

Unfunded Mandates

PHOTOCOPY
PRESERVATION

N T
N T

E X E C U T I V E O F F I C E O F T H E P R E S I D E
E X E C U T I V E O F F I C E O F T H E P R E S I D E

14-Jan-1994 03:33pm

TO: (See Below)

FROM: Ellen S. Seidman
 National Economic Council

SUBJECT: Summary memo from 1/13 OSHA reform group meeting

January 14, 1994

MEMORANDUM FOR OSHA REFORM WORKING GROUP

FROM: Ellen Seidman

SUBJECT: Assignments from yesterday's meeting

First, logistics: The three-hour meeting we have scheduled for Thursday, January 20, will run from 9:00 to noon in room 476 of the OEOB. Hopefully we won't need all three hours. If this is a real problem, please let me know; we can move it into a much less comfortable room from 10 to 1. On Friday, January 28, we will meet from 10 to noon in room 476.

Mandate? Unfunded?

We agreed that this question is an issue for testimony and Q&As, and we would attempt to avoid meeting it head on. That is, we would neither declare extended coverage to be a mandate, or deny that it is one. Instead, in addition to making the equity arguments, we would focus on elements suggesting that if coverage is a mandate, it's different than others and pretty small, namely: (i) a very large number of public sector workers are covered already, in both plan and non-plan states; (ii) the health and safety requirements apply to the states and localities in their capacity as employers, rather than as governments (do wage and hour laws apply to public sector employees?); (iii) OSHA provides the enforcement (i.e., the states don't have to run a "program"); (iv) it will be implemented by regulations under an executive order that requires special consideration for state and local governments; and (v) hopefully, we'll be able to have numbers that show that, in addition to having a positive NPV in a

OSHA will also work on possible design of incentives. The preference seemed to be for developmental money, although we discussed -- and will have to face -- whether any change in the match formula was appropriate. Note that even if we believe, as I think we do, that no legislative change in the match formula is desirable, we will need to think about what match level would provide an appropriate incentive to states, and what we think that level of match would cost.

We agreed that some delay in coverage after the effective date of the statute was probably a good idea, in part to give states time to adopt plans. We thought we would indicate support for some delay in testimony. I know we didn't discuss this, but might it make sense to allow states to opt in -- without adopting a plan -- prior to the end of the delay period? That way, public sector employees in states that didn't intend to adopt a plan could be covered earlier, which might make a delay for the others more palatable. Alternatively, could states be given, e.g., six months to decide whether they intend to submit a plan. If they declare yes, then coverage is delayed until the plan is accepted by OSHA, but to no later than three years after passage. If no, then coverage becomes effective immediately. There would be some fraudulent declarations, but probably not enough to worry about.

Penalties

In part to avoid making public sector employees second class citizens, in part to maintain the incentives for states to adopt plans, we rejected the notion that penalties should not apply to public sector employers. We recognize that this is likely to create some problems when a penalty is actually assessed. However, we thought that some system of rebating penalties generated by public sector coverage back to the state and local sector might be politically appealing. Pete Galvin is to look into (i) what the budgetary impact of this would be; and (ii) alternative schemes, including one in which state and local penalties would be used to fund state plan matching grants. Pete should run any ideas that seem viable in a policy sense past both DOL and OMB budget folks.

Coordination

The entire assignment this time rests with DOL. Please stay in touch with Mike Schmidt as work is done. In order to make certain that we don't have surprises in this area when the testimony comes around for clearance, Pete should be prepared to discuss where things stand, and distribute anything appropriate, at our meeting on Friday, January 28.

Distribution:

societal sense, coverage has a quick payback for the entities covered (do public employers pay workers comp?).

OSHA will also follow up with OMB-Budget (Larry Matlack) to check on how CBO is likely to score public sector coverage. If CBO is likely to score it as an unfunded mandate, OMB and OSHA will determine what can we do to (i) change their minds; and (ii) keep the number small.

Mitigation strategies

Joe Dear will direct OSHA in an effort to figure out what the budgetary tradeoffs are between OSHA FTEs to enforce public sector coverage and incentives that could be given to states to develop and implement state plans. In other words, what kind and level of incentives could we afford given the likely number of states that would use the incentives and become plan states?

OSHA REFORM AND UNFUNDED MANDATES

BACKGROUND

After several months of study and outreach by the Occupational Safety and Health Administration, capped off by a period of White House review and comment, Secretary Reich released a letter to Chairmen Kennedy and Ford indicating the Administration's support for the rapid enactment of OSHA reform legislation that would, among other things, "address gaps in the protection on public employees."

