. Not only do the three branches of the national government check one another, but the national and state governments also check each other. According to Alexander Hamilton in Federalist No. 85: "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."[21] And, as Madison states in Federalist No. 52, "The federal legislature will not only be restrained by its dependence on the people, as other legislative bodies are, but that it will be, moreover, watched and controlled by the several collateral legislatures, which other legislative bodies are not."[22]
>
> -- The Tenth Amendment to the Constitution confirms the premise implicit in the notion of enumerated powers: that all powers not delegated to the national government or denied to the States are reserved to the States.
>
> -- The sovereignty of the States is also preserved by Article V of the Constitution, which outlines the exclusive processes for amending the document. Amendments must be ratified by three-fourths of the States.

-- The sovereignty of the States is recognized in the Constitution in the makeup of the Senate, where, according to Madison, "the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty."[23]

-- According to Article I, section 4 of the Constitution, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."

-- The electoral college system of selecting the President and Vice President of the United States rests upon the political sovereignty of the States.

The federal character of our government under the Constitution is thus guaranteed by the document. But as a practical political concern, federalism is both strengthened by and essential to the health of popular government. Active and vital state and local governments are essential to the maintenance of political liberty, encouraging self-government in its most meaningful sense. Federalism provides for a form of government that fosters good citizenship while protecting fundamental liberties. As Alexis de Tocqueville wrote in Democracy in America, "State sovereignty enfolds every citizen and in one way or another affects every detail of life. [It is supported by] memories, customs, local prejudices [and] all those things which make the instinct of patriotism so powerful in the hearts of men."[24]

C. Historical Overview

While the Constitution establishes a federal system in which the povers and responsibilities for governing are divided between the national government and the governments of the several States, the history of our nation has been, by and large, a history of the centralization and consolidation of government and politics. Contrary to the vision of the Framers of the Constitution, the national government today dominates American politics. While the Constitution created, as Chief Justice Salmon Chase declared, "an indestructible Union, composed of indestruc-

tible States,"[25] the relationship of the States to the national government has been shaped more by the clash of interests than the political philosophy embodied in the Constitution.

As the analysis in Chapter II points out, the reserved powers of the States, while guaranteed by the Tenth Amendment, have gradually been nationalized through the national government's aggressive exercise and expansive interpretation of its enumerated powers. Article I, section 8, for example, states that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." At first glance, the Necessary and Proper Clause of the Constitution does not seem to represent a threat to state sovereignty. After all, the clause refers to powers "vested by this Constitution" in the national government -- that is, powers enumerated in the document itself. But over the years, beginning in 1819 with Chief Justice John Marshall's famous opinion in McCulloch v. Maryland,[26] the clause has provided a vehicle for the steady increase in the power and activity of the government in Washington.

Congress' power under section 8 to "regulate Commerce . . . among the several States" has been interpreted by the Supreme Court as equipping the national government with a virtual constitutional license to prescribe uniform public policies in an almost limitless range of areas traditionally within the province of state governments. The Framers of the Constitution recognized the importance of the commerce power. According to Madison, the power to regulate interstate commerce was essential to the power to regulate commerce with foreign nations. The absence of national authority in this area might lead, in Madison's words, to "serious interruptions of the public tranquillity."[27] Moreover, the Framers recognized that the economic health of the fledging republic would be tied to the ability to conduct business throughout the States, unfettered by unnecessary and burdensome state and local regulation. Much of

the economic and commercial growth of this country can be credited to the ability of the national government to exercise the commerce power with wisdom and restraint. The commerce power, however, has also provided a means for the national government to create national economic and regulatory policies that not only constrain action by the States in areas traditionally reserved to the States, but also undermine the sovereign decisonmaking authority of the States, which is guaranteed by the Constitution. Moreover, the authority of the national government to preempt state action, even in areas of traditional state authority, has its roots primarily in the Commerce Clause and the Necessary and Proper Clause.

The Constitution, however, only provides the framework within which the interests of the States and the national government have competed with each other. The gradual centralization of American government is as much the product of economic growth and societal change as it is the result of the tensions inherent in our constitutional system of government.

The single greatest challenge to federalism and state sovereignty was, of course, the Civil War. The divisiveness of slavery had long been an issue in American politics, undermining the strength of federalism from the beginning. But the major thrust toward centralization has occurred during the twentieth century. In 1913, the Constitution was amended to provide for the income tax. The Sixteenth Amendment gave the national government a tremendous advantage over the States regarding raising revenue. The national income tax itself does not impinge upon the authority of the States. But it has provided the resources necessary for the national government to grow dramatically and has, consequently, drained the States of much of their tax base. It is little wonder that most Americans think of Washington when they think of government today. After all, most of their tax money goes to Washington to underwrite the ubiquitous operations of the national government.

The Seventeenth Amendment, ratified the same year as the income tax amendment, provided for the direct popular election of

United States Senators. Originally, Senators were elected by state legislatures. The Senate was designed to be a federal institution within the Congress. The Seventeenth Amendment substantially diluted the original purpose of the Senate -- to provide a "constitutional recognition of the portion of sovereignty remaining in the individual States."[28]

The Depression of the Thirties produced the greatest impetus for centralization. As the States experienced tremendous economic hardship, they turned to Washington for assistance. The national government emerged from the Depression as that government to which many Americans looked for a response to their problems, its powers having been greatly enhanced through its virtually boundless (according to contemporary Supreme Court jurisprudence) power to condition a State's receipt of federal money on the State's conformity to national policy priorities. And it is important to point out that the national government assumed many of the responsibilities of state government by and large without any systematic effort to consult state elected officials.

The centralizing tendency in American politics has been fueled by other events as well. America's experience in two world wars and her influence on world events has contributed to a sense of nationalism that is in tension with loyalty to state governments. More recently, the attitude that the government in Washington can and should take the leading role in grappling with the problems of society has been nurtured by such initiatives as John Kennedy's "New Frontier" and Lyndon Johnson's "Great Society."

Noting that "[t]he last two decades have seen an unprecedented growth of federal regulatory activity," Justice O'Connor has recently observed that as late as 1954

> one could still speak of a "burden of persuasion on those favoring national intervention" in asserting that "National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Today, as federal legislation and coercive grant programs

> have expanded to embrace innumerable activities that were once viewed as local, the burden of persuasion has surely shifted, and the extraordinary has become ordinary.[29]

The charts in the Appendix to this report provide telling evidence of the degree to which the national government has come to dominate American government. They illustrate the dramatic growth, in number and scope, of federal regulations. More importantly, even in those program areas in which the States remain principally involved, state governments are rigidly constrained by a network of regulations regarding how money shall be spent, who shall spend it, how it shall be accounted for, and a host of requirements either unrelated or tenuously related to the purposes of the program. Moreover, these regulatory regimes have been established generally without any systematic effort to consult with the States. This most recent development -- the advent of "regulatory federalism" -- is perhaps the most disturbing feature of centralization, as it has largely transformed the States from the sovereign entities that in 1787 established the Constitution, and thus the national government, into administrative units of the national government. A 1984 study by the Advisory Commission on Intergovernmental Relations reported that most federal regulations were viewed as "expensive, inflexible, inefficient, inconsistent, intrusive, ineffective, and unaccountable"[30] by various representatives of state and local governments.

The regulatory morass that has come to engulf intergovernmental relations in this country has resulted from four strategies. Some regulations are the product of direct orders, which must be complied with under threat of civil or criminal penalties. For example, the Equal Employment Opportunity Act of 1972 bars job discrimination by state and local governments, extending requirements that had been imposed upon private employers since 1964.

A second source of regulation are "crosscutting" requirements: requirements imposed across the board on all federal grants to further various national policies. The Office of

Management and Budget has identified 68 crosscutting regulatory requirements presently in effect, dealing with issues ranging from discrimination to environmental protection.[31] Most have been adopted since 1969.

"Crossover" sanctions are national requirements that apply to one program area or activity in order to influence state and local policy in some other program area or activity. The failure to comply with a crossover requirement can result in a reduction or termination of funds in another, separately authorized program. The Emergency Highway Energy Conservation Act of 1974 provides a good example of how crossover sanctions work. The Act, as originally passed, prohibited the Secretary of Transportation from approving any highway construction projects utilizing federal funds in States having a speed limit in excess of 55 miles per hour.

Yet another regulatory strategy employed by the national government is partial preemption. Here the federal laws establish certain legal standards and the States are permitted to exercise their own police power in the area so long as the federal standards are satisfied. Perhaps the best example of partial preemption is the Clean Air Act Amendments of 1970. The Amendments establish national air quality standards and permit States to develop effective plans for implementing the policies necessary for achieving those standards.

While the tendency toward centralization in American government has been shaped by a host of political, social, and economic trends, centralization could not have occurred to the extent it has absent an expansive and in some cases erroneous judicial reading of the scope of national governmental powers. Over the course of two centuries of Supreme Court jurisprudence, the constitutional restrictions on the ability of the national government to encroach on the sovereign terrain of the States have gradually eroded to the point where virtually the only impediment that remains is Congress' sense of self-restraint. The next chapter of this report briefly traces the principal doctrinal developments in constitutional law that have played a major role in the erosion of federalism.

II. THE CONGRESS, THE SUPREME COURT, AND THE EROSION OF FEDERALISM

Chapter I of this report has given an overview of the Founders' intent concerning federalism and the historical trend toward centralization in the relationship among the governments in the United States. As we have seen, that trend has been shaped by both political and judicial influences -- as Congress and the executive branch have expanded the power and role of the national government, the Supreme Court has in effect ratified that expansion through broad readings of various provisions of the Constitution.

This chapter seeks to summarize the interpretive evolution of the constitutional provisions that have had the greatest significance for federalism. After describing how the Necessary and Proper Clause in Article I, section 8 has served as a means by which Congress has expanded the powers specifically granted elsewhere in section 8, this chapter surveys the political and legal evolution of the commerce power, the Tenth Amendment, the spending power, and the doctrine of implied preemption. The chapter closes with a discussion of several Supreme Court decisions that have great significance for federalism, but are not derived from a common constitutional provision or doctrine.

A. The Necessary and Proper Clause

Because the national government is a government of limited, delegated powers, it must be able to justify any exercise of power as both authorized by and not prohibited by the Constitution. Seventeen separate clauses in Article I, section 8 enumerate the specific powers of Congress. The eighteenth and final clause adds the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Before discussing the impact on federalism of Congress' exercise, over time, of some of the more significant specific powers enumerated in the first seventeen clauses of section 8, it is important to understand the relationship between those clauses

and the last clause. The Necessary and Proper Clause is not an independent source of power, but merely an authorization to use whatever means may be necessary and proper to implement the powers otherwise enumerated or specified.[32] Nevertheless, the interpretation given to the words "necessary and proper" directly affects the overall scope of congressional power under section 8. Thomas Jefferson believed that the Necessary and Proper Clause, if interpreted broadly, would "swallow up all the delegated powers and reduce the whole to one power"; Alexander Hamilton, on the other hand, argued that "[t]he only question must be . . . whether the means to be employed . . . has a natural relation to any of the acknowledged objects or lawful ends of the government."[33]

Hamilton's broader interpretation was ultimately accepted by the Supreme Court. In 1819, the Court, in McCulloch v. Maryland, upheld the power of Congress to create a national bank and determined that the States had no power to tax it. Eschewing the view that "necessary," as used in this clause, "limit[ed] the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory" (as Jefferson had contended), Chief Justice Marshall (adopting Hamilton's view) stated that "its use, in the common affairs of the world, or in approved authors, . . . frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."[34] Thus, although the power to establish a bank or to create a corporation cannot be found among the enumerated powers, the Court held that establishment of a national bank was a necessary and proper means of implementing such enumerated powers as the powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[35] Summing up, Chief Justice Marshall stated:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[36]

As will be evident in the ensuing discussion in other sections of this chapter concerning Congress' expansive use of the seventeen enumerated powers in Article I, section 8, Chief Justice Marshall's broad interpretation of the Necessary and Proper Clause has facilitated Congress' natural tendency to expand the national government's domain. Moreover, his view has consistently been reaffirmed by the Supreme Court. In 1927, for example, the Court declared that Congress "possess[es] not only such powers as are expressly granted to [it] by the Constitution, but [also] such auxiliary powers as are necessary and appropriate to make the express powers effective."[37] Indeed, the Court has gone so far as to say that it will sustain acts of Congress so long as they are necessary or appropriate to effectuate legitimate ends: Congress may "pass all laws necessary or proper for carrying into execution any of the powers specifically conferred" and "may make use of any appropriate means for this end."[38]

The Necessary and Proper Clause was not intended to be a separate source of congressional power, but merely the means by which Congress can implement powers specifically granted. The clause, however, has been the principal vehicle by which the Supreme Court has expanded the scope of Congress' other enumerated powers, especially the commerce power. As Justice O'Connor has observed:

> [T]he Court based the expansion [of the commerce power] on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." . . . It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power.[39]

B. The Commerce Power

One of the principal reasons for the calling of the Constitutional Convention was the proliferation of trade barriers among

the States. Article I, section 8 of the Constitution, which gives Congress the power to "regulate Commerce . . . among the several States,"[40] was designed to address this problem. Indeed, the available evidence suggests that the Framers' sole reason for giving Congress authority over interstate commerce was to permit the national legislature to eliminate, or at least control, state-created trade barriers.[41] James Madison, after the Constitutional Convention, maintained that the Commerce Clause was not intended to confer upon Congress a "power to be used for the positive purposes of the general government."[42]

At the Constitutional Convention, the delegates mentioned only nine times congressional control over "Commerce . . . among the several states."[43] Each of these references was to Congress' authority to protect the States from economic injury caused by the hostile restrictions of sister States.[44] Similarly, all of the statements made during the ratification process indicate that Congress' power over interstate commerce was intended to be limited. Edmund Randolph, for example, in his letter to the speaker of the Virginia House of Delegates, said that the "general government ought not to be the supreme arbiter for adjusting every contention among the states," particularly those relating to commerce.[45]

The discussions of the commerce power in The Federalist Papers also deal with Congress' authority to remove state-created barriers. James Madison stated that the Commerce Clause was intended to bring "relief [to] the States which import and export through other States from the improper contributions levied on them by the latter."[46] He illustrated the necessity for a "superintending authority over the reciprocal trade" of the States by pointing to several countries with weak central governments, such as Switzerland and Germany.[47] Similarly, Alexander Hamilton stated that under the Commerce Clause, "[t]he interfering and unneighborly regulations of some states, [which were] contrary to the true spirit of the Union," could be "restrained by national control."[48]

In Federalist No. 45, Madison addressed the claim that "the powers transferred to the federal Government . . . will be dangerous to the portion of authority left in the several States." He dismissed the Commerce Clause as "an addition which few oppose, and from which no apprehensions are entertained."[49] Madison and his contemporaries, however, underestimated the power of judicial interpretation.

The first major case construing the Commerce Clause was Gibbons v. Ogden.[50] In that case, the Supreme Court invalidated a New York law granting Aaron Ogden the exclusive right to operate steamboats between New York and New Jersey. The Court held this law invalid because it conflicted with a federal statute. Although this holding was rather narrow, Chief Justice Marshall's elaborate discussion of Congress' power under the Commerce Clause clearly stated that Congress could not regulate activities occurring wholly within the borders of one State:

> It is not intended to say, that these words [of the Commerce Clause] comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.[51]

Prior to the final decades of the nineteenth century, Congress rarely enacted regulatory legislation governing local activity. Therefore, the Supreme Court had few opportunities to reconsider the interpretation of the Commerce Clause set forth in Gibbons v. Ogden. In those few cases where the issue arose, the Supreme Court adhered to Chief Justice Marshall's position that Congress could not regulate activity occurring entirely within one State. In United States v. DeWitt,[52] for example, the Supreme Court invalidated a federal statute prohibiting intrastate sales of highly-inflammable naphtha. The Court reasoned that the law was "a police regulation, relating exclusively to the internal trade of the States."[53] Another example of the Court's early reluctance to interpret the Commerce Clause expansively was its decision that Congress lacked the power to establish a nation-

wide system for the registration of trademarks.[54] According to the Court, the federal trademark statute was "designed to govern the commerce wholly between citizens of the same State."[55]

In the late nineteenth century Congress enacted the first modern regulatory legislation, thereby giving the Supreme Court several opportunities to address the scope of the commerce power. The two principal examples of such legislation were the Interstate Commerce Act of 1887[56] and the Sherman Antitrust Act of 1890.[57] Interestingly enough, the Supreme Court applied different, apparently irreconcilable legal tests to these two statutes when considering their constitutionality under the Commerce Clause. Not surprisingly, the application of these competing legal tests yielded inconsistent results.

In The Sugar Trust Case,[58] which was decided in 1895, the Court considered the application of the Sherman Antitrust Act to a sugar refiner's acquisition of the stock of four other companies. Although the new conglomeration would refine 98% of all sugar produced in the United States, the Supreme Court held that this "monopoly of manufacture" could not be suppressed by Congress. The Court viewed the manufacture of a product as a purely local activity that could not be regulated, irrespective of its effect on interstate commerce. Chief Justice Fuller's opinion concluded that "[c]ommerce succeeds to manufacture, and is not a part of it."[59]

While Chief Justice Fuller, like Chief Justice Marshall in Gibbons, believed that Congress could "prescribe the rule by which commerce is to be governed," he also recognized that if the commerce power was not narrowly circumscribed, Congress would legislate in areas where the Framers intended the States to be paramount. His opinion for the Court stated:

> If it be held that [regulation of commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate,

> not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate . . . market? . . . The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests -- interests which in their nature are and must be local . . . .[60]

Nineteen years after The Sugar Trust Case, the Court considered the constitutionality of the Interstate Commerce Act, as it had been applied by the Interstate Commerce Commission (ICC). Pursuant to the Act, the ICC had regulated intrastate rail rates because of their effect on interstate commerce. In The Shreveport Rate Case,[61] the Supreme Court held that this application of the Act did not exceed the scope of the Commerce Clause, as "the interstate and intrastate transactions of carriers [often] are so related that the government of the one involves the control of the other. . . ."[62] The Court thus ignored the reasoning of The Sugar Trust Case, which had placed real judicial limits on the commerce power and, as a consequence, had preserved state control over matters of primarily local interest. Under the rule set forth in The Shreveport Rate Case, Congress could exercise power under the Commerce Clause over all matters having "such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce."[63]

Because The Shreveport Rate Case did not overrule The Sugar Trust Case, there were two competing tests that could be applied after 1914 to Commerce Clause legislation. The conflict between these two tests, which obviously had important consequences for our federal system, was not resolved until the 1930s.

In an attempt to combat the Great Depression of the 1930s, President Roosevelt pushed a vast array of statutes through Congress. Much of this New Deal legislation was based on the commerce power, for the "problems were economic, and the Commerce

Clause was the enumerated power most directly concerned with business and economic . . . matters."[64] In 1935, the Supreme Court invalidated the National Industrial Recovery Act, which required a poultry slaughterhouse to adhere to a national "code of fair competition" containing minimum wage and maximum hour provisions.[65] Citing The Sugar Trust Case, the Court held that this legislation dealt with "internal concerns" of the States.[66]

The following year, the Supreme Court again invalidated a major piece of New Deal legislation on the basis of The Sugar Trust Case. In Carter v. Carter Coal Co.,[67] the Court held that Congress lacked power under the Commerce Clause to enact the Bituminous Coal Conservation Act of 1935,[68] which established maximum hours and minimum wages for coal miners. The Court asserted that the mining of coal did not constitute "commerce," which meant "intercourse for the purposes of trade."[69] In adhering to the definition of "commerce" set forth in The Sugar Trust Case, the Court recognized that the Framers did not intend the Commerce Clause to be a plenary grant of legislative authority.

Shortly after the Carter Coal decision in February 1937, President Roosevelt proposed his "Court-packing" plan, which would have permitted him to appoint six new Justices to the Supreme Court. While the debate over the Court-packing plan was still raging, the Supreme Court handed down its historic decision in National Labor Relations Bd. v. Jones & Laughlin Steel Corp.,[70] upholding Congress' authority to enact the National Labor Relations Act.[71] The primary significance of the opinion was not its holding, but the reasoning of the Court. It entirely abandoned the analysis of The Sugar Trust Case, embracing instead the legal standard set forth in The Shreveport Rate Case. Chief Justice Hughes concluded that the National Labor Relations Act was constitutional because the local activities it regulated bore a "close and substantial relation to interstate commerce."[72] Shortly after the Court's opinion was handed down, the Senate rejected the Court-packing plan.