The case for doing so was compelling for a number of reasons. First, at the present time, less than half of the states (24) provide OSHA safety and health protection for their employees¹. This leaves more than 7 million state and local public employees uncovered by OSHA, although a number of states do provide some protections to employees under their own laws. The hazards facing public employees are no less serious than those facing their counterparts in the private sector, and the argument that the public sector should comply with laws imposed on the private sector is a powerful one. Moreover, coverage of public employees is strongly backed by public employee unions. Also, a number of governors and mayors in state Plan states who want the support of public employee unions may support the change. Finally, closing the gap in employee coverage is also included in the only OSHA reform bill introduced by the minority (albeit with an effective date delay several years longer than in the majority bills), and all minority members who spoke on this subject last year supported public sector coverage. This fact somewhat immunizes the issue from partisanship.

Having decided to "address gaps" in OSHA coverage, the problem for the Working Group is how to best square this commitment with the institutional concern of state and local officials that we not create another "unfunded federal mandate." This is a serious concern; many cities, towns, and villages have run out of the capacity to raise taxes. Accordingly, when the Federal government imposes a new duty, it may force them to cut back on police, fire, and other vital services. More generally, it forces them to reset their priorities -- not only differently than they would like, but sometimes without much warning.

¹ These States have chosen to work with the Occupational Safety and Health Administration to become State Plan states, which allows them to take over enforcement of OSHA requirements and tailor federal regulations to meet their State's needs.

Many of those concerned about the mounting impact of unfunded mandates have argued that if a new Federal mandate is necessary, it should be fully funded out of the Federal taxbase. Those who have expressed this point of view (i.e. the 53 co-sponsors of the Kempthorne Bill) argue that exceptions not be made to this general principle. Thus, if OSHA reform is viewed as an unfunded mandate, they would argue that any costs associated with that mandate should be fully funded by the Federal government. Obviously, this creates some appropriations problems.

Other state and local officials take a more flexible view of the situation. They accept the fact that some unfunded Federal mandates will always be necessary. However, they demand that the Federal government make sure that all such mandates be scientifically valid and necessary, build in state and local participation up-front, and allow as much flexibility as possible in implementation. This approach, which will be addressed later in this paper, is similar to the Administration's current approach to the issue.

Accordingly, the Administration is presented with three general questions to consider:

- How does support for OSHA Reform fit with the Administration's current position on unfunded mandates in general?
- Is OSHA Reform an unfunded mandate?
- Given our position on unfunded mandates, how can we justify supporting OSHA reform?

This paper will consider these three questions in detail.

DOES OSHA REFORM FIT WITHIN THE ADMINISTRATION'S CURRENT POSITION ON UNFUNDED MANDATES?

The Administration has clearly taken a strong public stand against the Federal government's imposition of unfunded mandates on state and local governments. Aside from a number of informal public statements on the issue, four examples stand out in this regard:

- **The National Performance Review.** Both in substance and in tone, the NPR called for a reduction in unfunded mandates. In addition to its recommendation that the "President should issue a directive limiting the use of unfunded mandates by the administration," the report also called for reviewing all agency regulations with the goal of eliminating half of them, and giving

cabinet secretaries and agency heads the authority to grant states and localities waivers from federal regulations or mandates.

- **Unfunded Mandates Day.** The President observed "Unfunded Mandates Day" (October 27, 1993) by meeting with Governors, Mayors, and other public officials to discuss the issue of unfunded mandates and their increasing burden on state and local governments. He also signed Executive Order 12875 on unfunded mandates (discussed below).
- **Executive Order 12866 -- Regulatory Planning and Review.** Through this Order, the President created a regulatory planning and review process that is more streamlined and will ensure that agencies regulate only when necessary and promulgate regulations that are cost-effective and sensible. Among other things, the Order requires each agency to consult with appropriate state and local officials before imposing regulatory requirements that significantly affect those entities, and asks agencies to strive to minimize regulatory burdens on state and local governments.
- **Executive Order 12875 -- Enhancing the Intergovernmental Partnership.** This Executive Order, also known as the "Unfunded Mandates" Order, attempts to reduce the imposition of Federal regulatory mandates on state and local governments and streamline the application process for discretionary waivers.

It is important to note that the unfunded mandates that the two Executive Orders listed above are referring to are **specifically limited to those regulations that are not required by law**. This is an important point, but is one that is not well understood. In the minds of most people, including Members of Congress and state and local officials, the Administration has taken a strong stand against unfunded mandates in general.