Jones & Laughlin represented a dramatic nationalization of sovereign decisionmaking power, for it permitted Congress to legislate in many areas where the States previously had exercised exclusive control.[73] But it is important to remember that even this case did not remove all limits on the commerce power. The Court expressly refused to extend Congress' authority "so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectively obliterate the distinction between what is national and what is local."[74] The Court's opinion, like the decision in The Shreveport Rate Case, required that the activity being regulated have a "close and substantial" relationship to interstate commerce. It was indisputable that the manufacturing operations of the Jones & Laughlin Steel Corporation substantially affected interstate commerce, since it was the fourth largest producer of steel in the United States. Accordingly, there was no reason for the States to believe Justice McReynolds dire prediction that Congress would now be free to regulate "almost anything--marriage, birth, death."[75]

In 1942, however, the Supreme Court abandoned all serious attempts to limit the scope of Congress' power under the Commerce Clause. The Court held, in Wickard v. Filburn,[76] that Congress could control a farmer's production of wheat for home consumption despite its "trivial" impact on interstate commerce. The Court opined that the commerce power could be used to regulate local activities that, when considered alone, had no impact on interstate commerce, if the class of such activities might reasonably be deemed to have substantial national consequences. The Court's adoption of this "cumulative effect" principle meant that Congress could regulate virtually any activity.

In removing the last discernable limit to the scope of Congress' commerce power, Wickard provided a vivid illustration of the Court's observation, one year earlier, that Congress' exercise of its Commerce Clause power may well "be attended by the same incidents which attend the exercise of the police power of the states."[77] Congress was left free to exercise control

over virtually any matter it chose. After the removal of this last judicial check, Congress enacted a wide range of legislation with only a tenuous relationship to interstate commerce.

For example, the commerce power was invoked in support of Congress' enactment of the Civil Rights Act of 1964,[78] and other antidiscrimination statutes, although ample authority for enactment of such measures was later found to have been provided by the Thirteenth and Fourteenth Amendments.[79] Perhaps the most vivid example, however, of legislation upheld on the basis of the "cumulative effect" principle is the Consumer Credit Protection Act,[80] which prohibits "loan sharking." In Perez v. United States,[81] the Supreme Court sustained the application of the Act to a transaction which had taken place entirely within one state: the loanshark convicted under the statute had used threats of violence to collect $3000 he had loaned to the owner of a local butcher shop. The Court acknowledged that the individual defendant's activities could not be shown to have any impact on interstate commerce, but nonetheless asserted that it was reasonable for Congress to conclude that the cumulative effect of such loan-sharking transactions could substantially affect interstate commerce. The Court reasoned that the funds obtained from these local loan-sharking activities often were used to finance "interstate crime."[82] Justice Stewart's convincing dissent pointed out the primary problem with the majority's analysis: the "Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws."[83]

It is undeniable that much of the legislation enacted under the commerce power has achieved desirable ends, such as beautification of the environment[84] and protection of the consumer.[85] The constitutional scheme envisioned by the Framers, however, reserved to the States sovereign responsibility concerning "all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[86] Because

virtually all of the "objects" over which the States reserved their sovereign powers when they created the national government bear at least some theoretical relationship to commerce, it is not an overstatement to say that, given the Supreme Court's Commerce Clause jurisprudence, the States exercise their reserved powers only at the sufferance of the national government.[87] And, as the following section demonstrates, this federal hegemony over the States has come about despite the Bill of Rights' explicit reservation to the States of all sovereign powers not delegated to the national government.

C. The Tenth Amendment and State Sovereignty

The Tenth Amendment makes explicit the necessary implication of the Constitution's structure regarding federalism: that all powers not delegated to the national government are reserved to the States or the people. In 1976 the Supreme Court relied in part on the Tenth Amendment in taking a modest step toward restoring constitutional restraints on Congress' commerce power.

By the mid 1970s, Congress' power to regulate any private activity affecting (theoretically) interstate commerce had been extended to include the activities of the States themselves. For example, in 1974 Congress amended the Fair Labor Standards Act to require state and local governments, as employers, to comply with minimum wage and maximum hour provisions.[88] Congress, "evidently encouraged by three decades of judicial winking" under the Commerce Clause, "presumed to command the states by directing the terms of their own public service."[89] In National League of Cities v. Usery,[90] however, the Supreme Court held that Congress lacked the power under the Commerce Clause to regulate the wages and hours of public employees engaged in "traditional government functions."

The Court's opinion in National League of Cities, which was written by Justice Rehnquist, emphasized that it was not limiting Congress' power over "areas of private endeavor."[91] Indeed, the Court reaffirmed the breadth of Congress' power to regulate any private activity affecting interstate commerce. The Court nonetheless concluded, however, that when Congress seeks to regulate

directly the employment activities of the States, an additional constitutional barrier is interposed. Such regulation of the "States qua States" is not permitted if it interferes with "functions essential to [their] separate and independent existence."[92] The Court asserted that this limit on exercises of the commerce power that threaten state sovereignty is inherent in the federal system established by the Constitution. As Justice Rehnquist put it:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[93]

Although the Supreme Court over the next nine years paid lip service on occasion to the limitation that the Tenth Amendment places on Congress' commerce power, it never again relied upon this restriction to invalidate a federal statute. Instead, it sought ways to find inapplicable or not controlling the state sovereignty principles articulated in National League of Cities.[94] Finally, in 1985, the Supreme Court overruled its landmark decision in National League of Cities.

In Garcia v. San Antonio Metropolitan Transit Authority,[95] the Court rejected the proposition that the Constitution places independent limits on Congress' power under the Commerce Clause. The Garcia Court held that "the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action."[96] Because the Constitution guarantees the States equal representation in the United States Senate (art. I, sec. 3), and assigns them dominant roles in the amendment process (art. V) and in determining the electoral qualifications of members of Congress (art. I, sec. 2), the Court reasoned that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."[97] The States' participation in the national

political process, according to the majority in Garcia, "ensures that laws that unduly burden the States will not be promulgated."[98]

One noted scholar has said of the Garcia Court's reasoning that "it . . . seem[s] so implausible to think that American politics will operate per se to constrain Congress within any serious person's view of merely regulating [commerce] . . . , as virtually to compel one's skepticism that those who assert this argument can possibly believe it."[99] The four dissenting Justices in Garcia were not much more charitable. Justice O'Connor noted that "[w]ith the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."[100] Justice Powell, decrying the Court's rejection of "almost 200 years of the understanding of the constitutional status of federalism,"[101] asserted that the Court's decision rendered Congress "free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action."[102] Justice Rehnquist confidently predicted that the principle of federalism enunciated in National League of Cities would "in time again command the support of a majority of this Court."[103] Until that time comes, however, it appears that for almost all purposes Congress will remain the sole judge of the extent of its commerce power.

D. The Spending Power

The last five decades have witnessed a dramatic rise in the number and size of federal programs under which Congress transfers money for certain purposes to state and local governments. With these transfers of federal money to the States have come equally sweeping transfers of sovereign governmental power in the opposite direction. Congress' exercise of the spending power has essentially redefined the relationship between the national government and the governments of the States, undermining the sovereign governing authority of the latter in three principal ways:

-- intrusion in areas of traditional state concern;

-- gradual transformation of the States into mere fiscal and administrative satrapies of the national government; and

-- erosion of the States' control over their own subordinate political units.

The States have accepted federal largesse since the early days of the Republic. During the Depression years, however, Congress not only significantly increased the amount of money flowing to the States, but also began to impose significant and intrusive conditions on the States' receipt of the money. Thus, federal largesse brought with it increased national control over state expenditures and increased federal involvement in areas that had theretofore been the exclusive province of the States. The net result has been a major expansion in the practical power of the national government to dictate not only the priorities in state budgets but also the very provisions of state laws and constitutions. It is a power that the States can lawfully resist -- but experience has shown that States lack the political will to resist because, in most cases, it would lead to major reductions in state revenues.

The scope of Congress' power under Article I, section 8 to collect taxes "to pay the Debts and provide for the common Defense and general Welfare" has been a matter of contention for most of our history. The debate has centered on whether Congress is limited to spending money for the purposes specifically enumerated in section 8 or whether Congress may spend money for any purpose that it believes will advance "the general Welfare." As a result, there has been a continuing debate over Congress' power to give the States money for purposes that are unrelated to its enumerated powers and are thus matters of state concern.

The issue first arose in the early 1800s when Congress began the practice of providing States with land or money for roads and waterways. These provisions for internal improvements met with often bitter resistance by those who believed them to be beyond the scope of Congress' enumerated powers. For example, President Madison vetoed a bill in 1817 that would have used dividends from

the Bank of the United States to build roads and canals; he believed Congress had no power to spend money for these purposes.[104] President Monroe, Madison's successor, expressed the same view,[105] as did Presidents Jackson,[106] Tyler,[107] Polk,[108] Pierce,[109] and Buchanan[110] through their vetos of similar legislation. Congress nonetheless continued to give States national largess, usually in the form of outright grants of public land, which were then sold to finance schools, transportation projects, and reclamation projects.[111] The number of such grants continued to rise after the Civil War.[112]

Not until 1936, however, did the Supreme Court address the issue of whether Article I, section 8 empowered Congress to spend money for the "general Welfare" independent of the enumerated powers. In United States v. Butler, the Court adopted a broad reading of Congress' authority:

> Since the foundation of the Nation sharp differences of opinion have persisted as to the true meaning of [art. I, sec. 8]. Study of all these leads us to conclude that . . . the power of Congress to authorize expenditure for public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.[113]

This reading has freed Congress to spend money for any purpose that may plausibly be described as advancing the general welfare, regardless of whether it involves functions that have traditionally belonged to the States. Congress has not been slow to utilize this power.

What is most important to emphasize is that in the exercise of this power Congress has taken the further step of imposing unrelated conditions on the receipt of the funds. There has been a sharp increase in national policymaking for issues that are essentially local in nature, as well as an increase in national control over the States' expenditure of funds and a parallel expansion of national control over the basic mechanisms of state government. For the first hundred years or so, Congress essentially imposed no restrictions on the money or property granted to the States. Congress did not create any mechanism for over-

seeing the States' use of the money raised from the sale of the millions of acres of public land given to the States for education. And when the national government's surplus was distributed to the States in 1837, there was no suggestion as to how the States should spend the money and no review of what they did with it.[114] The few substantive restrictions imposed in the ensuing decades were clearly tied to the purposes of the underlying statute.[115]

Beginning with Depression-era statutes, however, Congress has imposed conditions that are unrelated to the basic subject matter of the grants. These so-called "crossover" sanctions force States to adopt national policies on issues unrelated to the purposes of the underlying grant -- and to do so in disregard of local concerns or even local law. Grants for highway construction, for example, have been used to require that States regulate billboard advertising,[116] hide junkyards along the road,[117] survey all their roads to identify and correct hazards,[118] impose Hatch Act prohibitions on the political activity of state employees,[119] and comply with the now infamous 55 mile-per-hour speed limit.[120] Congress has dictated local land use by, for example, mandating community participation in national flood insurance programs and adoption of flood plain management guidelines before individuals in those communities may borrow funds from federally supervised lending institutions.[121] Similarly, Congress has intervened in state labor relations by requiring local governments to continue collective bargaining agreements with their employees or face denial of money for mass transit.[122] Affirmative action requirements have been imposed as a condition on a general grant of funds for primary education,[123] while local public works projects are required to include minority set-aside programs.[124] The list of such statutes is limited only by Congress' ingenuity.[125]

The courts have acquiesed in this erosion of state power, deferring to Congress and rejecting arguments that the conditions imposed interfered with the sovereign prerogatives reserved to the States under the Tenth Amendment.[126] Although the Supreme

Court at one time appeared receptive to challenges to statutes that appeared to coerce individuals,[127] it has persistently rejected similar arguments when applied to the States.

In Steward Machine Co. v. Davis,[128] the Supreme Court, in a 5-4 decision, rejected a constitutional challenge to two conditional sections of the Social Security Act. One of the grounds of attack was that the scheme coerced the States in contravention of the Tenth Amendment. Rejecting this argument, the Court held that a successful attack on the statute would require showing both that the law was not intended to advance the general welfare and that it was a "weapo[n] of coercion, destroying or impairing the autonomy of the states."[129]

The Court did not agree that the statute coerced "a surrender by the states of power essential to their quasi-sovereign existence."[130] The Court emphasized that the States had chosen to meet the criteria and remained free at all times to reject the federal largess:

> Alabama is still free, without breach of an agreement, to change her system overnight. No officer or agency of the national Government can force a compensation law upon her or keep it in existence. No officer or agency of that Government, either by suit or other means, can supervise or control the application of the payments . . .
>
> All that the state has done is to say in effect through the enactment of a statute that her agents [will comply with the federal law]. The statute may be repealed. The consent may be revoked. The deposits may be withdrawn. To find state destruction there is to find it almost anywhere.[131]

The Court's analysis has governed challenges to conditional grants ever since.

Although the Court upheld the conditions imposed, there is language in the Steward decision suggesting that there are indeed limits to Congress' spending power:

> In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter

> to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. The purpose of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity.[132]

This language led the Court recently to state, without elaboration, that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power."[133]

The courts have not yet identified any of those limits. Tenth Amendment challenges to federal grant-in-aid programs have been uniformly rejected,[134] despite the fact that compliance with the program's conditions would require the State to rearrange its budget priorities,[135] change its laws (as in Steward), or even amend its own constitution.[136] The courts have continued to reiterate that each statute is "not compulsory on the State [and] is not 'coercive' in the constitutional sense."[137]

Thus, the net result of the massive increase in conditional funding in the last fifty years has been to give the national government power to oversee the States' compliance with a wide range of conditional grants, and thus to direct state policy in areas of traditional state concern and authority, such as agriculture, employee relations, and relief. The carrot of federal funding has often induced States to take steps that they might otherwise forego or actively resist.

A few States have on occasion resisted the temptation. Oklahoma lost highway funds when it did not fire an individual whose employment violated the Hatch Act.[138] More recently, a few States have refused to comply with the new national minimum drinking age, even though they, too, will lose funds for highway construction.[139] That States are still sensitive to the restraints placed on them by these programs is evidenced by the numerous lawsuits that they continue to bring challenging the conditions.[140] The ultimate result for most States, however, has been eventual compliance, no matter how onerous or intrusive the conditions.

Congress' increasing use of conditional grants has had many results. First, it has gradually eroded the tax base of state and local governments by separating the taxing power (exercised at the national level) and the spending power (exercised at the state level). By accepting federal funds, States are able to raise money without having to raise taxes. And a State's rejection of federal funds denies its citizens the benefits of a program that is supported by their tax dollars. It is not surprising that this politically expedient source of funding is almost irresistible, no matter what qualms States may have about surrendering a portion of their sovereignty. Higher national taxes, however, make it more difficult for states and local governments to increase taxes, thereby undercutting their fiscal independence and making them more dependent upon the federal contribution.

Second, conditional grants have led to increasing uniformity. Matters of personnel, pay, and administration, for example, are standardized as each program imports the same national requirements into more and more areas of state activity. Conditional grants also encourage uniformity by concentrating society's resources on those problems that are sufficiently large to have attracted national attention -- and a national solution. Requirements for matching funding from the States automatically reduce the amount available to address other matters of intense local concern. The States may thus gradually cease to serve as experimental laboratories in which creative solutions are developed for problems of local concern.

Third, conditional funding has permitted the national government to bypass the States entirely through the direct funding of local governments and private grantees, such as nonprofit organizations, although the programs may have a significant impact on the States. This practice erodes the States' control over the activities of its subordinate political units.

In sum, while the use of conditional funding has given the States, especially poorer States, access to federal funds, it has also led to increased national involvement in areas that were

previously the States' concern, permitting the national government to require the States to conform to national policies on virtually any subject. The Supreme Court has determined that Congress' spending for "the general Welfare" need not be confined to purposes related to its enumerated powers, and it has rejected all claims that conditional grants impermissibly invade the residual sovereign authority reserved to the States. And, while the Supreme Court has hinted that there are constitutional limits on the requirements that the national government may impose on the States pursuant to the spending power, if those limits have not yet been reached, it is difficult to imagine what they are. Thus, it seems fair to conclude that the national government's sense of self-restraint is the only real restraint on its authority under the spending power (as with the commerce power) to intrude into matters within the traditional concern and authority of the States.

E. Preemption

Article VI, clause 2 of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This provision, the Supremacy Clause, states the unremarkable proposition that where federal and state law conflict, state law must yield and federal law prevail.[141]

Yet, the Supremacy Clause also states on its face that it was not intended to subjugate the States completely to the national government. Rather, its scope was expressly limited to the Constitution, treaties, and "[l]aws . . . made in [p]ursuance" of the Constitution. Thus, Alexander Hamilton observed that it did "not follow . . . that acts of the [national government] which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the [States] will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such."[142]

The Supremacy Clause nonetheless has been used to justify supplanting state regulations spanning the full range of the States' "residuary authorities." Acting under the Supremacy Clause, courts have invalidated various state tort,[143] contract,[144] and criminal laws,[145] state judicial procedures,[146] state utility regulations,[147] state noise regulations,[148] divorce laws,[149] usury laws,[150] employment laws,[151] tax laws,[152] and even the mandatory retirement age of state public safety officials.[153] In Ridgway v. Ridgway,[154] for example, the Supreme Court held that a part of a state divorce decree was invalid under the Supremacy Clause. The Court voided a Maine divorce decree ordering a serviceman to maintain his military life insurance policy for the benefit of his children. The federal statute which created the insurance program gave servicemen the right to designate the beneficiaries of their policies, and protected them from attachment by creditors. The Court held that these provisions overrode the Ridgways' divorce decree, nothwithstanding the fact that "[t]he legislation itself says nothing about contrary dictates of state law or state judgments."[155] Moreover, the courts have invalidated these and other state laws, not because they were substantively unconstitutional, but rather because they were said to be incompatible with, or "preempted by," federal statutes or regulations.

To be sure, the Supremacy Clause was intended by the Framers to displace -- to "preempt" -- state laws that conflict with an exercise of Congress' enumerated powers. If application of the preemption doctrine in such cases is problematic, it is not because the Supremacy Clause has been misinterpreted, but because the proper scope of some other constitutional provision, under which Congress purported to act, has been exceeded.

On the other hand, the courts decide a great many preemption cases where the federal enactment is silent as to its preemptive effect. In these cases, the court decides for itself whether the state and federal laws are incompatible. Not surprisingly, results vary widely; moreover, the standards applied by the courts also vary. As a consequence, it is often difficult to

predict whether any given state statute will be found to have been preempted.

This relatively recent, but very dramatic shift in federal-state relations is best appreciated from a historical perspective. Initially, the Supreme Court was very solicitous of the proper sovereignty of the States. In McCulloch v. Maryland,[156] the Court first defined the scope of the Supremacy Clause as applied to federal statutes.[157] At issue was whether a State could validly tax notes issued by the federally-chartered Bank of the United States. Writing for the Court, Chief Justice Marshall first examined whether Congress had the power to charter a bank at all. Finding that it had such power under the Necessary and Proper Clause, Marshall next inquired whether a State could properly tax a branch of that bank. It could not, he said, since "the power to tax involves the power to destroy"[158] and since under the Supremacy Clause "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the Constitutional laws enacted by Congress . . . ."[159]

Similarly, in Gibbons v. Ogden,[160] the Court held that New York statutes giving to certain steamboat operators exclusive steam navigation rights to state waters were "repugnant" to a federal statute granting licenses to engage in coastal trade. As in McCulloch, however, Marshall was careful to point out that the federal statute at issue had been duly enacted pursuant to one of Congress' enumerated powers, the Commerce Clause.

Following Marshall's death, the Court gave even greater emphasis to the limitations of congressional power. The Court stressed that the reserved powers of the States were beyond congressional interference. Accordingly, state legislation confined to its proper sphere could not, by definition, conflict with federal law, and could not, therefore, be preempted.[161]

However, this barrier to preemption of state laws has since collapsed. As we have previously discussed, the judicial expansion of Congress' powers, most notably its commerce power, has all but eliminated any restrictions on the subject matter about

which Congress may legislate. There are now few, if any, areas which cannot be regulated by the national government. Consequently, there are few, if any, state laws which cannot be preempted. As a practical matter, then, apart from congressional self-restraint, there is only one remaining limitation on preemption: the Supreme Court's construction of federal law. It has proven none too confining.

The Court has analyzed implied preemption cases under two main headings: "conflict preemption" and "occupation of the field preemption." Of these, the less controversial is conflict preemption. If a state law actually conflicts with federal law, it is, of course, quite properly displaced under the Supremacy Clause. That is what the Clause was designed to do. The question, however, of whether state and federal law actually do conflict is one which a court must decide. And the power to decide that question is subject to abuse.

Sometimes the Court has given appropriate deference to state sovereignty. It has, for example, stated that state law is preempted only when "compliance with both federal and state regulations is a physical impossibility".[162] On the other hand, the Court sometimes has struck down state statutes which only potentially conflicted with federal law.[163] Such decisions do obvious violence to the sovereign authority of the states.

Even greater encroachments upon state sovereignty (and upon the separation of powers), however, have been countenanced by the Court's so-called occupation of the field cases. Under that doctrine, even if a court cannot identify any conflict between federal and state law, it still may invalidate the state law if it determines that the federal regulatory scheme was designed to be exclusive of even complementary state regulation. In that case, the federal legislation is said to "occupy the field," and all state regulation of the same subject -- complementary as well as contradictory -- is struck down.

It is one thing for Congress to dictate such a preemptive result. There is, of course, no question that Congress can, by explicit legislation, displace state regulation in any field

whose boundaries lie entirely within the reach of one of Congress' enumerated powers. But it is quite a different matter for a court to declare an entire field of state law preempted in the absence of an express statement to that effect.

In cases in which the Supreme Court has implied occupation of the field preemption from a federal statute that is silent on the question, the Court typically grounds its decision on inferences of congressional intent drawn from the statute's legislative history. How malleable a standard this is, however, can be seen from the Court's insistence that such "clear and manifest purpose" may be inferred if the federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."[164] Thus, according to at least some of its members, the Court has the power unilaterally to decide which "federal interests" are so "dominant" that any federal regulation of the subject will preempt all state regulation.

Indeed, on at least two occasions, the Court has preempted state law in the face of clear evidence of a contrary congressional intent. In City of Burbank v. Lockheed Air Terminal, Inc.,[165] the Court voted 5-4 to preempt a city ordinance forbidding jet takeoffs between 11 p.m. and 7 a.m. The Court's rationale was that "the pervasive nature of the scheme of federal regulation of aircraft noise" showed that Congress intended to preempt all state regulation of it, even though there was no express provision of preemption in the relevant statute.[166] Dissenting, Justice Rehnquist pointed out that the committee report on the statute reflected a contrary congressional intent, explicitly providing that "[t]he authority of State and local government to regulate use, operation, or movement of products is not affected at all by the bill. (The preemption provision discussed in this paragraph does not apply to aircraft. . . .)."[167]

An earlier case, Pennsylvania v. Nelson,[168] provides an even more vivid example of the Supreme Court lightly inferring a congressional intent to displace an entire field of state police power. There, the Court struck down the Pennsylvania Sedition

Act, finding it to be preempted by a similar federal statute. The Court acknowledged that, in the statute in question, Congress had "not stated specifically" whether it had intended to occupy the field and thus preempt all state legislation.[169] Nevertheless, the Court argued that the "pervasive" nature of the federal statute,[170] together with the fact that it "touched" a field in which the federal interest was dominant,[171] and the "serious danger" of inconsistent adjudications,[172] made "the conclusion . . . inescapable that Congress . . . intended to occupy the field of sedition."[173] Justice Reed dissented, pointing out that Congress' intent was better derived from another section of the same title, which provided that "[n]othing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."[174] He concluded that "[c]ourts should not interfere [where] [t]he state and national legislative bodies have legislated within constitutional limits."[175]

In sum, there is little question that the courts have improperly invalidated constitutional exercises of state sovereign authority. While cases of implied preemption used to be rare and limited, they are now commonplace and far-reaching. More importantly, while there once were effective subject matter limits on the regulatory areas that Congress could constitutionally occupy (and thus preempt), there now are virtually none.

F. Miscellaneous Judicial Decisions Eroding Federalism

One of the most important, and one of the most complicated, legal issues involving the sovereign powers of the States is the relationship between federalism and judicial interpretation of the Constitution. As we have seen, the federal courts have clearly played a major role in the modern decline of federalism, though the nature of that role is often not fully appreciated or well understood.

The specific topic of this section is the effect on federalism of judicial activism, particularly activism that imposes on state decisionmaking authority constitutional limitations that

are not fairly found in the Constitution.[176] Supreme Court decisions of this character are numerous, and this section of the report will discuss some examples that dramatically illustrate the injury to federalism that they inflict.

As the earlier sections of this chapter demonstrate, the Supreme Court has acquiesced in expansions of national power by the legislative and executive branches that exceed the proper authority of these branches under the Constitution. In these cases, the Court played a role secondary to that of the Congress and the executive branch, but a role nonetheless necessary to the successful nationalization of state sovereign authority.

Although less frequent, the courts also erode federalism in a more direct fashion by affirmatively exercising power not granted to the federal judiciary by the Constitution. In other words, courts have imposed limitations on the States that are not created by the Constitution but rather by the courts themselves. This kind of judicial activism is the focus of this section.[177]

When the federal courts create and impose constitutional limitations on the States, federalism suffers in two ways. First, a decision improperly limiting state decisionmaking authority obviously represents a direct and illegitimate alteration in the federal-state relationship established by the Constitution. Second, but just as significantly, any judicial decision that departs from the original meaning of the Constitution does serious damage to the structure of constitutional federalism, regardless of the subject of the decision. This important point, which obviously has implications beyond the narrow topic of this section, often goes unrecognized and is worth a closer look.

When judges decide constitutional cases on some basis other than the original meaning of the document -- i.e., engage in judicial activism -- it is not too much to say that they are amending the Constitution; they are either creating a new provision or ignoring or rewriting existing ones. Recognizing that times and circumstances may change, the Framers of the Constitution provided a specific, and in many ways very cumbersome, mechanism for amending the document when necessary. Judges who

take it upon themselves to adapt the Constitution to modern conditions through the less demanding process of judicial activism are circumventing that mechanism and arrogating to themselves a power specifically committed by the Constitution to other elements of our political order. Because those "other elements" are, in large measure, the States, every time courts depart from the Constitution, even for the best of reasons, federalism suffers.

The Framers' chosen method for amending the Constitution is set forth in Article V of that document. Under Article V, amendments to the Constitution can be proposed either by a two-thirds vote of both Houses of Congress or by a constitutional convention called by Congress upon the application of two-thirds of the States. Amendments proposed by either method must then be ratified by three-fourths of the States before becoming part of the Constitution.[178]

Article V is a vital bulwark of constitutional federalism in two principal respects. First, and most obviously, the requirement that any proposed amendment be ratified by three-fourths of the States before becoming part of the Constitution grants to the States a decisive role in changing the nation's fundamental document. The requirement of an otherwise unprecedented supermajority of three-fourths (as opposed to the supermajority of two-thirds used for other purposes in the document) illustrates how seriously the Framers took this point. Second, the process for proposing amendments to the Constitution also reflects a deep concern for federalism. As noted, Article V provides two ways by which amendments can be proposed: a two-thirds vote of both Houses of Congress or a constitutional convention applied for by two-thirds of the state legislatures.[179]

Thus, Article V provides the States with a say -- and any thirteen States with an absolute veto -- over changes in the nation's governing document. Accordingly, when judges, openly or tacitly, claim the power to amend the Constitution, they are infringing on important prerogatives of the States.

In our history several important Supreme Court decisions stand out for the degree to which they illustrate judicial indifference to the constitutional principle of federalism. The Supreme Court's 1973 decision in Roe v. Wade,[180] addressing the constitutionality of state abortion statutes, is among its most controversial decisions ever. Much of the controversy concerns the underlying political issue of abortion rather than the opinion's merit as an exposition of constitutional law. With respect to the latter, however, the decision represents a serious threat to federalism.

In Roe v. Wade the Supreme Court decided that Texas' criminal abortion statutes, which proscribed abortion except when performed or attempted in order to save the life of the mother, violated the woman's "right of privacy," which the Court found to be guaranteed by "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[181] The Fourteenth Amendment, among other things, prohibits States from depriving persons of "life, liberty, or property, without due process of law." The Court rejected, however, the contention that the States could never regulate abortions, because the States have important interests "in safeguarding health, in maintaining medical standards, and in protecting potential life."[182] The Court then set forth a detailed code specifying what kinds of regulations are appropriate at various stages of pregnancy, essentially forbidding all regulation during the first trimester of pregnancy, allowing some regulation of abortion procedures during the second trimester, and allowing States to ban abortions entirely during the third trimester.

The Court did not question in Roe, and has not subsequently questioned, that for purposes of the federal Constitution, protecting potential life is a permissible state goal that exists "throughout the course of the woman's pregnancy,"[183] and that the abortion regulations at issue in Roe reasonably promoted this goal. Ordinarily, the Court will not find state legislation to be a deprivation of life, liberty, or property without due process of law unless there is no rational connection between the

means chosen and a permissible state goal. Nonetheless, the Court in Roe imposed a far heavier burden on the States, requiring them to show a compelling interest in their goals, a burden ordinarily applied only to state action that impinges upon principles or values deliberately placed by the Constitution outside the normal legislative process.[184] The Court, however, could not and did not even attempt to ground its finding that abortion is such a constitutional right in the text, structure, or history of the document.[185] Indeed, near the end of its opinion, the Court made no reference to the Constitution in explaining that its holding "is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day."[186]

The Roe decision's implications for federalism, in both the short and long run, are dramatic. Its immediate impact, of course, is to withdraw from state legislatures an issue of great concern to many on the basis of a doctrine found nowhere in the Constitution. The Court, on its own, thus nationalized an issue committed by the Constitution to resolution by the States. Whether or not one approves of this result on grounds of policy, the negative effect on constitutional federalism is undeniable. Of equal significance, the Court also set the stage for further inroads on the prerogatives of the States by establishing that restrictions on state authority not found in the Constitution might nonetheless be asserted as a matter of federal law if "the profound problems of the present day" so require. To be sure, Roe v. Wade was perhaps not the only case in recent times to assert this principle,[187] but it did so with unusual clarity and in a context that could not be ignored. Though this aspect of the opinion has not yet generally been expanded into other areas of state action,[188] the prospect that the Court will nationalize other issues of state concern, imposing uniformity where the Constitution contemplates diversity, is a very real one.

The constitutional principle of "one man, one vote" was created by the Supreme Court in the early 1960's in a series of

decisions known as the "Reapportionment Cases," which, when issued, ranked among the most controversial and widely criticized opinions ever written by the Court. In the years following the reapportionment decisions, thirty-two States -- only two short of the constitutionally required two-thirds majority -- called upon Congress to convene a constitutional convention so that amendments to overturn the decisions could be proposed. While the decisions today are a solid part of the nation's political landscape, they were an important watershed in the history of federalism.

The cases began in 1962 with Baker v. Carr,[189] in which the Supreme Court decided for the first time that federal courts were competent to decide issues regarding the internal political arrangements of the States. The claim in that case was that the State of Tennessee, in violation of its own laws and constitution, had failed for sixty years to reapportion its state legislative voting districts to reflect population changes. As a result, representatives of some geographical units represented far fewer eligible voters than representatives elsewhere in the State. Voters in "underrepresented" districts claimed that this denied them the equal protection of the laws guaranteed by the Fourteenth Amendment ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"). The Court did not actually decide that this constitutional claim was correct, but it concluded, contrary to a long history of prior decisions, that federal courts are capable of deciding that question, and that the state legislative process of districting is a subject into which federal courts can and should intrude.

Two years later, in Reynolds v. Sims,[190] the Court actually decided the constitutional question. The case concerned a challenge under the Equal Protection Clause of the Fourteenth Amendment to Alabama's apportionment of seats in the two houses of its state legislature. As was the case in Baker v. Carr, the Alabama legislature had, in violation of its own laws and state constitution, failed for over 60 years to reapportion these seats to

account for population changes, with the result that voters in some populous districts alleged that their votes were debased in comparison with voters in smaller districts having the same number of representatives. In a lengthy opinion, the Court agreed, concluding that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[191] The Court added, however, that this was to be done only as far as practicality allows; "[m]athematical exactness or precision is hardly a workable constitutional requirement."[192] The Court did not elaborate upon what kinds of deviations are permissible, but left the issue to be resolved case-by-case.[193]

In its substance, Reynolds provided no new justifications for the Court's position, nor did it offer any new textual or historical analysis to bolster prior reasoning. Nor did the Court adequately respond to the point that the United States Senate is apportioned under the Article I of the Constitution on the basis of geography, not population. Rather, the entirety of the Court's reasoning was encapsulated in the following passage:

> A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong commmand of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.[194]

The effect of Reynolds, and of the Reapportionment Cases as a whole, is to place the state legislative process of districting under the overlordship of the federal judiciary.[195] At the time, only the vaguest of standards were given to the lower federal courts which had to supervise the process, and today the situation is not markedly different. The result is an unprecedented intrusion, both in scope and in detail, into the States' legislative processes. Courts must decide which deviations from population equality are justifiable (i.e., as a matter of abstract political theory), and which legislative considerations are acceptable.

The Constitution specifies at length and in detail the permissible practices and procedures involved in selecting a representative government, and considerations of federalism inform the whole structure of these procedures.[196] To conclude that the first section of the Fourteenth Amendment overturns this structure, replacing it with adjudication by federal courts, is a monumental (though not by that fact alone incorrect) proposition, which, whether or not it can be established,[197] certainly was not established, nor even sought to be established, by the Court in the Reapportionment Cases.

The decisions discussed thus far -- Roe v. Wade and the Reapportionment Cases -- are familiar to both the legal community and the general public. By contrast, Washington v. Seattle School District No. 1[198] is relatively obscure. In many ways, however, it reached the most remarkable result of any of these cases: that the federal Constitution prevents a state legislature or a State's voters from setting a constitutionally permissible educational policy for public schools.

In March 1978, a local school board in Seattle, Washington initiated a program of mandatory busing of schoolchildren in order to promote racial balance in the local public schools. There had never been a finding that the Seattle schools were illegally segregated, and the board was therefore under no legal or constitutional obligation to implement such a program. Eight months later, the State's voters passed an initiative, by a two-to-one margin, forbidding school boards from implementing mandatory busing programs except for certain specific purposes, including compliance with court orders to engage in busing, but not including the achievement of racial balance not required by law. The initiative had the effect of a state statute establishing as the educational policy of the State that, wherever feasible, public schoolchildren should attend schools near their home. In the absence of intentional action by the State causing segregation of its school system (which was not involved in this case), policies of this kind have always been recognized as consistent with the federal Constitution.

Nonetheless, the school board, a subordinate governmental unit of the State of Washington, sued the State in federal court, charging that the initiative violated the Fourteenth Amendment. The Court agreed with the school board, holding that by substituting a statewide decision for the decisions of local school boards, the initiative unconstitutionally "imposes substantial and unique burdens on racial minorities,"[199] by requiring them to address requests for mandatory busing to the state legislature or the voters rather than merely to their local school boards. The Court emphasized, however, that the mere repeal of a law or policy, even one pertaining to racial matters, does not violate the Constitution: "It is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan."[200]

The upshot of the Court's opinion was to prevent the State from deciding a question of education policy -- the use of mandatory busing -- at the state rather than the local level, even when that question pertained only to the wisdom as a policy matter of forced busing. The initiative by its terms did not affect the use of busing to comply with legal obligations; it merely established a general neighborhood school policy, subject to specifically drawn exceptions for matters like overcrowding of neighborhood schools or the unavailability at some schools of special courses of study. The Court thus dramatically interfered with the ability of a State -- and in this case the voters of the State acting directly through the initiative process -- to set education policy with respect to an important issue. The result is an "unprecedented intrusion into the structure of a state government,"[201] essentially allowing subordinate state bodies to defy the State and the voters on policy matters, and to assert the Constitution in defense of their defiance in federal court.

G. Conclusion

The decline in the political vitality of the States and the consolidation and centralization of governmental power in Washington cannot be chronicled completely in the few pages allotted here. Clearly, however, the current condition of federalism can

be traced to the way Congress, the executive branch, and the Supreme Court have interpreted and applied the national government's constitutional powers, especially since the 1930s. Through expansive readings of such constitutional provisions as the Commerce Clause, the spending power and the Supremacy Clause, the legislative and executive branches of the national government have been able to dominate politics and government in this country. The Supreme Court, as well, through its power to interpret the Constitution, has been a necessary partner in the process, either by ratifying actions taken by the other two branches or by interpreting the Constitution so as to place limitations on the States' authority not expressed in the Constitution itself.

Any attempt at revitalizing federalism must start with initiatives aimed at curbing the national government's ability to undermine the constitutional authority of the States. Several such proposals are outlined in Chapter IV of the report. Beyond being constitutionally mandated, "support of the state governments in all their rights"[202] is wise public policy, as Chapter III of this report seeks to demonstrate.

III. THE CONTEMPORARY IMPORTANCE OF FEDERALISM

Federalism as an argument for or against a proposition is at present generally employed only for reasons of political expediency. A genuine renaissance of federalism requires an understanding of the reasons that it would presage better government and more enlightened public policy. The reasons are manifold:

1. The science of government is the science of experiment. The perennial problems that confront government -- seeking to upgrade education, for instance -- can be addressed most intelligently by drawing upon the experience of 50 different States, in lieu of the untested theories often presented to Congress.

The examples of constructive state experimentation are legion. In the area of education in recent years, States have embraced a rich variety of education reforms: merit pay for teachers, teacher certification through testing, minimum competency standards for student high school graduation, so-called "no-pass, no-play" rules for student extracurricular eligibility, special schools for the gifted, and equal per capita spending per pupil. These varying approaches can be studied and tailored to fit unique facets of local education.

States have also adopted a variety of no-fault auto insurance laws, permissible only because Congress rejected proposals to enact federal legislation in the area. Many of the state laws have been amended based on unanticipated results. The learning curve regarding no-fault laws continues to rise. State experimentation with no-fault schemes has given the people of these States a variety of auto insurance laws that are far better tailored to their needs than an unbending nationwide rule.

With regard to banking, States have trailblazed an effort to foster regionalized or nationwide operations. By enacting reciprocity statutes permitted by federal law, States have authorized bank holding companies to extend operations across state boundaries to bolster competition and to spur economic differences. Experience under these state enactments has discredited the theory behind some federal banking laws that large banking institutions are necessarily at odds with the cause of fostering competition and consumer welfare.

States are also actively experimenting with telephone deregulation. Nebraska has removed regulatory shackles from phone companies offering local exchange service. Several other States have authorized competition for intra-state toll service, while still others continue to insist on a monopoly in that market. States have embraced a variety of so-called "lifeline" phone service plans for the impoverished, and have experimented with the concepts of local measured service and private pay phones. Shared tenant service options are flourishing. States have additionally varied in the permissible diversification activities of phone companies. The contrasting state approaches to telephone regulations are yielding a rich harvest of information indispensable to identifying the most fruitful public policy in this field.

In the area of insurance regulation, state experimentation has also proved rewarding. Many States have discarded so-called prior approval rules and opted for pricing flexibility and a variety of group insurance plans. Experience in such States generally disproved a prevalent view that prior approval of pricing by insurance commissioners was necessary to prevent business abuses. Insurance regulations by the States continue to evolve, informed by the experience of different States with different regulatory schemes.

States have been innovators in the creation of enterprise zones. Generally, businesses located in such zones are freed of the usual tangle of regulatory rules or taxes in order to encourage investment and job creation. Experience with these zones will provide a wealth of information regarding preferred government methods to stimulate economic growth consistent with the public welfare.

States vary in the licensing of occupations. Some States require the licensing of occupations ranging from auto repair shops to beauticians, whereas others do not. This experimentation has allowed the accumulation of data on the extent to which licensing reduces the incidence of fraud or misconduct, and on how much it increases prices to consumers. Such information is indispensable to the development of sound public policy.

States have adopted varied versions of the Uniform Commercial Code. Experience with the Code has led some States to revise certain rules under Article 9 governing secured transactions. As a result of state experimentation, legal rules governing business operations under the Uniform Commercial Code have evolved in a progressive fashion from State to State, without sacrificing the benefits of large-scale uniformity.

In the area of labor relations, state experimentation has proved equally valuable. State laws have adopted various approaches on unemployment insurance taxes and eligibility rules, workmen's compensation schemes, employment training for welfare recipients and the right of employees to refuse union membership. States have frequently changed laws in these matters depending on experiences and evolving desires of their residents. Consequently, state policies governing right to work, employment insurance, workmen's compensation, and manpower training are better tailored to serve the citizens of each State than would a rigid nationwide policy.

States have experimented with many approaches to protecting confidences of news reporters. Newsmen's privilege statutes abound in the States, and they permit an informed evaluation of the trade-offs between comprehensive news reporting and the needs of civil and criminal justice litigants. States frequently revise newsmen's privilege laws based on the experience of the States.

New Jersey has experimented with a law requiring political subdivisions to accept a reasonable number of low-income housing units. This experience has proven useful to other States contemplating the same type of measure.

California is considering a bill to shield any producer of an AIDS vaccine from daunting liability rules. Its purpose would be to accelerate discovery and marketing of such a vaccine. If enacted, the bill would be exceedingly informative to policymakers determining whether to relax, maintain, or increase liability exposure for drug manufacturers.

In the area of welfare, States differ substantially on the amount of aid given to families with dependent children or with unemployed fathers. The differences among state programs permit a fair evaluation of the question whether welfare substantially decreases work incentives or fosters family disintegration. They further permit state residents to adopt a level of welfare that matches their sense of equality and fairness.

With respect to criminal law, States have chartered new approaches to punishment, plea bargaining, and rights of the accused. A wide array of mandatory sentencing laws have been enacted by States over the past few decades. Some States, such as Alaska and California, have placed curbs on plea bargaining. And state supreme courts have interpreted state constitutions in over 200 cases to create criminal law rights not guaranteed by the United States Constitution. These varied criminal law rules permit the assembly of information and experience necessary for informed legislative changes in state criminal law.

Limitations of space preclude providing additional illustrations of the virtue of preserving and enhancing state sovereign prerogatives. The important point is that the States, as laboratories for testing public policies, can experiment with novel, risky, even exotic, approaches to their problems without threatening the nation as a whole.