Given this perception, the danger inherent in supporting any kind of mandated coverage of state and local employees is that it may be viewed as contradicting the Administration's previous statements and actions on unfunded mandates, and therefore cut the Administration's credibility on the issue. This danger is especially worrisome given the current political environment surrounding unfunded mandates, including:

- **S-993 -- The Community Regulatory Relief Act (The "Kempthorne Bill"):** Senator Kempthorne's bill, which would require the Federal government to pay to state and local governments the direct costs incurred by those entities in complying with Federal

mandates, currently has 53 co-sponsors (including 10 Democrats).

- **U.S. Conference of Mayors and National Governors Association Resolutions on Unfunded Mandates:** In June, the Conference passed a resolution calling on the Congress and the President to pass legislation to end the practice of unfunded mandates. A similar resolution will likely be passed at the upcoming NGA meeting later this month.

In all, there seems to be a groundswell of political opposition to unfunded federal mandates coming from state and local communities. The Administration has, to date, responded positively to this rising tide of opinion by taking a public stand against unfunded mandates. The questions we must consider are: First, is OSHA reform an unfunded mandate, and; second, how do we square our support of OSHA Reform in light on our public statements and the current political mood?

IS OSHA REFORM AN UNFUNDED MANDATE?

Definition

What is an "unfunded mandate?" The term "Federal mandate" contained in the most prominent piece of legislation introduced on this topic, S. 993 (Kempthorne et al), reads as follows:

- ". . . a statute or regulation that requires a state or local government to --
- (A) take certain actions (including a requirement that a government meet national standards in providing a service), or;
 - (B) comply with certain specified conditions in order to receive or continue to receive Federal assistance and which requires the termination or reduction of such assistance if such government fails to comply with such conditions."

An "unfunded" Federal mandate is one which would not meet the requirement of section 4 of the bill that:

". . . any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the state or local government only if all funds necessary to pay the direct costs incurred by the state or local government in conducting the activity are provided by the Federal government for the fiscal year in which the direct cost is incurred."

Arguments For and Against

There have been three main arguments offered against defining OSHA reform as an unfunded mandate." First, if the concept of unfunded mandates were really limited to the costs of "conducting an activity," it could be argued that the legislation does not create an unfunded mandate at all. Coverage of state and local employees does not require the state to run any new program -- only to comply in its employment practices with Federal rules, administered by the Federal government unless the state elects to run the program itself. Second, some have argued that OSHA reform deals with state and local governments in their capacities as employers, and not as governing entities (i.e. not in their capacity as service providers, or law and policy makers). Therefore, OSHA reform does not fall under the standard definition of an unfunded mandate. Finally, employee unions have asserted that the benefits of OSHA coverage demonstrably exceed the costs; if so, it can be argued that there is no net cost, and thus no unfunded mandate. At this point, DOL does not have the hard data available to confirm this argument.

In practice, however, the type of unfunded mandates which are the subject of complaint include many situations comparable to OSHA -- where the focus is on the cost of bringing state or local facilities into compliance with the law, just as private sector facilities must be in compliance with the law. The state and local governments who would for the first time be covered by OSHA reform will incur a new direct cost: the cost of compliance with OSHA requirements and regulations. In addition, even those state and local governments already covered will face incremental costs under the proposed legislation. Finally, from a political standpoint, OSHA reform will almost certainly be classified as an unfunded mandate by its opponents. Given these reasons, it would be difficult to argue that OSHA reform is not an unfunded mandate.

DOES OSHA REFORM MEET ACCEPTABLE CRITERIA FOR ENACTMENT?

Fortunately, not all of those who are concerned about unfunded mandates take the Kempthorne approach insisting that ALL Federal mandates be fully funded. Rather, many have adopted a more middle-of-the-road approach. A good example of this approach has been articulated by Columbus Mayor Gregory S. Lashutka. In his testimony before the Senate Committee on Governmental Affairs, Mayor Lashutka, a longtime advocate against unfunded Federal mandates, offered four key principals that should guide the Federal government in enacting such mandates:

1. The legislation or regulation in question should be based on well-

founded science or fact;

2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available;
3. The Federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all, and;
4. Local governments should be treated as a full partner in the development of any new laws or regulations.

These four principals are similar in spirit to the Administration's Executive Orders on Unfunded Mandates and Regulatory Planning and Review, in that they do not advocate an **absolute** ban on unfunded mandates. Rather, both approaches call on the Federal government to make sure that any unfunded mandate be well justified and reasonable, build in up-front participation by state and local governments, and be as flexible as possible for state and local governments to implement.