2. States are engaged in public policy competition among themselves. When the size of government is kept as localized as possible, there is the potential that jurisdictions will compete against one another in the kinds of public goods they provide, the kinds of regulation of private activity they permit, and the way they tax their citizens. The reason that such competition exists is the possibility for "exit": People and firms can leave political jurisdictions. The possibility that people and firms "vote on their feet" should not be understated. Ill-conceived public policy over the long-run leads to an exodus of business and talented individuals; the State's tax base erodes and its infrastructure deteriorates. States are thus strongly encouraged to rectify misguided public policy in order to maintain fiscal health and to enhance their appeal to potential residents.

There are many examples of how the interjurisdictional competition implicit in a federalist system has produced a lively marketplace for the way people and firms wish to be governed. Corporations choose to incorporate in Delaware because its laws give managers greater discretion to run corporations in a manner that maximizes the wealth of shareholders. Despite their geographic similarities, the neighboring states of Utah and Nevada have radically different preferences for gambling -- and for the tourism and tax revenues it generates. At present, education reforms, business enterprise zones, and state deregulatory measures are blossoming among the States, spurred by the desire to attract businesses and skilled individuals.

In contrast to States, Congress lacks a strong political incentive to correct misconceived public policy that is fastened on all individuals or businesses of the nation. Injurious national public policy cannot be escaped by flight to a different State, and the absence of a competitive disadvantage caused by the policy stifles constituent calls for reform by Congress. Ill-conceived or outmoded federal regulation of rates of entry and exit of railroads, motor carriers, and airlines persisted for generations before any substantial reform was undertaken.

3. State legislative bodies are in a position to be more responsive to constituents than is Congress. State legislatures generally contain fewer members, are more knowledgeable of local conditions, and are less pressed for time than Congress. And malfunctioning state laws that burden all state residents are likely to evoke swift statutory reform.

Members of Congress are frequently less than well-informed of local conditions or needs because they are understandably preoccupied with pressing national questions such as balanced budget laws, tax reform, defense spending, sanctions against South Africa, or aid to "Contra" forces fighting the Sandinistas in Nicaragua.[203] Fifty years or more can elapse before Congress comprehensively reviews and revises federal law to reflect the evolving needs and desires of the citizenry.

4. States can make public policy tailored to their unique circumstances. State policy is thus more likely to satisfy constituent desires. As Woodrow Wilson observed:

> We know that we still have a singularly various country, that it would be folly to apply uniform rules of development to all parts of the country, that our strength has been in the elasticity of our institutions, in the almost infinite adaptability of our laws, that our vitality has consisted largely in the dispersal of political authority, in the necessity that communities should take care of themselves and work out their own order and progress.[204]

The federal 55 mile-per-hour speed rule as a condition for full state participation in federal highway funds aptly illustrates the imprudence of imposing nationwide policy in areas in which the needs and desires of the people vary widely from State to State. The limit may be desirable in urban States and substantially reduce accidents there, but in rural States such as Idaho or Wyoming limiting speed to 55 miles per hour may be unwanted and counterproductive. Likewise, the nation-wide minimum wage and overtime provisions of the Fair Labor Standards Act overlook the large local differences in the cost of living and labor markets. Similar examples abound.

5. State sovereignty is an essential safeguard of liberty. Thomas Hobbes lectured that "freedom is political power divided into small fragments."[205] Thomas Jefferson maintained that "the true barriers of our liberty in this country are our State governments."[206] And Woodrow Wilson pointed out that the "concentration of power is what always precedes the destruction of human liberties."[207] Finally, as Justice Powell wrote in dissent in Garcia,[208]

> [T]he harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. . . . Nor is it a matter of the wisdom or folly of certain policy choices. . . . Rather, by usurping functions traditionally performed by the States, federal overreaching . . . undermines the constitutionally mandated balance of power between the States and the federal goverment, a balance designed to protect our fundamental liberties.

IV. RESTORING FEDERALISM TO AMERICAN GOVERNMENT

A. General Role of Federalism Principles in Policymaking

America today is obviously a very different place from the America of the eighteenth century. And American government today differs in some very fundamental ways from the government established by the Constitution crafted by the Framers in Philadelphia in 1787. A national government of limited, enumerated powers has been replaced by an active and expansive national government that touches the daily life of every citizen. States, once the hub of political activity and the very source of our political tradition, have been transformed -- in significant part -- into administrative appendages for the national government, their independent political power usurped by almost two centuries of constitutional evolution and political and economic change. Federalism, as the Framers understood it, seems only barely related to American government in the 1980s.

The tendency to centralize and consolidate government is easy to understand. It is not surprising that public officials and well-meaning citizens who believe their policy ideas to be sound often seek to impose those ideas uniformly among the fifty States. It is not surprising that individuals who feel strongly about the merits of a public program often seek to bestow that program upon as many of their fellow citizens as possible. And it is not surprising that multi-state businesses would rather comply with a single set of regulations emanating from a single source than with fifty separate sets of regulations coming from fifty different state capitals.

It is precisely because each of us can understand the impetus toward centralization of governmental authority that particular care must be taken to avoid falling victim to this tendency and, in the process, undermining the constitutional balance within our system of government. Indeed, an acute appreciation of the natural tendency to centralize authority inspired the Framers to create a constitutional system designed to thwart that tendency.

As has been set forth in this report, federalism is both a constitutional principle and a practical strategy for good government. It is not an antiquated idea. It makes good sense today, as it did two hundred years ago. Those who argue that any attempt at revitalizing federalism is doomed to failure -- because the problems of government today are so different from the kinds of problems confronting the Framers -- fail to recognize that while the particular issues differ, the political principles that provide the foundation of those issues are the same. Moreover, such claims are blind to the record of public policy failures engineered by Congress since the New Deal.

The desire to revitalize federalism in American government is not a call to disassemble the government in Washington and return all power to the States, and it is not a call to return to the days of the Framers. Nor is it a denial of the self-evident proposition, recognized by the Framers, that in a host of areas the sovereign powers of the national government are and must be exclusive. Rather, it is a call for a return to the Framers' vision of a nation of States -- a system of government in which the national government exercises sovereign authority in accord with the letter, and the limits, of its constitutionally enumerated powers, and the States exercise sovereign authority in all other areas. It is a call for innovation and experimentation in government. And at its very roots it is based on the recognition that the people of the United States are the ultimate source of sovereignty and that they can best exercise their authority in the statehouses, city halls, town halls, and county court houses scattered throughout this land.

Listed below are recommended policymaking criteria aimed at promoting federalism by ensuring that the policymaking process of the national government respects the sovereign authority of the States under the Constitution. It is important to recognize that the greatest threat to federalism is the fact that those who exercise authority in the national government -- whether as members of the legislative, executive, or judicial branches -- tend to look first to the national government when attempting to

deal with society's problems. That is why it is imperative that steps be taken to resist that tendency within the policymaking process.

The Working Group on Federalism recommends that the following criteria, which build on President Reagan's Statement of Federalism Principles, should be adhered to when promulgating policy at the national level:

-- There should be strict adherence to constitutional principles. The political branches of the national government should closely examine the constitutional and/or statutory authority supporting any federal action that would limit the policymaking discretion of the States, and should skeptically assess the necessity for such action.

-- Such federal action should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. The States should be consulted before any policy is implemented.

-- The national government should adopt a non-intervention policy regarding matters properly within the constitutional powers reserved to the States. States have the sovereign authority to govern as they see fit in those areas not delegated to the national government by the Constitution.

-- With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Washington-based oversight of state administration is neither necessary nor desirable.

-- The national government should refrain, to the maximum extent possible, from establishing national, uniform standards governing the administration of national policy. States should be encouraged to develop their own approaches to the implementation of national programs.

-- States should be encouraged to work together to develop model or uniform state laws to meet problems common to the States.

-- When uniform nation-wide standards are necessary to ensure the efficient and effective administration of national policy, the States should be consulted in the formulation of those standards.

B. Possible Reforms to Revitalize Federalism

As we have seen, the principal cause of the decline of federalism has been doctrinal developments in constitutional law that have largely freed the national government of the constraints inherent in its enumerated powers. This evolutionary process culminated recently in the Garcia case, where the Supreme Court "abdicate[d] its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States,"[209] ruling in effect that "federal political officials . . . are the sole judges of the limits of their own power."[210]

As mentioned in the introduction to this report, a constitutional amendment would be the most effective means of addressing and correcting the doctrinal constitutional developments that have led to the nationalization of state sovereignty. Proposals for amending the Constitution, however, should be advanced only after all other alternatives are examined and found wanting. The primary alternatives to constitutional amendment focus on the institutional processes of the political branches; proposals of this nature would call upon the political branches to impose discipline on themselves in order to ensure their "solicitude . . . for the continued vitality of States."[211] If such reforms proved both practicable and effective, the need to restore a proper respect for the States through constitutional amendment may be obviated.

1. Institutional Process Reforms

A variety of possible reforms in the institutional processes of the political branches are suggested by the constitutional developments, previously outlined in this report, that have led to the centralization of American government in Washington. Such reforms would call for both legislative action and executive action.

a. Legislative action

The following procedural reforms could be enacted through legislation or imposed through revision of the House and Senate Rules:

(1) Urge Congress to require a statement of constitutional authority and a federalism assessment for all federal legislation. Requiring that every bill introduced in Congress explicitly state Congress' constitutional authority to enact the proposed measure, with citation to specific provisions of the Constitution, would focus the attention of Congress and the public on the nature and scope of the asserted power and the propriety of its proposed exercise. Inviting such scrutiny would help to ensure that dubious exercises of federal power are avoided. In addition, each bill introduced in Congress -- or at least any committee report favorably reporting the bill -- could be required to contain a "Federalism Assessment." The requirements for such an assessment could be modeled after the Regulatory Impact Evaluation currently required in the Senate or the Regulatory Impact Analysis required by Executive Order 12291. The assessment could be required to discuss such matters as the efforts the States have taken to address the subject of the bill; the factors necessitating a national solution; the extent to which the bill's provisions would affect the States' ability to discharge traditional state governmental functions, or other aspects of state sovereignty; the effect on the States' ability to innovate and experiment with solutions; and the overall effect on the distribution of power and responsibilities among the various levels of government.

(2) Seek limitations on federal regulation of the States that interferes with state sovereignty. The Supreme Court held in Garcia that Congress is in effect the sole judge of the extent of its commerce power. Accordingly, it is entirely appropriate -- indeed, it is critical -- that Congress impose such limits on itself. The standard could be modeled after the National League of Cities formula: that congressional regulation of the States as States is not permitted if it interferes with

"functions essential to [the States'] separate and independent existence" (426 U.S. at 845) or "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (426 U.S. at 852). Congress could apply this legislative standard to any congressional actions (and federal agency action based on such congressional actions) that directly regulate the States, no matter what enumerated power is invoked: commerce, spending, or otherwise. Moreover, Congress could require itself to be explicit when it intends to regulate the States as States; under such a congressionally imposed requirement, absent an explicit statement that legislation is intended to apply directly to the activities of the States, the statute would not be interpreted to so apply.

(3) Seek congressional restrictions on the use of grants to indirectly regulate the States. The last twenty years have seen explosive growth in the use by Congress of conditional funding grants to impose a vast array of regulations that have little or no relationship to the programs being funded. Congress could be asked to abandon the current indirect practice of tying such regulations to the grants system, thus restricting such regulation of the States to direct orders to the States. Congress could implement this proposal by adopting procedural constraints on future enactment of crosscutting and crossover regulations.

(4) Discourage federal grants that authorize local expenditures that are not authorized by the States. In some programs, federal funds are provided directly to local governments for use in ways not authorized, and sometimes explicitly prohibited, by state law. A good example is the federal Payment in Lieu of Taxes Act, which compensates local governments for the loss of tax revenues resulting from the tax-exempt status of federal lands in their jurisdictions. The Act authorizes local governments to use the federal funds for any governmental purpose. In Lawrence County v. Lead-Deadwood School District No. 40-1,[212] the Supreme Court invalidated under the Supremacy Clause a South Dakota statute requiring localities to

allocate such federal funds in accord with the scheme mandated by South Dakota for allocation of general tax revenues. The result in that case was that a State was prohibited by the national government from controlling the expenditures of one of its own political subdivisions. Congress could adopt restraints on its ability, through federal spending, to subvert the authority of the States over their own political subdivisions.

(5) Seek establishment of federalism subcommittees of the judiciary committees and revision of parliamentary rules. Currently, the governmental affairs committees in Congress have subcommittees on intergovernmental relations. These subcommittees, and the full committees to which they report, concentrate on questions of government efficiency and the management of federal grant programs; they do not concern themselves in any consistent way with the appropriate division of governmental responsibilities under the Constitution and the impact of proposed measures on the sovereign prerogatives of the States. The focus of these subcommittees is thus too narrow for the comprehensive and studied approach to federalism questions that a proper respect for the States, especially in light of Garcia, requires Congress to take. Accordingly, Congress should consider establishing federalism subcommittees to review all proposed legislation that has potentially adverse implications for state sovereignty. Specifically, these subcommittees would have the responsibility for ensuring congressional compliance with any procedual reforms adopted by Congress to preserve federalism. Such subcommittees would therefore serve a function analogous to that performed by the budget committees, which were established by the Congressional Budget Act of 1974. Given the essentially constitutional nature of the considerations that would be required by these reforms, it seems appropriate that these new subcommittees report to the judiciary committees, which of course currently have jurisdiction over constitutional matters. As an additional enforcement mechanism, Congress could amend its parliamentary rules to provide that a point of order could be raised concerning legislation not complying with the

procedural reforms. Thus, during floor consideration of such a bill, the parliamentarian could be asked to rule that it is out of order to vote on the bill.

(6) Promote optional state consolidation of federal programs. Federal grant programs often unnecessarily restrict state discretion in administering federal assistance. The Working Group has been developing a proposal to improve the efficiency and effectiveness of state-administered grant programs by giving States flexibility in meeting the purposes of federal grant programs and by permitting them to exercise substantial discretion in the allocation of federal funds. Under the proposal, any State could apply to consolidate the funds it receives from any or all of a set of specified federal programs. While States would have to meet certain planning and reporting requirements and certain basic rules such as human rights protections, most existing program requirements would not apply. States could choose from among various clusters of subject matter-related block, formula, and project grant programs (e.g., human service programs). Under this approach, States could respond to their particular problems, take advantage of their particular skills, and retain governing and administrative authority.

(7) Seek a requirement that Congress' intent to preempt be explicit. Preemption of state regulatory authority is often asserted by federal agencies, and implied by federal courts, on the basis that Congress' intent to "occupy the field" may be inferred from the particular statute or its legislative history. According preemptive effect on this basis to federal agency rulemaking is a particular affront to federalism because States are not represented in the agencies and are thus without even the procedural protections recognized in Garcia. A State's sovereign authority should be displaced only when Congress' power and intent to do so are clear and certain, and efforts to divine congressional intent by inference are necessarily imprecise. An effective curb on implied federal preemption could be established by enactment of legislation providing that no federal law shall

be construed to preempt state law unless (1) the law contains an express preemption provision or (2) the exercise of state authority directly conflicts with the exercise of federal authority under the federal statute in question.

(8) Seek a prohibition on agency preemption by rulemaking or a requirement that congressional authorization of agency preemption be explicit. The implicit prohibition on agency preemption by rulemaking suggested in the preceding proposal could be made even more explicit by enactment of a provision specifically denying federal agencies the power to preempt state law by rulemaking. Under such a provision, any preemption would have to be accomplished by statute. A more modest proposal would be for the legislation to state that no law authorizing an agency to issue regulations shall be construed as authorizing preemption by regulation unless the law explicitly authorizes such preemption. The legislation could provide that any such authorization should provide standards to control the agency's exercise of its preemption authority.

(9) Reform federal court jurisdiction. Until 1875 the state courts had primary responsibility for adjudicating all civil cases, including those involving federal rights. Now, almost 40% of the federal district court caseload consists of cases involving diversity jurisdiction (claims between citizens of different States but based on state law), suits pursuant to section 1983, habeas corpus petitions, and so-called "federal tort" cases involving private citizens. Consideration should be given to proposing omnibus court reform legislation. Such legislation might include such proposals as abolishing or limiting diversity of citizenship jurisdiction, restricting federal court habeas corpus review of petitions by state prisoners, and requiring exhaustion of state administrative and/or judicial remedies before relief may be sought in federal court. A judicial federalism legislative initiative would make clear that the Administration's commitment to federalism extends to all branches of the national government.

b. Executive action

The following federalism initiatives could be undertaken directly by presidential or other administrative action:

(1) Executive order on federalism. The President could implement the Statement of Federalism Principles by issuing a comprehensive executive order on federalism setting forth concrete guidelines to be referred to by agencies when they undertake actions with federalism implications. These guidelines could establish procedures to be followed in federalism matters -- such as identification of federal and state interests, consultation with state representatives, and intra-agency federalism review. They could also identify substantive federalism legal and policy criteria. For example, the guidelines could identify substantive legal and policy criteria relating to when preemption of state law may be asserted.

The executive order could further provide for an interagency review mechanism to ensure that the federalism principles and guidelines are followed and applied consistently throughout the executive branch. Possible review mechanisms might include a government-wide coordination and review authority for regulations and legislative proposals and comments. That mechanism could be modeled after the regulatory review systems operated by the Office of Management and Budget under E.O. 12291 and by the Department of Justice under E.O. 12250. Agencies could be required to prepare a federalism assessment for all proposed regulatory actions and legislation or legislative comments. A central government agency, such as OMB or the Justice Department, could review these proposals and provide comments reflecting a federalism perspective.

(2) Revision of E.O. 12291 and OMB Circular A-19. As an alternative to a comprehensive federalism executive order, the existing regulatory review system could be modified to ensure that federalism implications of agency action are closely scrutinized. Some relatively minor changes to the wording of E.O. 12291 could ensure that agency regulatory decisions reflect a studied consideration of federalism concerns. In addition, the legislative review system operated by OMB under Circular A-19

could be similarly modified: agencies could be required to undertake federalism assessments in connection with any proposed legislation or legislative comments.

(3) Encourage uniform state laws and interstate compacts. As has commonly been done in the environmental and banking areas, States may enter into regional or other interstate compacts providing for coordinated and consistent state governmental action. And state adoption of uniform codes (e.g., the Uniform Commercial Code) can be an effective way of providing large-scale uniformity while preserving appropriate state control and flexibility. Whenever possible, the national government should encourage the States to enter into compacts with other States and to adopt uniform codes. Thus, where a problem of national or regional scope exists, the national government should not automatically seek to impose its own solution, but should consider whether coordinated state action would be preferable. In some circumstances, specific national government legislative or administrative action facilitating the establishment of interstate compacts and state adoption of uniform codes may be appropriate.

(4) Encourage the States to establish a clearinghouse to share information and ideas. Recognizing that many of the best public policy innovations are developed in the "laboratories" of state government, the Administration should encourage the States to establish a clearinghouse to share information and ideas concerning the resolution at the state level of problems common to some or all of the States. Through such a systematic mechanism for sharing information and ideas, the States collectively could profit from the mistakes and successes of public policy experimentation by individual States.

(5) Advance pro-federalism positions through litigation.

(a) Preemption. Arguments that a federal statute or administrative regulation preempts state law should be advanced only if the law or regulation by its terms preempts state law (or there is some other firm and palpable evidence

compelling the conclusion that Congress intended preemption of State law), or if the requirements of state law are irreconcilable with the requirements or express purposes of that federal law or regulation.

(b) State sovereignty. Government litigators should recognize -- and advocate in appropriate cases -- the protection of state sovereignty provided by the constitutional structure of specifically enumerated national powers and generally reserved state powers, as expressly recognized in the Tenth Amendment. The Justice Department should seek an appropriate case in which to urge the Supreme Court to reconsider and overrule Garcia.

(c) Prosecutorial discretion. When exercising their discretion on whether to investigate or prosecute conduct that may violate both federal and state criminal law, United States government prosecutors should be sensitive to the primary responsibility States have in investigating and prosecuting local crimes.

2. Constitutional Amendments

While it is to be hoped that effective safeguards against further encroachments on the sovereign authority of the States can be established through institutional process reforms such as those outlined above, it is nonetheless important to acknowledge the very real prospect that the only way to ensure that the Framers' vision of federalism is effectively and permanently restored to American government is by restoring that vision to the Constitution itself, through the amendment process. Accordingly, proposals for reform of a constitutional dimension should be studied and considered for possible submission to the Congress and/or the States.

Possible constitutional amendments would likely fall into two categories. One type of amendment would alter the institutional decisionmaking process of the national government in a manner designed to protect the governing authority of the States.

The other type would be aimed at defining the enumerated powers of Congress under Article I in ways that would provide more effective limitations on the national government's ability to intrude into state prerogatives.

CONCLUSION

The Working Group on Federalism strongly believes that President Reagan's goal of "restor[ing] the constitutional symmetry between the central Government and the States and . . . reestablishing the freedom and variety of federalism"[213] can be achieved only if limits are placed on the national government's ability to invade the sovereign authority of the States.

The Working Group stands ready to prepare for the Domestic Policy Council's consideration specific initiatives based on the foregoing ideas for reform of the institutional processes of the political branches, and to develop proposals for a constitutional amendment designed to restore federalism. In this effort, the Working Group will seek the input of state and local officials and other persons and organizations representing the interests of the States.

In 1981, President Reagan stated his regret that "this nation has never fully debated the fact that over the past 40 years federalism -- one of the underlying principles of our Constitution -- has nearly disappeared as a guiding force in American politics and government" and announced that his Administration "intends to initiate such a debate."[214] The members of the Working Group on Federalism are eager to assist the Domestic Policy Council to ensure that the President's goal is accomplished.

[1] The Federalist Papers, No. 39, at 245 (C. Rossiter ed. 1961). All citations herein to The Federalist Papers will be to this edition.

[2] Address in the Ratifying Convention of Virginia (June 4-12, 1788), in Antifederalists versus Federalists 208-209 (J. Lewis ed. 1967).

[3] 426 U.S. 883 (1976). In Oregon v. Mitchell, 400 U.S. 112 (1970), the Supreme Court invalidated a federal statute lowering the voting age for state and local elections. The Court held that the federal statute was an encroachment on the State's express authority under Article I, section 2 of the Constitution to establish voting qualifications in state and local elections. The decision in Oregon v. Mitchell was superceded by the Twenty-sixth Amendment. Prior to Mitchell the last decision invalidating an act of Congress on federalism grounds was Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[4] 469 U.S. 528 (1985).

[5] Id. at 575 (Powell, J., dissenting).

[6] Address to the National Conference of State Legislatures, Public Papers of Ronald Reagan 679 (1981).

[7] Inaugural Address, id. at 2 (1981).

[8] 469 U.S. at 552.

[9] Documents Illustrative of the Formation of the Union of the American States 121 (C.C. Tansill, ed., 1927).

[10] See Madison's Notes of Debates in the Federal Convention of 1787, 35 (1956).

[11] The Federalist Papers, No. 39, at 246.

[12] The Federalist Papers, No. 39, at 245.

[13] The Federalist Papers, No. 45, at 292-293.

[14] The Federalist Papers, No. 39, at 256.

[15] The Federalist Papers, No. 32, at 198.

[16] The Federalist Papers, No. 31, at 197.

[17] Letters of Agrippa, reprinted in Schwartz, The Bill of Rights: A Documentary History, 510, 511 (1971).

[18] Letter from Samuel Adams to Richard Henry Lee (Dec 3, 1787), reprinted in Anti-Federalists versus Federalists 159 (J. Lewis ed. 1967). Antifederalists raised these concerns in almost every State ratifying convention. See generally 1-4, Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d. ed. 1854) (hereinafter cited as "Elliot's Debates").

[19] Id.

[20] United States v. Darby, 312 U.S. 100, 124 (1941).

[21] The Federalist Papers, No. 85, at 526.

[22] The Federalist Papers, No. 52, at 330.

[23] The Federalist Papers, No. 62, at 378.

[24] Alexis de Tocqueville, Democracy in America, vol. II, 169 (Doubleday, 1969).

[25] Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

[26] 17 U.S. (4 Wheat.) 316 (1819).

[27] The Federalist Papers, No. 42, at 268.

[28] The Federalist Papers, No. 62, at 378.

[29] Garcia, 469 U.S. at 587 (O'Connor, J., dissenting), quoting Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 544-545 (1954).

[30] Advisory Commission on Intergovernmental Relations, Regulatory Federalism: Policy, Process, Impact and Reform 12 (1984).

[31] Office of Management and Budget, Directory of Policy Requirements and Administrative Standards for Federal Aid Programs (1985).

[32] McCulloch v. Maryland, 17 U.S. at 411-12 (the Necessary and Proper Clause provides Congress "the right . . . to employ the necessary means, for the execution of the powers conferred on the government").

[33] G. Gunther, Constitutional Law 96 (10th ed. 1980) (hereinafter cited as "Gunther").

[34] McCulloch v. Maryland, 17 U.S. at 413-14.

[35] See id. at 407.

[36] Id. at 421. In McCulloch, Marshall also stated that Congress must not enact laws beyond its power "under the pretext" of exercising one of the enumerated powers. 17 U.S. at 423.

Despite this requirement, the Supreme Court has generally refused to inquire into a statute's actual purposes or the real motives of its congressional sponsors when considering whether Congress has the authority to enact the statute; the Court instead has focused on whether the statute promotes legitimate ends. See, e.g., United States v. Darby, 312 U.S. at 115 ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control").

[37] McGrain v. Daughtery, 273 U.S. 135, 173 (1927); see also Reina v. United States, 364 U.S. 507, 511-12 (1960) ("Congress may legislate . . . to the extent necessary and proper for the more effective exercise of a granted power" -- statute granting immunity from state prosecution upheld as necessary and proper for effective execution of Congress' power to enact narcotics laws).

[38] Luxton v. North River Bridge Co., 153 U.S. 525, 529 (1894).

[39] Garcia, 469 U.S. at 584-85 (citations omitted). See also United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) ("The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.").

[40] The Commerce Clause also grants Congress the power to "regulate Commerce with foreign Nations . . . and with the Indian Tribes." U.S. Const., art. I, sec. 8, cl. 3.

[41] See 3 Farrand, The Records of the Federal Convention of 1787 478 (letter of February 13, 1829, from James Madison to J.C. Cabell) (the Commerce Clause "grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves . . . .") (hereinafter cited as "Farrand").

[42] Ibid.

[43] Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 470 (1941).

[44] See, e.g., 2 Farrand 308 (remarks of Mr. Sherman) ("[t]he oppression of the uncommercial states was guarded against by the power to regulate trade between the States"); id. at 360 (remarks of Mr. Ellsworth) ("[t]he power of regulating trade between the states will protect them against each other").

[45] 1 Elliot's Debates, at 485-486.

[46] The Federalist Papers, No. 42, at 267.

[47] Id. at 268.

[48] The Federalist Papers, No. 22, at 144.

[49] The Federalist Papers, No. 45, at 288, 293.

[50] 22 U.S. (9 Wheat.) 1 (1824).

[51] Id. at 194.

[52] 76 U.S. (9 Wall.) 41 (1870).

[53] Id. at 45.

[54] The Trademark Cases, 100 U.S. 82 (1879).

[55] Id. at 96-97.

[56] Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (current version at 49 U.S.C. 10101, et seq.).

[57] Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. 1, et seq.).

[58] United States v. E.C. Knight Co. (The Sugar Trust Case), 156 U.S. 1 (1895).

[59] Id. at 12.

[60] Id. at 14-15.

[61] Houston E. & W. Texas Ry. Co. v. United States, 234 U.S. 342 (1914).

[62] Id. at 351.

[63] Id. at 355.

[64] Gunther, supra, at 140-141.

[65] Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[66] Id. at 551.

[67] 298 U.S. 238 (1936).

[68] The Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991.

[69] 298 U.S. at 303.

[70] 301 U.S. 1 (1937).

[71] Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. 151, et seq.).

[72] Jones & Laughlin, 301 U.S. at 37.

[73] In the years following Jones & Laughlin, the Court upheld every New Deal statute challenged as exceeding congressional power under the Commerce Clause. See NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (National Labor Relations Act (NLRA) can be applied to small clothing manufacturer); Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 (1938) (upheld the validity of Labor Board order directed to a fruit packing concern); Consolidated Edison v. NLRB, 305 U.S. 197 (1938) (upheld federal control over the labor relations of a power plant selling its output entirely within one state); NLRB v. Fainblatt, 306 U.S. 601 (1939) (sustained application of the NLRA to a garment processor who delivered his entire output within the state); A.B. Kirschbaum v. Walling, 316 U.S. 517 (1942) (Fair Labor Standards Act (FLSA) could be applied to employees who did not produce goods for commerce but who were employed merely in the maintenance and operation of a loft building where tenants did produce and sell ladies garments for interstate commerce); Warren Bradshaw Drilling Co. v. Hall, 317 U.S. 88 (1942) (FLSA could be applied to operators of oil well drilling rigs even though drillers themselves did not produce for commerce); Walton v. Southern Package Corp., 320 U.S. 540 (1944) (FLSA extended to night-watchmen at veneer plant); Borden Co. v. Borella, 325 U.S. 679 (1945) (FLSA covers porters and elevator operators in a New York office building); Currin v. Wallace, 306 U.S. 1 (1939) (upheld the Tobacco Inspection Act of 1937, which established federal inspection and grading at tobacco auctions); United States v. Rock Royal Cooperative, Inc., 307 U.S. 533 (1939) (sustained Agricultural Marketing Agreement Act, which empowered the Secretary of Agriculture to maintain parity prices for a variety of agricultural commodities through the imposition of marketing quotas and price schedules); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (upheld the Bituminous Coal Act of 1937, which established a system for price-fixing in the coal industry); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (business of insurance was in itself interstate commerce, and thus subject to regulation under the Sherman Antitrust Act); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) (upheld federal control over the non-navigable upper reaches of an interstate stream).

[74] Jones & Laughlin, 301 U.S. at 37.

[75] Id. at 99 (McReynolds, J., dissenting).

[76] 317 U.S. 111 (1942).

[77] United States v. Darby, 312 U.S. at 114.

[78] See, e.g., Katzenbach v. McClung, 378 U.S. 294 (1964)(nondiscrimination provisions of 1964 Civil Rights Act can be applied to small, local restaurant serving food which has moved in interstate commerce). One noted commentator has criticized the Court's rationale in McClung as "a clear example of permitting

the tail (the commerce clause) to wag the whole dog (the tenth amendment)." W. Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709, 1711 n.13 (1985).

[79] See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Griffin v. Breckinridge, 403 U.S. 88 (1971); Runyon v. McCrary, 427 U.S. 160 (1976). In Daniel v. Paul, 395 U.S. 298 (1969), the Supreme Court held that the provisions of the Civil Rights Act prohibiting discrimination in public accommodations whose operations "affect commerce" could be applied to the Lake Nixon Club near Little Rock, Arkansas, a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar. The Court concluded that the entire club could be subjected to congressional regulation because its snack bar served interstate travellers and a substantial portion of the food served had "moved in commerce." In a dissenting opinion, Justice Black concluded that applying the Act's requirements to this club "would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me." Id. at 315.

[80] 82 Stat. 159 (1968) (current version at 18 U.S.C. 891).

[81] 402 U.S. 146 (1971).

[82] Id. at 154-157.

[83] Id. at 157 (Stewart, J., dissenting).

[84] See, e.g., Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

[85] See, e.g., Truth-in-Lending Act, Pub. L. No. 91-644, 84 Stat. 1880 (1970).

[86] The Federalist Papers, No. 45, at 292-293.

[87] See Garcia, 469 U.S.at 584 (O'Connor, J., dissenting) ("Because virtually every state activity, like virtually every activity of a private individual arguably 'affects' interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers.").

[88] In 1966, Congress extended the FLSA to cover public employees of state hospitals, institutions, and schools. 80 Stat. 831, 29 U.S.C. 203(d). The Supreme Court sustained those amendments in Maryland v. Wirtz, 392 U.S. 183 (1968). In 1974, Congress went further and extended the Act to all state employees. 88 Stat. 55, 29 U.S.C. 203(d),(s)(5),(x). The 1974 amendments prompted the Court to reconsider and overrule Wirtz. See National Leaque of Cities v. Usery, 426 U.S. 833, 837-38, 854 (1976).

[89] W. Van Alstyne, supra, 83 Mich. L. Rev. at 1712.

[90] 426 U.S. 833 (1976).

[91] Id. at 840.

[92] Id. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

[93] Id.

[94] See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (upholding federal legislation enacting a national system for regulating surface coal mining); United Transportation Union v. Long Island Rail Road Co., 455 U.S. 678 (1982) (upholding the application of the Railway Labor Act of 1926 to a state-owned commuter railroad); FERC v. Mississippi, 456 U.S. 742 (1982) (upholding requirement that state utility commissions use prescribed procedures and consider certain federal standards); EEOC v. Wyoming, 460 U.S. 226 (1983) (holding that the Tenth Amendment does not preclude application to the States of the Age Discrimination in Employment Act).

[95] 469 U.S. 528 (1985).

[96] Id. at 556.

[97] Id. at 554.

[98] Id. at 556.

[99] Van Alstyne, supra, 83 Mich. L. Rev. at 1724 n.64.

[100] Garcia, 469 U.S. at 588 (O'Connor, J., dissenting).

[101] Id. at 560 (Powell, J., dissenting).

[102] Id. at 575 (Powell, J., dissenting).

[103] Id. at 580 (Rehnquist, J., dissenting); see also id. at 589 (O'Connor, J., dissenting).

[104] J. Richardson, 1 Messages and Papers of the Presidents 584 (1909) (hereinafter cited as "Richardson").

[105] 2 Richardson, supra, at 11, 18 (1817) (inaugural address). However, by 1822 he had modified his views to conclude that Congress could appropriate money for internal improvements that advanced the national welfare but that the money had to be given directly to the States for expenditure because only they had jurisdiction to spend the money. Id. at 142-43 (Views of the President of the United States on the Subject of Internal Improvements) (veto of bill to repair the Cumberland Road).

[106] Id. at 483 (1830) (veto of a bill to finance the Maysville Road).

[107] C. Warren, Congress as Santa Claus 22 (1932).

[108] Id.

[109] Cong. Globe, 33rd Cong., 1st Sess. 1060, 1061 (1854) (veto of a grant of land to the States for the benefit of the insane).

[110] 5 Richardson, supra, at 543, 547 (1859) (veto of the Morrill Act, which gave land to the States to be used for educational purposes).

[111] See, e.g., 1 Stat. 550, sec. 6 (land for education, incorporating by reference statute from the Continental Congress); 2 Stat. 490 (1808) ($200,000 to the States to purchase arms for their militia); 3 Stat. 428, 430 (1818) (land grants for schools and roads). Most Western States received grants of public land to establish educational institutions at the time of their admission to the Union. D. Walker, Toward a Functioning Federalism, 51-52 (1981). See e.g., 9 Stat. 56, sec. 7 (1846) (admission of Wisconsin). This custom predates the Constitution: the Land Ordinance of 1785 provided a similar land grant. 28 J. Cont. Cong. 298, 301 (1785).

[112] See, e.g., 34 Stat. 63 (1906) (grants for agricultural experiment stations); 36 Stat. 961 (1911) (grants for prevention of forest fires).

[113] 297 U.S. 1, 65-66 (1936).

[114] J. Clark, The Rise of A New Federalism 140 (1938) (hereinafter cited as "Clark").

[115] See, e.g., First Morrill Act, 12 Stat. 503 (1862) (aid limited to certain kinds of education); Second Morrill Act, 26 Stat. 417 (1890) (review of eligibility); Weeks Act, 36 Stat. 961 (1911) (state matching funds); Clark, supra, at 142 (approval of state implementing plans and inspection of state activities).

[116] Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (1965).

[117] 23 U.S.C. 136.

[118] 23 U.S.C. 152.

[119] 5 U.S.C. 1501-1508. This program was upheld in Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947).

[120] 23 U.S.C. 154.

[121] 42 U.S.C. 4022. See Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978), aff'd mem., 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979).

[122] 49 U.S.C. 1609(c)(2). See City of Macon v. Marshall, 439 F.Supp. 1209 (M.D. Ga. 1977).

[123] Lau v. Nichols, 414 U.S. 563 (1974) (interpreting 42 U.S.C. 2000d).

[124] 42 U.S.C. 6705(f)(2). See Fullilove v. Klutznick, 448 U.S. 448 (1980).

[125] See 42 U.S.C. 7616 (States ineligible for sewage treatment grants unless in compliance with federal clean air and motor vehicle emissions programs); 42 U.S.C. 7544 (grants for inspection of vehicle emission devices tied to compliance with 23 U.S.C. 402's requirement that states have a general highway safety program); 23 U.S.C. 402(b)(1)(E) (grants for highway safety program tied to providing sidewalk curbs that are accessible to the handicapped). Other such laws have only recently been repealed. 42 U.S.C. 1397a(a)(9)(A)(1976) (receipt of social services funds tied to federal staffing levels for day care centers) (upheld in Stiner v. Califano, 438 F. Supp. 796 (W.D. Okl. 1977) (3-judge court)); 7 U.S.C. 2019 (d)(1976) (participation in food stamp program precludes any reduction in other state-funded general welfare programs) (upheld in Dupler v. City of Portland, 421 F. Supp. 1314 (D. Maine 1976)).

[126] Massachusetts v. Mellon, 262 U.S. 447, 480 (1923), was one of the earliest challenges made on this ground.

[127] See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936) (tax on coal struck down because regulation of labor relations is a purely state activity); United States v. Butler, 297 U.S. 1 (1936) (federal incentive to convince farmers to reduce crops struck down because regulation of agricultural is beyond the delegated powers of the national government); Hill v. Wallace, 259 U.S. 44 (1922) (tax on grain sales void as attempt to regulate boards of trade); Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20 (1922) (tax on companies that employ children struck down because regulation of child labor is a purely state activity).

[128] 301 U.S. 548 (1937).

[129] Id. at 586.

[130] Id. at 593.

[131] Id. at 595, 596.

[132] Id. at 590-91.

[133] Pennhurst State School v. Halderman, 451 U.S. 1, 17 n.13 (1981). In Pennhurst the Court made clear that the States cannot be held to alleged conditions that are not clearly expressed. See also Fullilove v. Klutznick, 448 U.S. 448 (1980); Lau v. Nichols, 414 U.S. 563 (1974).

[134] See, e.g., State of Oklahoma v. Schweiker, 655 F.2d 401, 406 n.9 (D.C. Cir. 1981); City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973) (State claimed that the temptation to accept money is too strong in this day of fiscal constraint to be resisted).

[135] See State of Oklahoma v. Schweiker, 655 F.2d at 413.

[136] See State of North Carolina v. Califano, 445 F. Supp. 532, 534-36 (E.D. N.C. 1977) (footnote omitted) (3 judge panel), aff'd mem., 435 U.S. 962 (1978).

[137] Id. at 535-36 (footnotes omitted).

[138] Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947).

[139] Raise a Glass to Federalism, N.Y. Times, May 3, 1986, at 26, col. 1.

[140] E.g., South Dakota v. Dole, No. 85-5223 (8th Cir., May 21, 1986) (rejecting Tenth Amendment challenge to condition on highway funds of enactment of a 21-year-old drinking age); Alabama v. Lynq, No. 86-H-392-N (M.D. Ala., filed April 10, 1986) (challenge to Food Stamp Act amendment that prevents states from participating in the program if they tax food stamps).

[141] Writing in Federalist No. 44, James Madison said that if it were otherwise, if state constitutions had been allowed to prevail over federal law, then "the world would have seen, for the first time, a system of government founded on the inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." The Federalist Papers, No. 44, at 287.

[142] The Federalist Papers, No. 33, at 204. For example, Hamilton opined that, "[t]hough a law . . . for laying a tax for the use of the United States would be supreme in its nature and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of a state . . . would not be the supreme law of the land, but a usurpation of power not granted by the Constitution." Id. at 205.

[143] See, e.g., Allis-Chalmers Corp. v. Lueck, 105 S.Ct. 1904 (1985) (employee's state tort action against employer and insurer under collective bargaining agreement preempted by LMRA).

[144] See, e.g., Salomon v. Transamerica Occidental Life Ins. Co., No. 85-1835 (4th Cir. Sept. 18, 1986) (Virginia breach of contract claim against insurance company preempted by ERISA).

[145] See, e.g., Pennsylvania v. Nelson, 350 U.S. 497 (1956) (Pennsylvania sedition act preempted by similar federal statute).

[146] See, e.g., International Longshoremen's Ass'n v. Davis, 106 S.Ct. 1904 (1986) (NLRA preemption is jurisdictional and therefore itself preempts state procedural rule denominating it an affirmative defense).

[147] See, e.g., FERC v. Mississippi, 456 U.S. 742, 759 (1982) (federal regulations exempting nontraditional generating facilities from state law did "nothing more than preempt conflicting state enactments in the traditional way").

[148] See, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (city noise regulation limiting hours of jet takeoffs preempted).

[149] See Ridgway v. Ridgway, 454 U.S. 46 (1981) (Servicemen's Group Life Insurance Act provision permitting insured to designate beneficiary held to preempt terms of Maine divorce decree).

[150] See, e.g., Grant v. General Electric Credit Corp., 764 F.2d 1404 (11th Cir. 1985) (en banc) (Georgia usury law preempted as applied to mobile home sales contract).

[151] See, e.g., Golden State Transit Corp. v. City of Los Angeles, 106 S.Ct. 1395 (1986) (City's action conditioning taxicab franchise renewal on settlement of labor dispute preempted by federal labor law).

[152] See, e.g., Xerox Corp. v. Harris County, Texas, 459 U.S. 145 (1982) (property tax on goods stored under bond in customs warehouse preempted by comprehensive federal regulation of customs duties).

[153] EEOC v. Wyoming, 460 U.S. 226 (1983) (mandatory retirement age of state game wardens preempted by federal law).

[154] 454 U.S. 46 (1981).

[155] Id. at 53.

[156] 17 U.S. (4 Wheat.) 316 (1819).

[157] Earlier, the Court had construed the Clause as it applied to federal treaties in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[158] 17 U.S. (4 Wheat.) at 431.

[159] Id. at 436.

[160] 22 U.S. (9 Wheat.) 1 (1824).

[161] See License Cases, 46 U.S. (5 How.) 504, 576-577 (1847) (opinion of Taney, C.J.) (although States may not forbid importation of foreign liquor pursuant to federal statute, they may regulate or even forbid its resale); see also New York v. Miln, 11 Pet. (36 U.S.) 102, 139 (1837) (upholding New York statute requiring ship captains to report to Mayor of New York concerning alien passengers, and stating that, within its police power, "the authority of a state is complete, unqualified, and exclusive").

[162] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

[163] See, e.g., San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (state regulation of labor activities covered by NLRA preempted due to their "potential frustration of national purpose"); Pennsylvania v. Nelson, 350 U.S. 497, 509 (1956) (state sedition statute preempted by federal statute in part because of possibility of incompatible adjudications).

[164] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), quoted with approval, Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 105 S.Ct. 2371, 2375 (1985).

[165] 411 U.S. 624 (1973).

[166] Id. at 633.

[167] Id. at 641 (Rehnquist, J., dissenting). Justice Rehnquist went on to rebut the majority's construction of the statute's legislative history. See id. at 642-651.

[168] 350 U.S. 497 (1956).

[169] Id. at 501.

[170] Id. at 502-504.

[171] Id. at 504-505.

[172] Id. at 505-509.

[173] Id. at 504.

[174] Id. at 519 (Reed, J., dissenting), quoting 18 U.S.C. 3231.

[175] Id. at 520.

[176] In its broadest sense, "judicial activism," as the term is used in this section, is simply shorthand for judges imposing on the Constitution a meaning not found in the document itself. Thus, the recent public debate concerning "original intent" as a means of construing the Constitution is really about judicial activism: Should judges find meaning in the Constitution by reference to its language, structure, and history, or should they create meaning based on their perception of modern values and problems?

The theory of interpretation most directly opposed to judicial activism often goes by the name of "interpretivism." Interpretivism is the belief that the Constitution is a permanent document, expressing certain basic and enduring principles about the distribution and limits of government powers -- principles that judges are bound to respect unless and until they give way to change through the constitutionally prescribed amendment process. Contrary to some characterizations of this position, it does not require that one know precisely how the Framers of the Constitution would have decided particular cases. As Justice Antonin Scalia has put it, the focus is on discovering the "original meaning" of the language found in the Constitution, not the original subjective intent of specific historical figures. See Address to Attorney General's Conference on Economic Liberties (June 1986). History, the structure of the Constitution, and the general understandings prevalent when the various constitutional provisions were framed all can be relevant guides to discovering the meaning of this language.

Of course, a great many constitutional questions will not have clear answers even when all legitimate sources of original meaning have been examined. But even in these cases, what we do know about the original meaning of the document will provide guideposts and set boundaries. As Judge Robert Bork, a leading interpretivist scholar, put it in a recent speech, the text, structure, and history of the Constitution "provide the judge not with a conclusion about a specific case, but with a premise from which to begin reasoning about that case. . . ." Address to University of San Diego Law School (November 1985). In other words, one can know that a particular answer to a constitutional question is wrong without knowing precisely which answer is right.

[177] Obviously, courts can also construe statutes incorrectly in a manner damaging to federalism. This is "activism" in a real sense, but the discussion here is confined to matters of constitutional law.

[178] Article V also provides that the amendment process cannot be used to deprive a State of its equal suffrage in the Senate without its consent.

[179] The precise language of Article V reads: "Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments. . . ."

[180] 410 U.S. 113 (1973). See also the lesser known companion case of Doe v. Bolton, 410 U.S. 179 (1973). Doe discussed the constitutionality of some of the procedural requirements of Georgia's abortion statute, approving some and rejecting others.

[181] 410 U.S. at 153.

[182] Id. at 154.

[183] Beal v. Doe, 432 U.S. 438, 446 (1977) (quoted in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 428 (1983)). It bears emphasizing that for the Court to reach this conclusion, it need not and did not conclude that protecting potential life was a wise policy for a State to follow. It only requires saying that it is among the extremely broad range of goals that a state legislature may, wisely or not, choose to pursue.

[184] In recent years, the Court has decided that the Fourteenth Amendment subjects the States to many of the provisions of the Bill of Rights that originally restricted only the national government, thus restricting the States' ability to regulate in ordinary fashion in certain areas of life traditionally within the province of the States. Familiar examples are the First Amendment's prohibition on laws abridging the freedom of speech, press, petition, or religious exercise; the Fourth Amendment's ban on unreasonable searches or seizures; and the Fifth Amendment's guarantee of freedom from self-incrimination.

[185] One noted commentator has said of Roe: "At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking." Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 936-37 (1973).

[186] 410 U.S. at 165.

[187] One possible precursor of Roe v. Wade was Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Court invalidated a Connecticut statute regulating the use of contraceptives by married persons. The Court did not base its holding on any particular constitutional guarantee, or on any inference to be drawn from any particular guarantee. Rather, it contended that a number of specific guarantees generated "zones of privacy," 381 U.S. at 484, from which the Court created an independent right to privacy not dependent upon any constitutional provision or set of provisions.

[188] See Bowers v. Hardwick, 106 S.Ct. 2841 (1986) (upholding validity of state statute outlawing sodomy).

[189] 369 U.S. 186 (1962).

[190] 377 U.S. 533 (1964).

[191] Id. at 568.

[192] Id. at 577 (footnote omitted).

[193] Id. at 578. This open-ended standard generated numerous cases, especially following the 1970 census. For a recent representative example, see Brown v. Thomson, 462 U.S. 835 (1983).

[194] 377 U.S. at 568.

[195] Indeed, the Court has recently expanded its oversight of state political processes by indicating that it will henceforth entertain challenges to state districting plans on the grounds that political parties have been unfairly "gerrymandered." See Davis v. Bandemer, 106 S.Ct. 2797 (1986).

[196] See, e.g., Article I, sections 2-4; Amendments 14 (sec. 2), 17, 24, 26.

[197] See R. Berger, Government by Judiciary 69-98 (1979).

[198] 458 U.S. 457 (1982).

[199] Id. at 470. See also id. at 474 ("The initiative removes the authority to address a racial problem -- and only a racial problem -- from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of de facto [i.e., unintentional, and therefore constitutional] school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.").

[200] Id. at 485-86 n.29. Justice Powell, in a dissenting opinion joined by three other Justices, expressed his puzzlement at this conclusion: "I perceive no logic in -- and certainly no constitutional basis for -- a distinction between repealing the Seattle Plan of mandatory busing and establishing a statewide policy to the same effect. The people of a State have far greater interest in the general problems associated with compelled busing for the purpose of integration than in the plan of a single school board." 458 U.S. at 500 n.16 (Powell, J., dissenting).

[201] Id. at 489 (Powell, J., dissenting).

[202] T. Jefferson, First Inaugural Address (March 4, 1801).

[203] As Justice Powell has observed, members of the national government "know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels - not in Washington . . . - that 'democratic self-government' is best exemplified." Garcia, 469 U.S. at 577 (Powell, J., dissenting).

[204] E. David Cronin, The Political Thought of Woodrow Wilson 130-31 (1965).

[205] S. Ervin, Preserving the Constitution 72 (1984)(hereinafter cited as "Ervin").

[206] D. Malone, Jefferson and the Ordeal of Liberty 394 (1962).

[207] Ervin, supra, at 73.

[208] Garcia, 469 U.S. at 572.

[209] Garcia, 469 U.S. at 581 (O'Connor, J., dissenting).

[210] Id. at 567 (Powell, J., dissenting).

[211] Id. at 557.

[212] 105 S.Ct. 695 (1985)

[213] President Ronald Reagan, Address to the National Conference of State Legislatures, July 30, 1981, (17 Weekly Comp. Pres. Doc. 836).

[214] Id.

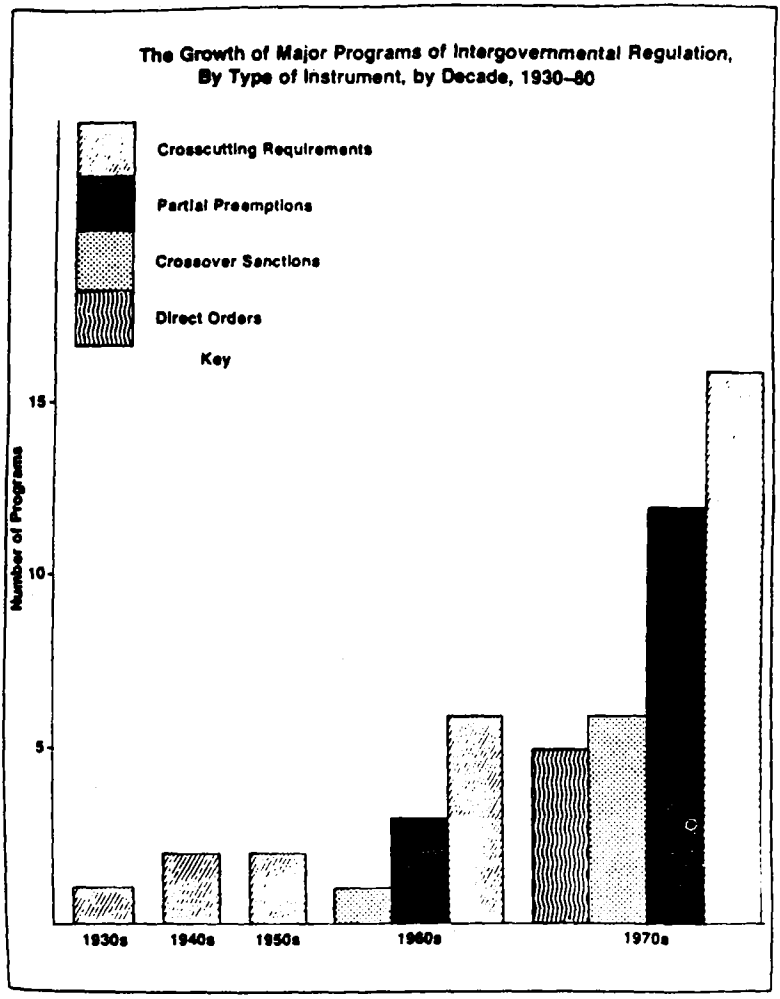
APPENDIX *

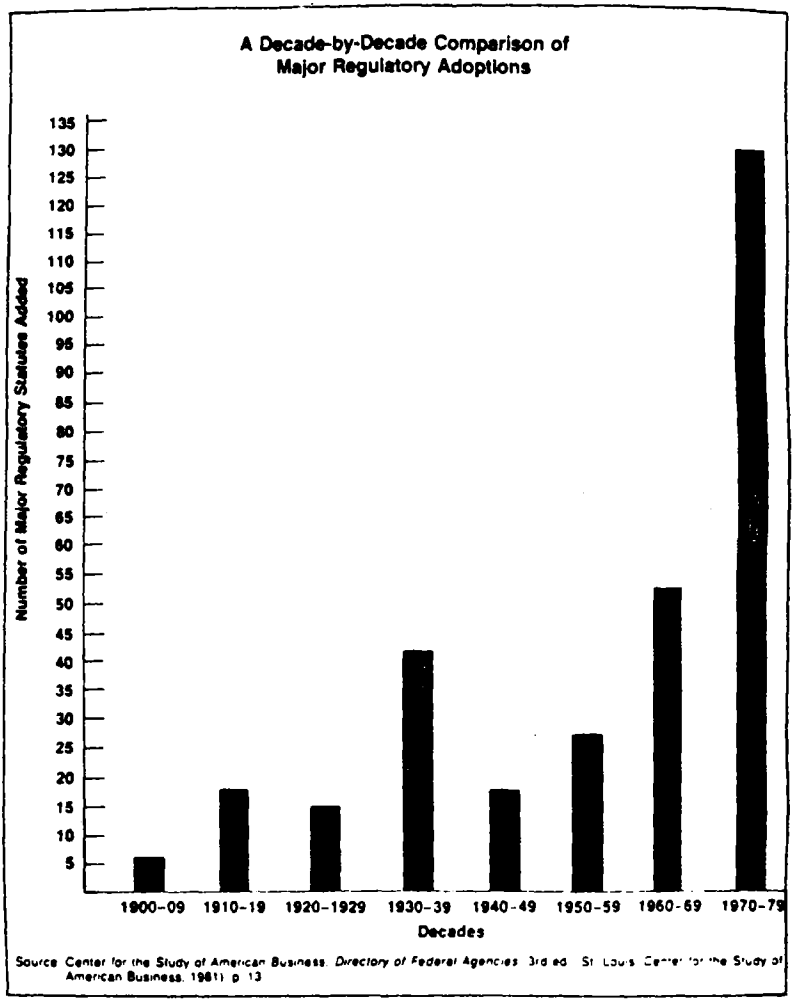
Growth of Regulatory Agencies

Decade-by-Decade Comparison of Major Regulatory Adoptions

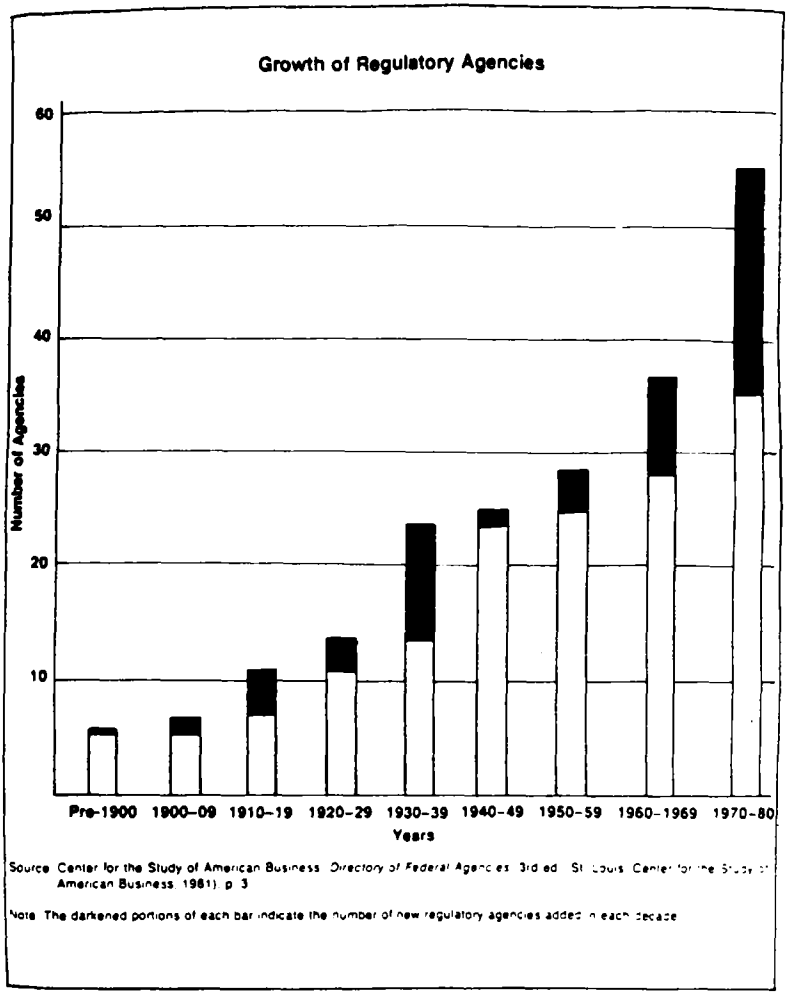
The Growth of Major Programs of Intergovernmental Regulation, by Type of Instrument, by Decade, 1930-80

* Reported in Regulatory Federalism: Policy, Process, Impact and Reform, Advisory Commission on Intergovernmental Relations, Washington, D.C., February 1984.


The Growth of Major Programs of Intergovernmental Regulation, By Type of Instrument, by Decade, 1930–80
Crosscutting Requirements
Partial Preemptions
Crossover Sanctions
Direct Orders
Key
Number of Programs
15
10
5
1930s
1940s
1950s
1960s
1970s



Source: Center for the Study of American Business, *Directory of Federal Agencies*, 3rd ed. St. Louis: Center for the Study of American Business, 1981), p. 13.



Source: Center for the Study of American Business, *Directory of Federal Agencies*, 3rd ed. (St. Louis: Center for the Study of American Business, 1981), p. 3.

Note: The darkened portions of each bar indicate the number of new regulatory agencies added in each decade.

Mr. MCINTOSH. Also, Bernie, if you do not mind, I will ask unanimous consent that we extend the time, because I would like to hear the answer from everyone to that question.

Mr. DeSeve, you elaborated what you think should be done. Do you want to add anything more?

Mr. DESEVE. I don't think so.

Mr. MCINTOSH. Mr. Racine, what do you think should be done, either here in Congress or at the White House?

Mr. RACINE. Based on what I have heard today, I would recommend that the process of consultation go on. I think we have heard from Mr. DeSeve this afternoon that they are willing to go back, the administration, to go back to the previous Executive order and start with that as a basis for discussions. I think that is a good faith effort. It seems that this country has operated under two existing Executive orders for many years without a lot of difficulty, and I would let that process continue.

Mr. MCINTOSH. I take it implicit in that you don't think Congress should act until we see what the result is?

Mr. RACINE. I think you could infer that, yes, sir.

Mr. MCINTOSH. Let me ask you this: Do you see things that should be changed in those earlier Executive orders, or do you think they are basically substantively on track?

Mr. RACINE. I can't say I am an expert on Executive orders, Mr. Chairman, but again from what I have learned in this process and heard today, it would seem to me there is a basis for looking at the previous Executive orders in the light of recent congressional action, as well as judicial action, with a view toward updating that Executive order.

Mr. MCINTOSH. Let me ask you this: Given that both of those, the unfunded mandates and the court cases, actually took the previous status quo and changed it more in favor of deference to the States, should the Executive order be updated in that direction, or should it be updated in the direction of giving the bureaucracies more discretion?

Mr. RACINE. I think that goes beyond my knowledge of these Executive orders, Mr. Chairman, but I think——

Mr. MCINTOSH. Well, let me put it to you a different way. Do you think we should have a rule, either an Executive order or a statute, that says when you are writing the regulation you have to defer to the States as allowed, or, when you are writing a regulation, you can if you want to? Which do you think would be better?

Mr. RACINE. I am not sure it is an either/or situation, Mr. Chairman.

Mr. MCINTOSH. Well, that is what we are talking about today.

Mr. RACINE. Well, it is and it isn't. I find these questions similar to the questions we face at the State government level when we are dealing with our local governments, although we don't have a 10th amendment that applies in those cases. But I find that there is always a tension between the two, and they tend to be political tensions based on the politics of the day. I would prefer to see flexibility in these matters, so that that tension can continue, so the Congress can work with the executive branch to work these things out. I have a hard time with saying it shall work this way or that way.

Mr. MCINTOSH. Flexibility, of course, means the executive, the Federal Government gets to decide which way they come down. If you nail it down, then it always falls on the benefit of the States. That is the key difference between the Reagan Executive order and the proposed new one.

Mr. RACINE. I am not sure I agree with that, Mr. Chairman, but, again, I do not claim any expertise in these two Executive orders. I believe that is an opinion that has been expressed today. I believe there are other opinions that have been expressed today as well.

My perspective is I want to see States hold on to as much authority as possible. In my testimony I talked about various areas where we have received that flexibility. I disagree with Mr. Horowitz's interpretation of my remarks. The waiver that I referred to in my testimony was given in the first weeks or perhaps months of the Clinton administration operating under existing law that had been passed by previous Congresses and worked on by previous administrations, which the Clinton administration merely showed early flexibility in granting that waiver.

Mr. MCINTOSH. Would you be troubled if there is a future Bush administration or Quayle administration; would you have confidence they would give you as much flexibility?

Mr. RACINE. I don't know. I am speculating on something that may or may not happen, so I would rather not do that. Thank you, Mr. Chairman.

Mr. MCINTOSH. Envisioning something like that, can't you see why you would want to have some protections there?

Mr. RACINE. I have a hard time envisioning that, Mr. Chairman, so you have to give me some time to think on this.

Mr. MCINTOSH. Mr. Schwartz, what do you think should be done?

Mr. SCHWARTZ. Well, Mr. Chairman, being the form of government that has no ability to either preempt or mandate anyone other than the taxpayers, somebody once said maybe we need another form of government below this.

I do not think with the legislative agenda that Congress has, which appears to be ambitious for the remainder of the term, that it would seem to me if the issue can be resolved as the administration is saying it can be, and hopefully it can be and the negotiations can go on. Even if it is not signed off in a 2 or 37-week period, but significant progress is made, then I think that process should continue. That makes sense.

I will be honest with you in terms of it has been a number of prints since I read the principal decision, which I found fascinating, and I would like to review that again, to be honest with you. I would like to go back and read the Unfunded Mandates Act again. I would tell you I would raise an issue, and it is a philosophical position in terms of looking at we are going to put a threshold of $100 million in a bill that came out. Obviously as a municipal official we were thrilled that act was signed, it was properly passed by the Congress and signed by the President, but a lot of us would sit and say what level. A lot of municipal officials would say zero. It is that simple.

In terms of what Mr. Sanders was saying, there are constitutional issues in terms of segregation and other issues that are very clear constitutional issues and properly ruled that way. There is a

difference when we get to an unfunded mandate that tells me to raise the money if I don't have it, when Congress doesn't send the money with it, or preemption issue in terms of traditional zoning rights which traditionally are not constitutional issues in my opinion.

So I would suggest that let's see what the progress is. The willingness is there, and when that such willingness exists, let's see what progresses. That seems to be a logical way to proceed at this time.

Mr. HOROWITZ. Mr. Chairman, I just wanted to add in one thing very briefly. To move on to the legislative federalism that Mr. Sanders and others have raised, I will note there is some creative thinking going on. There is currently before the Congress a bipartisan bill involving an "auto choice" system sponsored by Democrats and Republicans, Lieberman, McConnell, Moynihan, Moran and others. But what it does is have a non-preemptive Federal bill. In other words, the Federal legislation is passed and shakes up the deck with minimal intrusion on substantive State law. It affects State law, but then, and this is what is striking and it is a kind of model that doesn't always work, but it is a very interesting thing, at least I wanted to lay on the record, it is only the first word rather than the last word on the subject. Once the Federal law is passed, State governments are free to repeal or modify any or all provisions of the Federal law. So it is not a "one size fits all" matter, it involves the Federal Government getting involved in a matter of interest to the Federal Government and yet leaving the final word to State legislatures.

So I think a lot of creative thinking needs to go on, and I do say, Mr. Sanders, that there are some who really do say I would like this law, I wish it was in effect in all 50 States, but I do defer to federalism. I suspect you are one of them, and I believe there are other Members of Congress that feel that way.

Mr. SANDERS. I plead guilty to not being 100 percent consistent on that myself, but you would agree there are many conservatives who will use their power when they have it, regardless of their respect for cities.

Mr. MCINTOSH. Let me address that. I think you are probably right, Bernie, and the better solution would be for all of us to have greater deference to the States in this. For example, your problem with the health care bill, I think it would have been a good improvement to bring the concept Mr. Horowitz brought in to say we will lay out a Federal standard, but if Vermont wants to increase the protection for patients, then they can do that.

Mr. SANDERS. David, that existed not only in health care, but consumer protection. Various States are different. Indiana is different than Vermont, right? If we want to provide more consumer protection, is it appropriate for the Banking Committee or the Congress to override our concerns? I think not. I would hope you would agree with me.

Mr. MCINTOSH. I have to say, in my mind at least, the direction we should consider in the area of federalism is something like that. It is the background provision that we will not intend to preempt State laws unless we are explicit about it up here on Capitol Hill, and, therefore, regulations implementing those laws should not

preempt State policy. But, if Congress in its wisdom or lack of wisdom, but in its final judgment, does decide to preempt, then that gives a clear signal to the executive branch how they should operate. Perhaps we can move in something in that direction as a standard that we could find bipartisan support for, realizing that it cuts different ways depending on what the issue is being addressed, but gives the maximum deference to the States, in the background setting at least, in how statutes should be interpreted.

I have got one other quick question for Mr. DeSeve. Did the administration, when they updated the Executive order, President Reagan's Executive order, did they have any kind of study like the one that——

Mr. DESEVE. I don't believe there was any study that was that comprehensive.

Mr. MCINTOSH. One would hope they would engage in that before they make major changes from those earlier Executive orders.

I have no other questions for the panel. Do you have any other questions?

Mr. SANDERS. No, I don't. Thank you.

Mr. MCINTOSH. I appreciate all of you coming. We will hold the record open for 3 additional days. There were some questions for you that I didn't have time to ask and I think some of the other Members, so I would ask that if you could, we will send you those and respond to those promptly so we can put those into the record.

Thank you. With that, this hearing is adjourned.

[Whereupon, at 1:50 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
MINORITY (202) 225–5051
TTY (202) 225–6852

July 30, 1998

BY FACSIMILE

The Honorable William J. Clinton
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

On Tuesday, the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, which I chair, held a hearing on your recent executive order (E.O. 13083) "Federalism." Leaders representing the five largest State and local organizations testified that they want you to withdraw your order because it fundamentally changes the relationship between the federal government and State and local governments. Your order would revoke President Reagan's Federalism order and your earlier Federalism order which supplemented President Reagan's order. These two orders contained important constraints on federal regulatory power by requiring a minimum of federal intrusion and substantial deference to state governance.

Although the Administration's representative at the hearing, G. Edward DeSeve, Acting Deputy Director for Management, Office of Management and Budget, was unable to provide a clear answer to why you issued the order, he promised to engage the State and local governments in discussions about substantive changes to the executive order. He specifically agreed to use President Reagan's order as the starting point of those discussions.

Therefore, I can see no reason for E.O. 13083 not to be withdrawn or, at least, suspended indefinitely. Merely delaying the effective date will impede the Administration and the State and local governments from engaging in an effective consultation using President Reagan's order as the basis for discussions. Unless you withdraw or suspend indefinitely E.O. 13083, the Congress will have to consider taking up legislation to restore the proper balance of power between the federal government and State and local governments.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable John Tierney

Effect of Three Federalism Executive Orders

1987 Reagan E.O.	1993 Clinton E.O.	1998 Clinton E.O.
Protects State and local government prerogatives	supplemented Reagan E.O.	**REVOKED** both Reagan and 1993 Clinton E.O.s
Requires Federalism Assessment for all regulatory and legislative proposals (without a $ threshold)	no change	**REVOKED**
Refrain from uniform national standards	no change	Uniform national standards if justified
No preemption of State law unless clear Congressional intent or clear conflict with federal law	no change	**REVOKED**

"With some of his closest advisers deeply pessimistic about the chances of getting major legislation passed during the rest of the year, Mr. Clinton plans to issue a series of executive orders to demonstrate that he can still be effective.

'**Stroke of the pen**,' Paul Begala, an aide to Mr. Clinton, said in summarizing the approach. '**Law of the land. Kind of cool.**'"

New York Times
July 5, 1998

Federal Register
Vol. 52, No. 210
Friday, October 30, 1987

Presidential Documents

Title 3—

The President

Executive Order 12612 of October 26, 1987

Federalism

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4. *Special Requirements for Preemption.* (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. *Special Requirements for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. *Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

Sec. 7. *Government-wide Federalism Coordination and Review.* (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A–19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A–19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Ronald Reagan

THE WHITE HOUSE,
October 26, 1987.

[FR Doc. 87–25301
Filed 10–28–87; 4:29 pm]
Billing code 3195–01–M

Executive Orders

ENHANCING THE INTERGOVERNMENTAL PARTNERSHIP

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 26, 1993

EXECUTIVE ORDER
#12875
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ENHANCING THE INTERGOVERNMENTAL PARTNERSHIP

The Federal Government is charged with protecting the health and safety, as well as promoting other national interests, of the American people. However, the cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments. In addition, the cost, complexity, and delay in applying for and receiving waivers from Federal requirements in appropriate cases have hindered State, local, and tribal governments from tailoring Federal programs to meet the specific or unique needs of their communities. These governments should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal Government.

THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to reduce the imposition of unfunded mandates upon -
cation process for and increase the availability of waivers to State, local, and tribal governments; and to establish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities, it is hereby ordered as follows:

Section 1. Reduction of Unfunded Mandates. (a) To the extent feasible and permitted by law, no executive department or agency ("agency") shall promulgate any regulation that is

not required by statute and that creates a mandate upon a State, local, or tribal government, unless:

(1) funds necessary to pay the direct costs incurred by the State, local, or tribal government in complying with the mandate are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of regulations containing the proposed mandate, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications submitted to the agency by such units of government, and the agency's position supporting the need to issue the regulation containing the mandate.

(b) Each agency shall develop an effective process to permit elected officials and other representatives of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.

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Sec. 2. Increasing Flexibility for State and Local Waivers. (a) Each agency shall review its waiver application process and take appropriate steps to streamline that process.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State, local, or tribal government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the State, local, and tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the fullest extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements of the programs that are discretionary and subject to waiver by the agency.

Sec. 3. Responsibility for Agency Implementation. The Chief Operating Officer of each agency shall be responsible for ensuring the implementation of and compliance with this order.

Sec. 4. Executive Order No. 12866. This order shall supplement but not supersede the requirements contained in Executive Order No. 12866 ("Regulatory Planning and Review").

Sec. 5. Scope. (a) Executive agency means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(b) Independent agencies are requested to comply with the provisions of this order.

Sec. 6. Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a
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mentalities, its officers or employees, or any other person.

Sec. 7. Effective Date. This order shall be effective 90 days after the date of this order.

WILLIAM J. CLINTON

THE WHITE HOUSE,
October 26, 1993.

# # #

Federal Register
Vol. 63, No. 96
Tuesday, May 19, 1998

Presidential Documents

Title 3—

The President

Executive Order 13083 of May 14, 1998

Federalism

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to guarantee the division of governmental responsibilities, embodied in the Constitution, between the Federal Government and the States that was intended by the Framers and application of those principles by the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this order:

(a) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

(b) "Policies that have federalism implications" refers to Federal regulations, proposed legislation, and other policy statements or actions that have substantial direct effects on the States or on the relationship, or the distribution of power and responsibilities, between the Federal Government and the States.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

Sec. 2. *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications, agencies shall be guided by the following fundamental federalism principles:

(a) The structure of government established by the Constitution is premised upon a system of checks and balances.

(b) The Constitution created a Federal Government of supreme, but limited, powers. The sovereign powers not granted to the Federal Government are reserved to the people or to the States, unless prohibited to the States by the Constitution.

(c) Federalism reflects the principle that dividing power between the Federal Government and the States serves to protect individual liberty. Preserving State authority provides an essential balance to the power of the Federal Government, while preserving the supremacy of Federal law provides an essential balance to the power of the States.

(d) The people of the States are at liberty, subject only to the limitations in the Constitution itself or in Federal law, to define the moral, political, and legal character of their lives.

(e) Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. States and local governments are often uniquely situated to discern the sentiments of the people and to govern accordingly.

(f) Effective public policy is often achieved when there is competition among the several States in the fashioning of different approaches to public policy issues. The search for enlightened public policy is often furthered when individual States and local governments are free to experiment with a variety of approaches to public issues. Uniform, national approaches to

public policy problems can inhibit the creation of effective solutions to those problems.

(g) Policies of the Federal Government should recognize the responsibility of—and should encourage opportunities for—States, local governments, private associations, neighborhoods, families, and individuals to achieve personal, social, environmental, and economic objectives through cooperative effort.

Sec. 3. *Federalism Policymaking Criteria.* In addition to adhering to the fundamental federalism principles set forth in section 2 of this order, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of States and local governments, and should carefully assess the necessity for such action.

(b) Agencies may limit the policymaking discretion of States and local governments only after determining that there is constitutional and legal authority for the action.

(c) With respect to Federal statutes and regulations administered by States and local governments, the Federal Government should grant States and local governments the maximum administrative discretion possible. Any Federal oversight of such State and local administration should not unnecessarily intrude on State and local discretion.

(d) It is important to recognize the distinction between matters of national or multi-state scope (which may justify Federal action) and matters that are merely common to the States (which may not justify Federal action because individual States, acting individually or together, may effectively deal with them). Matters of national or multi-state scope that justify Federal action may arise in a variety of circumstances, including:

(1) When the matter to be addressed by Federal action occurs interstate as opposed to being contained within one State's boundaries.

(2) When the source of the matter to be addressed occurs in a State different from the State (or States) where a significant amount of the harm occurs.

(3) When there is a need for uniform national standards.

(4) When decentralization increases the costs of government thus imposing additional burdens on the taxpayer.

(5) When States have not adequately protected individual rights and liberties.

(6) When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States.

(7) When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities.

(8) When the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations.

(9) When the matter to be regulated significantly or uniquely affects Indian tribal governments.

Sec. 4. *Consultation.* (a) Each agency shall have an effective process to permit elected officials and other representatives of State and local governments to provide meaningful and timely input in the development of regulatory policies that have federalism implications.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that is not required by statute, that has federalism implica-

tions, and that imposes substantial direct compliance costs on States and local governments, unless:

(1) funds necessary to pay the direct costs incurred by the State or local government in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected States and local governments, a summary of the nature of their concerns, and the agency's position supporting the need to issue the regulation; and

(B) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by States or local governments.

Sec. 5. *Increasing Flexibility for State and Local Waivers.* (a) Agencies shall review the processes under which States and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State or local government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the State or local level in cases in which the proposed waiver is consistent with applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 6. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 7. *General Provisions.* (a) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(b) This order shall supplement but not supersede the requirements contained in Executive Order 12866 ("Regulatory Planning and Review"), Executive Order 12988 ("Civil Justice Reform"), and OMB Circular A-19.

(c) Executive Order 12612 of October 26, 1987, and Executive Order 12875 of October 26, 1993, are revoked.

(d) The consultation and waiver provisions in sections 4 and 5 of this order shall complement the Executive order entitled, "Consultation and Coordination with Indian Tribal Governments," being issued on this day.

(e) This order shall be effective 90 days after the date of this order.

William J. Clinton

THE WHITE HOUSE,
May 14, 1998.

[FR Doc. 98-13552
Filed 5-19-98; 11:24 am]
Billing code 3195-01-P

For Immediate Release
Contact Michael Riley 202-546-3000 or mriley@fcref.org

Over 100 Organizations Form Coalition Opposing Executive Order

Groups Sign Letter Supporting Federalism, Opposing EO 13083

WASHINGTON, DC—July 28, 1998— More than 100 groups, organized by the Free Congress Foundation's Coalition for Constitutional Liberties, announced their opposition to President Clinton's Executive Order 13083, "Federalism", in a letter delivered to House Speaker Newt Gingrich and Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs Chairman David McIntosh. McIntosh's subcommittee will be hearing testimony today in regards to Executive Order 13083 and the new powers it grants to federal regulatory agencies to intervene in the affairs of state and local governments.

"This executive order effectively revokes the 10th Amendment to our Constitution by unconstitutionally claiming rights and powers specifically reserved to the states and to the people," said Lisa S. Dean, Vice President for Technology Policy at the Free Congress Foundation. **"By authorizing federal action over the states for basically any reason, President Clinton has made a mockery of the historic understanding of Federalism."**

"By promising to implement his political agenda through Executive Orders, as opposed to the constitutional legislative process that requires congressional approval, President Clinton has crowned himself King," said Dean.

Signed by the President on May 14th, Executive Order 13083 outlines a series of new "Federalism Policymaking Criteria" that authorizes federal regulatory action in the following circumstances:

- *"When there is a need for uniform national standards."*
- *"When decentralization increases the costs of government thus imposing additional burdens on the taxpayer."*
- *"When states have not adequately protected individual rights and liberties."*
- *"When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States."*
- *"When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities."*

(More)

- *"When the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations."*

Executive Order 13083 also revokes President Reagan's Executive Order 12612, which established a stringent procedure for federal agencies prior to issuing regulations that would effect state and local governments.

Excerpts of the letter, which was sent to the congressional leadership and selected members, include:

"This latest executive order, while giving lip service to the historic and common understanding of the principle of federalism, explicitly establishes policymaking guidelines that will undermine the foundations of federalism by legitimizing unnecessary and unconstitutional national regulatory powers and actions."

"We express the sentiments of millions of Americans who cherish our inheritance of liberty when we ask you to utilize your position of leadership to act decisively on this issue. Executive Order 13083 needs to be repealed immediately, and the federalist protections that are found in President Reagan's Executive Order 12612 need to be explicitly codified and made public law."

The Free Congress Foundation is a 20 year-old Washington based think tank which teaches people how to be effective in the political process, promotes cultural conservatism, and works against government encroachment in the individual's right to privacy.

# # #

NOTE: For a copy of the letter including a list of coalition members, please contact Michael Riley at (202) 546-3000, ext. 434 or mriley@fcref.org.

Coalition for Constitutional Liberties

A project of the Free Congress Foundation's Center for Technology Policy
717 Second Street NE * Washington D.C. 20002 * 202/546-3000 * Fax 202/544-2819 * http://www.freecongress.org/

Lisa S. Dean
Director

Patrick S. Poole
Deputy Director

July 27, 1998

Honorable David McIntosh
U.S. House of Representatives
1208 Longworth House Office Building
Washington D.C. 20515

Dear Chairman McIntosh,

We write to you today to express our grave concern regarding President Clinton's issuance of Executive Order 13083 addressing this administration's view of the principle of Federalism. This order explicitly revokes President Reagan's Executive Order 12612, which strongly affirmed the Framers vision of strong state sovereignty and power, as well as requiring conclusive constitutional authority and a defined process for federal intervention into the affairs of the states.

This latest executive order, while giving lip service to the historic and common understanding of the principle of federalism, explicitly establishes policymaking guidelines that will undermine the foundations of federalism by legitimizing unnecessary and unconstitutional national regulatory powers and actions.

Of particular concern are the provisions that now authorize intervention in the affairs of the states: "when States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States (Section 3, subsection D6), "when placing regulatory authority at the State or local level would undermine regulatory goals" (Section 3, subsection D7); and to enforce "international obligations" (Section 3, subsection D8) This sweeping authorization of federal intervention directly threatens the very heart of federalism and state sovereignty.

Executive Order 13083 will be implemented on August 14th, and any positive action after that time either by Congress or the President will still mean that the protections established by Executive Order 12612 will be repealed, we would therefore urge you to respond forcefully to this flagrant power grab, and strongly support the efforts of several of the members of the House to create a substantive and immediate legislative response.

We understand that the Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs will be holding hearings on this topic on Tuesday, July 28th. We would urge you to question the administration's representatives testifying at that time regarding the driving force for issuing this executive order, and what constitutional authority justifies the assumption of these newfound executive powers over the states.

We express the sentiments of millions of Americans who cherish our inheritance of liberty when we ask you to utilize your position of leadership to act decisively on this issue. Executive Order 13083 needs to be repealed immediately, and the federalist protections that are found in President Reagan's Executive Order 12612 need to be explicitly codified and made public law. With such a response, we will assure you of our active support to reaffirm the hollowed and legitimate powers of our federal, state and local governments. We thank you in advance for your timely intervention on this matter.

Sincerely,

Lisa S. Dean
Free Congress Foundation

Phyllis Schlafly
Eagle Forum

Larry Pratt
Gun Owners of America

Amy Moritz-Ridenour
National Center for Public Policy Research

Martin Hoyt
American Assoc. of Christian Schools

Thomas DeWeese
American Policy Center

Kenneth F. Boehm
National Legal and Policy Center

Forest Montgomery
National Association of Evangelicals

Michael Farris
Home School Legal Defense Association

Chris Klicka
National Center for Home Education

Nancie G. Marzulla
Defenders of Property Rights

William A. Smith
Indiana Family Institute

Gary Palmer
Alabama Family Alliance

Forest Thigpen
Mississippi Family Council

Sadie Fields
Christian Coalition of Georgia

Bobbie Patray
Tennessee Eagle Forum

John Adams
HARTland

Olivia Hanson
Faith and Freedom

Aaron Klein
Conservative Strategy Alliance

Dr. Wiley Drake
American Family Association of California

T. Rogers Wade
Georgia Public Policy Foundation

Robin DeJarnette
Virginia Family Foundation

Brandon Dutcher
Oklahoma Council for Public Affairs

Sean Duffy
Commonwealth Foundation, Pennsylvania

Robert Klous
Christian Values in Action

Dave Augustus
Parents Coalition of Texas

Rick Shaftan
Neighborhood Research

David F. Salisbury
Sutherland Institute, Utah

Patricia Owens
Wisconsin State Sovereignty Coalition

Dianna Lightfoot
Physician's Resource Council of Alabama

Miriam Archer
Christian Coalition of California

Dot Ward
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Samuel A. Cravotta
West Virginia Family Foundation

David Hall
Kuyper Institute for Political Studies

J. Stanley Marshall
James Madison Institute, Florida

Marvin Munyon
Family Research Institute of Wisconsin

William T. Riley
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Barbara Susco
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California Capitol Resource Council

Cliff Kincaid
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Dar VanderArk
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American Focus

Jack Morgan
Take Back Tennessee

David Muralt
Citizens for Excellence in Education

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Eagle Forum of Alabama

John Paulton
South Dakota Family Policy Council

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American Center for Legislative Reform

Nolen Cox
American Family Association of Georgia

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Janet Parshall's America Show

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Howard L. Pringnitz
American Constitution Party of Texas

Stephen M. Wetzel
Missionaries to the Unborn

John Poe
Delaware Home Education Association

Thomas A. Carder
ChildCare Action Project

Jon E. Dougherty
USA Journal

Gwen A. Moore
Eagle Forum of Minnesota

James H. Berberich
Missouri Christian Coalition

Linda B. Dietz
Citizens for Judicial Reform

Ken Patterson
Georgia Home Education Association

Balint Vazsonyi
Center for the American Founding

Clarence Whiteaker
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Oklahoma Family Policy Center

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Palmetto Family Council, South Carolina

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Michigan Family Forum

Tom Prichard
Minnesota Family Council

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Iowa Family Policy Center

John C. Willke, M.D.
Life Issues Institute

Michael W. Watson
Arkansas Policy Foundation

Kelly Shackelford
Texas Free Market Foundation

Robert Kellow
American Family Association of New Jersey

FRONTIERS OF FREEDOM INSTITUTE
Senator Malcolm Wallop (ret.)
Chairman

July 27, 1998

Senator Trent Lott
United States Senate
Washington, D.C. 20510

RE: Executive Order 13083

Dear ~~Senator Lott:~~ Trent

Frontiers of Freedom is extremely disturbed by E.O. 13083, which President Clinton signed in relative secrecy in Manchester, England last May 14. The Order is a fundamental attack on the status of state and local governments vis-a-vis the Federal Bureaucracy, and asserts the superiority of the unelected over the elected officials of your State. It is a return to the tax-and-spend, governmental growth policies of the 1960's and '70s disguised as an affirmation of the role of the states. I share the view of our members that this Order reverses major gains achieved by Republicans during the last twenty years, and turns concepts of federalism on their heads.

I have attached an analysis of E.O. 13083, which reveals it to be a power grab of historic proportions masquerading as something else. Please use or duplicate and circulate the analysis as you see fit. I am sure that the state and local governments of the states are appalled at the prospect of being routinely overruled by unelected bureaucrats in Washington, who will not need to justify their conduct on the basis of cost-benefit analyses or respect for the individual states.

I trust that you will oppose this encroachment on the other branches and levels of government, and that you will join the opposition to the Clinton power grab. I suggest that legislation be passed to prohibit the use of public funds or human resources on its implementation until Congressional hearings on the intent and effect of the Order can be held and analyzed.

I would like to discuss ways in which my organization can assist you, or perform other functions that you suggest. My Chief Counsel, Patrick O'Brien, will manage our overall effort. If you will assign a staff member to this matter, I will have Mr. O'Brien contact him or her. In the meantime, let me encourage your defense of our traditional system of government.

Very truly yours,

Malcolm Wallop

Malcolm Wallop, U.S. Senate-Ret.
Chairman

Enclosure

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FRONTIERS OF FREEDOM INSTITUTE
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SECTION ANALYSIS OF EXECUTIVE ORDER 13083

On May 14, President Clinton signed Executive Order 13083 in Manchester, England, away from the scrutiny of the Washington Press and without additional fanfare. Following a storm of protest from state governors, mayors, and other officials, White House staff claimed the Order was a mistake and placed the blame on a low-level OMB official (Washington Post, July 16, 1998, p. A-15). The White House offered no explanation as to why the President signed the Order, nor did it state that it would be revoked. The Order takes effect on August 12, 1998, unless Congress intervenes.

Executive Order 13083 embodies a direct rejection of limited government and free market principles. It delegates nearly unlimited discretion to unelected agency officials who can regulate at whim without resort to cost-benefit analysis or respect for the role of the states. The following is a summary of the more objectionable provisions in the recent Order.

Repudiation of Traditional Constitutional Principles

The underlying, liberal philosophy of the Clinton Administration is neatly summarized in Section (2)(b) of the Order: "The Constitution created a Federal Government of supreme, but limited powers." Had the Order merely stated that the powers of the Federal Government were limited, it would have been accurate. The misstatement in the Order plainly -- and apparently intentionally -- distorts the plain meaning of the Constitution. Article VI of the Constitution states that the Constitution and the laws validly enacted thereunder are the supreme law of the land; however, in order to allay fears of a power-grab by the central government, Amendment 10 in the Bill of Rights plainly states that any authority not specifically delegated to the federal government is reserved for the states and the citizenry. Read together, these provisions allocate power between states, citizens, and the federal government -- rather than create the sort of feudal hierarchy envisioned by the Order.

Lest this distinction be deemed technical or legalistic, it sets the premise from which the substantive provisions of Executive Order 13083 flow. If we accept the premise that the Federal Government is superior to the states (rather than larger, but co-equal), then we must accept the conclusion that the Executive Branch and its unelected functionaries can dictate to the inferior States and their similarly benighted citizens. In fact, the substantive provisions of the Order authorizes the bureaucracy to do just that.

Elimination of Reagan Protections

Realizing that the Federal government often regulated without respect to cost-benefit analysis, and often compelled the states to implement federal mandates without regard to the proper roles of the states nor to the imposition of administrative costs, the Reagan Administration took appropriate steps, including Executive Order 12612. It requires regulators to balance the cost and the benefits of proposed regulations; to engage in a systematic and uniform review of the impact of regulations on the system of federalism, and to fund any mandate imposed on the states. Section 7(c) revokes the Reagan Order, while other provisions encourage the resurrection of the abuses Executive Order 12612 was designed to prevent.

New Justifications for Bureaucratic Control of the States

Section 3 of the new Clinton Order pays lip service to traditional principles of federalism, and then states a list of "reasons" why regulators can ignore the role of the states in our system of government. Among them are:

Section 3(d)(2); "when the source of the matter to be addressed occurs in a State different from the State (or States) where a significant amount of the harm occurs" -- whereby a regulator can use activity in one location to justify regulation in a separate jurisdiction. Thus, if a regulation is directed at a Western or Eastern State or States, the regulator need only point to incidents in the North or South.

Section 3(d)(3): "where there is a need for uniform national standards" (emphasis added), apparently in the minds of the unelected, who may prefer uniformity to state and local governmental innovation and experimentation. Keeping life simple for the bureaucracy in Washington appears to be a policy goal that supersedes the right of any state to chart its own course.

Section 3(d)(4): "when decentralization increases the costs of government thus imposing additional burdens on the taxpayer"; Clintonspeak for the proposition that we can place a price tag on Constitutional principles, and thereby justify the imposition of an unlimited bureaucracy on "efficiency" grounds. Many historians agree that totalitarian regimes are, indeed, cost-effective. Here, "efficiency" judgements made in obscurity by Administration officials would provide the premise for a bureaucratic preemption of state authority -- without regard for the Constitutional system.

Section 3(d)(5): "when States have not adequately protected individual rights and liberties". This vague statement authorizes an individual bureaucrat to make subjective value judgements. We all accept the proposition that "rights" are not always absolute, nor neatly hierarchical. Thus, in some cases, such as in a state of war, individual rights may be limited for the safety of the nation by elected officials, in an open manner, and subject to oversights and safeguards. This section is radically different. For example, it authorizes unelected, relatively anonymous functionaries to decide when the right of a camper to view a spotted owl outweighs the interests of 30,000 employees in their continued employment.

Section 3(d)(6) eliminates an important, but unstated individual right -- the right of individuals and groups to "vote with their feet". Americans have long prized their right to walk away from jurisdictions they find less desirable, while states and localities have long engaged in a healthy competition to attract residents and businesses. Section 3(d)(6) ends that tradition. Now a bureaucrat can ignore state, local, and individual preferences by imposing a regulatory regime "when states would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other states". The bureaucrat, not the state, decides what is "necessary" and when the previously sovereign states are "reluctant", both highly subjective terms that in essence subjugate the state to personal whims in Washington.

Section 3(d)(7) is a near-perfect expression of Administration egomania. This provision permits regulation "when placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of state authorities." Thus, when the poor, stupid State cannot manage its own affairs, Washington will set things right through the application of superior knowledge beyond the capacity of the provincial officials. Read in conjunction with Section 3(d)(3), the right to regulate in the cause of nationwide uniformity, this provision permits nationwide regulation when 49 of 50 States are perfectly capable of addressing the issue at hand. These provisions provide the rationale for a return to the bureaucratic expansionism of the 1960's and'70's.

Other Provisions

Section 5 makes a hollow reference to regulatory flexibility, but actually impedes the development of "the laboratory of the states". Although Section 5(a) appears to encourage agencies to streamline the processes of obtaining regulatory waivers, the waiver will be conditioned on a bureaucratic determination that "the proposed waiver is consistent with applicable federal policy objectives and is otherwise appropriate". Section 5(b). This section provides two vague, and largely unreviewable reasons to deny waivers when the administrator can find a conflicting "federal policy objective" or a reason to claim the request is not "otherwise appropriate".

What do these terms really mean? As the Cheshire Cat in Alice in Wonderland would say, "Words mean what I say they mean. No more, no less." Perhaps the bureaucrat will object to a waiver request, and then slowly disappear -- leaving only his smile.

WILLIAM, REX AND THE FEUDALIST PAPERS

Hon. Malcolm Wallop (U.S. Senate - Ret.)

The medieval monarchs of England were government personified. All laws emanated from them, and changed with the will of the king. Indeed, the was no "capitol" of England in the usual sense: wherever the monarch held court, government sat. Periodically, the kings would embark on a tour of the realm, issuing edicts and setting the royal camp wherever and whenever the mood struck. It was in this tradition that Bill Clinton, the man who apparently would be king, issued the most blatant assault on the Constitution of his increasingly questionable Presidency.

Perhaps Mr. Clinton was under the influence of yet another romantic notion when, in Manchester, England (far from the gaze of that segment of the media and Congress with knowledge of the Constitution), he signed Executive Order 13083. That document asserts the superiority of the Presidency (monarchy?) over the other branches of the federal government, the several states, and the individual citizens. Many Constitutional lawyers and scholars consider it the product of a dangerous distain for the rule of law in the United States, and a contempt for the intelligence of lesser mortals. It could be viewed as an assertion of Divine Right, but for Mr. Clinton's repeated refusal to couple "One Nation" and "Under God" in his most recent State of the Union address.

Even William, Rex's most ardent supporters should be chilled by a reading of E.O. 13083. It begins with the grossly incorrect claim that "The Constitution created a Federal Government of supreme, but limited powers". This assertion overlooks or ignores Amendment 10 in the Bill of Rights, which was included for the very purpose of preventing a power-grab by the federal government. It states that any authority not specifically granted to the central government is reserved to the States and the individual citizens. The Constitution plainly created a system of

coequal branched and levels of government designed to hold each other in check; not - as the Administration suggests, a hierarchy atop which sits the President/Monarch.

Be that as it may, E.O. 13083 recites a litany of reasons whereby the bureaucracy can rule the states: "Where there is a need for uniform national standards", apparently in the minds of the White House courtiers rather than in the laws passed by Congress; "when decentralization increases the costs of government", thus placing assumptions regarding efficiency made by the bureaucrats on a higher legal plane than Constitutional principles of federalism and respect for the "laboratory of the states"; and "when States have not adequately protected individual liberties", an invitation to the unelected to make subjective judgements ordinarily reserved for the Courts and Congress (a license to abuse, for example, the interests of 30,000 timber industry employees in their jobs in favor of those who are enamored of Spotted Owls).

Were this reaffirmation of the Big Government principles of the 1960s liberals not sufficiently frightening, E.O. 13083 rejects the most basic free-market freedom: the right of the individual to vote with his or her feet. Now the Presidency can impose regulation "when states would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other states". Think about this. Virginia and Maryland, Texas and Florida, New York and New Jersey, or California and Arizona would no longer offer competing business incentives if some faceless bureaucrat decided that he or she knew better than the elected officials of the several states. If the regulations are, in fact, necessary or desirable, are not the people effected sufficiently intelligent to make that decision?

Maybe not, according to the dictate. E.O. 13083 contains thinly-veiled contempt for our ability to govern ourselves. A top-down imposition of regulations is justified "when placing regulatory authority at the state or local level would undermine regulatory goals because high

costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of state authorities." In other words, says the Monarch, if I decide that I'm smarter than you, you must do as I command. Can you think of any instance in our history when a federal government official did not claim "specialized expertise"? Without that claim, there is little justification for a bureaucracy at all.

I urge you to read and study E.O. 13083. It is totally antithetical to a basic concept contained in the Declaration of Independence: that all government derives its authority from the consent of the governed. Instead, it asserts the right of the President to dictate his will to the states as a King would dictate his whim to a province. I think it paints a rather frightening picture of President Clinton and his White House, one more analogous to a medieval despot and his retainers than to an elected official and other public servants. It also suggests that another Conservative Revolution is in order.

Hon. Malcolm Wallop (U.S. Senate - Ret.) is Chairman of Frontiers of Freedom Institute, a nonpartisan, public policy organization based in Arlington, Virginia.

The Heritage Foundation
Executive Memorandum

No. 536 June 25, 1998

PRESIDENT CLINTON'S SELLOUT OF FEDERALISM

ADAM D. THIERER

On May 14, 1998, without much fanfare or public attention, the White House released a new executive order on federalism. President Bill Clinton's Executive Order 13083 revokes E.O. 12612, issued by President Ronald Reagan in 1987. The Clinton executive order outlines a series of new "Federalism Policymaking Criteria" that executive branch departments and agencies must follow "when formulating and implementing policies that have federalism implications." The guidelines establish broad but ambiguous and unconstitutional tests to justify intervention by the federal government in matters that typically are left to states and local communities.

E.O. 13083 follows a precedent established by President Clinton when he gutted President Reagan's Executive Order 12606 protecting the family (revoked by E.O. 13045) and E.O. 12291 mandating cost-benefit analysis of federal rules (revoked by E.O. 12866). The new executive order reverses much of President Reagan's sound policy on federalism. It pays only lip service to the benefits of the original federalist framework wrought by the Founding Fathers. Even worse, it establishes policymaking guidelines that will undermine the foundations of federalism by legitimizing unnecessary and unconstitutional national regulatory powers and actions.

ONE STEP FORWARD, TWO STEPS BACK

President Clinton's Executive Order 13083 borrows much of the language of President Reagan's E.O. 12612 to define "fundamental federalism principles." For example, Section 2 of the Clinton executive order notes that

> [T]he Constitution is premised upon a system of checks and balances. . . . The sovereign powers not granted to the Federal Government are reserved to the people or the States. . . . Federalism reflects the principle that dividing power between the Federal Government and the States serves to protect individual liberty. Preserving State authority provides an essential balance to the power of the Federal Government. . . . The people of the States are at liberty, subject only to the limitations of the Constitution itself or in Federal law, to define the moral, political, and legal character of their lives. . . . Effective public policy is often achieved when there is competition among the several States. . . .

The guidelines that the White House believes justify federal regulatory action are set out under

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"Federalism Policymaking Criteria" in Section 3. The more ambiguous and open-ended of the criteria "justifying" federal action include:

- "When decentralization increases the costs of government thus imposing additional burdens on the taxpayer."
- "When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other states."
- "When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities."
- "When the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations."

ATTACKING THE FEDERALIST FRAMEWORK

Such criteria for federal action are a grotesque distortion of the Framers' language establishing the original federalist system. Nowhere in the Constitution or Bill of Rights is there any mention of such justification for federal regulatory activity. Nor can the new criteria be justified on the grounds that such rules and regulations might be needed to protect interstate commerce.

This is not to say that there are no legitimate matters of concern for the federal government. As Ronald Reagan's now-defunct E.O. 12612 pointed out at great length, the federal government specifically was given few, limited, and enumerated powers. The Constitution grants the federal government powers over such issues as national defense, international trade and diplomacy, immigration procedures, maintenance of the monetary system, patents and copyright enforcement, bankruptcy procedures, and the regulation of interstate commerce.

A forthcoming Heritage Foundation book entitled *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age* outlines when the federal government legitimately may exercise its authority under the Constitution, and when the states and local communities (and more important, individuals and corporations) should be left free to exercise their own discretion. Clearly, aside from those specifically enumerated powers that justify federal action in Article I, the Founders did not intend that the federal government should exercise authority over the states, local communities, or the people.

President Clinton's new executive order on federalism is a serious affront to the federalist framework established in the U.S. Constitution. It adopts and expands the tortured logic of New Deal expansionist policymaking and jurisprudence. President Clinton's version of federalism would make individuals more, not less, subservient to the federal government. The Founding Fathers' version, by comparison, limits the power of the federal government over the lives and liberty of individuals.

Congress should reject the treading on the Constitution that President Clinton's new executive order embodies. Congress should make clear, in any future legislation with federalism implications, that such guidelines are inappropriate. And it should order federal agencies to follow stricter guidelines, such as those in President Reagan's E.O. 12612. Alternatively, Congress should take steps to codify the language of E.O. 12612 and direct that all federal agencies follow it instead of President Clinton's E.O. 13083.

Either way, Members of Congress must make a strong statement that leaves no doubt of their commitment to resist President Clinton's effort to eviscerate what remains of the American federalist system.

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The Lincoln Log

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Tax Relief Now

By C. Grady Drago

Numerous economists have stated that we are the most highly taxed generation in the history of the nation. It is estimated that the average family pays about 38% of their income in taxes; that taxes are at least 18% too high; and that our taxes under this administration are the highest in relation to our GDP of anytime in our history except one year during WWII.

The economy appears to be perking right along, and unemployment appears to be on the low end. However, how many of these jobs are low paying service jobs, and how many of those employed in those industries would be working at all if the level of taxes were not creating a strain on households?

The case for a tax cut was succinctly enunciated by U.S. Senator Larry Craig in his article in the current issue of the ADDRESS, published by the Lincoln Heritage Institute. In that article, Senator Craig said: "The greatest threat facing America today is excessive taxation, and with it, a Washington culture that has transformed 'excessive' into 'accepted'. "

He further states, "By any estimation, America's tax burden is excessive. Washington is projected to take in $1.68 trillion dollars in taxes this year. No government in history has ever collected that much from its citizens. As an overall burden, that amounts to 20 percent of the nation's gross domestic product - one fifth of everything produced in this country is consumed by Washington. Today, and even more sadly, tomorrow, America is saddled with the same tax burden that used to be reserved only for calamities such as defeating Nazi Germany.

These are real dollars taken from real families that could be spent, saved, or invested in real things. The median dual-earning American family pays $22,521 in taxes - $15,400 to Washington alone. That is more than they pay for food, for housing, for clothing, and for medical care combined. That is more than they have ever paid, and they must now work longer and harder than ever to pay it."

Senator Craig certainly hits the nail on the head, and makes a point that should be acted upon now.

For the entire article, please contact the Institute. ◆

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Clinton's First Imperial Order: A Presidency Our Founders Thought They Had Prevented

By C. Grady Drago

With the stroke of a pen, Bill Clinton, in penning Executive Order 13083 on May 14, 1998, has made "big government" the biggest it has been in the history of this nation. It will be a government the founders thought they had prohibited. Powers reserved to states and individuals in the Constitution and Bill of Rights have just been wiped away with a stroke of Clinton's pen. Are you ready for unelected bureaucratic elitists to run your lives?

This EO signed while Bill Clinton was in England, redefines Federalism. Section 2 details how states and every level of state and local government (including townships, local school boards, and authorities) will lose power and rights to an Executive Branch made up of unelected elitists not responsible to the people.

Clinton has changed the definition of federalism and left states and individual rights in shambles. This is a definition no one with even a modest knowledge of the history and meaning of our federal republic would recognize. Arbitrary edicts by Presidents could well become a way of life, and the rule of law, as called for in the Constitution and Bill of Rights, could be a thing of the past. The drafting of this EO is the first step in that direction.

To my knowledge no President has the authority to arbitrarily negate the 10th Amendment of the Constitution!. Clinton has taken aim at the very heart of the Bill of Rights by deleting EO 12612. If a law suit against the actions of a President has ever been in order, it is on this E O.

Big government is not simply the number of federal programs, the size of the budget, or the size of the deficit; it is the extent to which government controls essential elements in our daily lives. This astounding E O certainly puts "big brother" in your living room.

According to James Madison (one of the most effective delegates to the Constitutional Convention and the father of the Bill of Rights) the reason the Bill of Rights was offered (by him) and the reason it was adopted was the fear that the Constitution would not survive because the states and people from which the powers in the new government originated, would not support a Constitution that did not guarantee them protection against abuses of their new government.

The primary difference between the Articles of Confederation and the Constitution (which established our Federal Republic) was the establishment of a single independent chief executive; and the indirect representation of individual citizens in each state and the equal representation of each state in a two House Congress. Also established were three independent branches of government with the power to establish policy through legislation specifically vested in the Congress, not in the Chief Executive or in the Courts.

Section 3 of EO13083 details the issues that would become the sole jurisdiction of the Executive Branch justifying federal actions. "When there is a need for uniform national action"; "When decentralization increases the costs of government...;" When states have not adequately protected individual rights and liberties...;" "When placing regulatory authority at the state or local level would undermine regulatory goals..." The key here is who makes the findings on reaching the thresholds of "increased costs of government', 'adequate protection', 'need of uniform action', etc.

What we have here is a carte blanche ability of the President to apply arbitrary political decisions in interpreting U.S. law, in derogation of the rule of law. Public education, public health, abortion rights, bilingual education, housing, land use planning, property rights of individuals and state and local governments, health insurance, pensions, and environmental determinations are just some of the issues that fit into the category of Section 3, of the Ex. Order.

According to the President's staff, he intends to utilize EO's more aggressively in the future putting in place policies and programs Congress and the people refuse to approve and enact legislatively. This doesn't sound like a chief executive, does it? Does it sound like an emperor?

The Congress, the Governor's Conference, the Conference of Mayors, and other similar organizations should take immediate action to prevent Executive Order 13083 from becoming effective on August 14, 1998.

There is such strong growing opposition to this action, that we have been told of at least three 'Letters to the Editor' have been published speculating that Clinton may use this and the Y2K problem to stay in office.

Obviously this EO was not written by someone that loves individual liberty and states rights. I wonder if this is what Bill Clinton meant when he claimed to be a "New Democrat?"

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