Because Mayor Lashutka's key principals are similar to the Administration's approach, they can be used as a rough benchmark for trying to determine whether or not OSHA Reform meets acceptable criteria for enactment, even if it is not fully funded:

1. The legislation or regulation in question should be based on well-founded science or fact.
 - OSHA Reform goes a long way toward meeting this criteria. Secretary Reich presented a strong case for the need for OSHA reform in April, including the need for coverage of public employees. In addition, statistics collected by the Department of Labor show that workers in the public sector are at no less risk (and frequently more risk) than their counterparts in the private sector.
 - Any new regulation or requirement issued under the new law will be subject to the Administration's Executive Order on Regulatory Planning and Review, which ensures that they are based on well-founded science or fact.
2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available, and;

3. The Federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all;
 - In terms of administration, OSHA already provides states the option to set up a State Plan to meet local needs and priorities. The State Plan process allows states enormous flexibility in implementing OSHA rules and regulations.
 - Again, any new rules and regulations will go through the process set up by the Executive Order on Regulatory Planning and Review. This process specifically requires state and local participation and flexibility.
 - A delay of several years in the effective date of public sector coverage is agreeable to the sponsors of the majority bill and already contained in the minority bill. This delay, if enacted, will provide state and local governments adequate time to phase-in compliance efforts and thus minimize the disruption that any up-front investments might otherwise create for other pressing priorities.
 - The whole point of OSHA reform is to get public employers and their employees, just like those in the private sector, engaged in designing and implementing flexible solutions that fit local conditions and particular worksites.
4. Local governments should be treated as a full partner in the development of any new laws or regulations.
 - The Department of Labor and Congress have sought, and will continue to seek, the involvement of representatives of state and local governments in designing OSHA reform legislation. Specific state and local representation on DOL's OSHA advisory council has been discussed as a distinct possibility, and the OSH Administration meets regularly with state Plan designees.

Given the arguments listed above, it seems that a credible case can be made for supporting OSHA reform/public sector coverage while remaining true to the principles set forth in Executive Orders 12866 and 12875. How this case will be received politically, especially by state and local governments, however, remains to be seen. In the politically charged atmosphere surrounding the unfunded mandate debate, it is likely that the subtle distinction between "justified" and "unjustified" Federal mandates will not be appreciated or understood by everyone.

January 20, 1994

MEMORANDUM FOR CAROL RASCO

FROM: Mike Schmidt

SUBJECT: Occupational Safety and Health Act (OSHA) Reform and
Unfunded Mandates

As you know, I am currently a member of the OSHA Reform Working Group that is examining the Kennedy/Ford OSHA reform bills and will be making recommendations on Administration positions on various sections of the bill. During the course of the group's work, the issue of unfunded mandates has become quite significant, especially as they apply to mandatory OSHA coverage of public sector employees. I have attached a paper on the subject that I adapted from a longer Issue Paper that DOL prepared for the working group on unfunded mandates and OSHA reform. You will have a chance to review and approve the working group's recommendations sometime in the next few weeks. However, I thought that you might be interested in taking a closer look at the issue of unfunded mandates in OSHA reform and how it applies to the Administration's overall position on the issue.

Current Working Group Strategies

At the last meeting of the Working Group, we discussed strategies that could be used to deal with the questions about "unfunded mandates" that we are certain will be raised during the course of the OSHA reform debate. At this point, the group agreed on the following strategy in preparing drafts of testimony and Q&As for Secretary Reich's and Undersecretary Deer's upcoming testimony on OSHA reform in early February:

- **Avoid taking the issue head-on:** in testimony and Q&A sessions, we will neither attempt to declare public sector coverage to be a mandate, or deny that it is one.
- **Focus on OSHA reform as a different kind of mandate:** in addition to the equity arguments that the Secretary has been making, we will focus on elements suggesting that if coverage is a mandate, it is different than other mandates (and pretty small as well) for a number of reasons, namely:

- a very large number of public sector workers are already covered, in both state Plan and non-Plan states;
- health and safety requirements will apply to the states and localities in their capacity as employers, rather than as governments;
- OSHA provides the enforcement unless states decide to become state Plan states;
- OSHA regulations will be implemented under an Executive Order that requires special consideration for and local governments, and;
- hopefully, we will have numbers to show that OSHA reform has a positive payback for the entities covered (in terms of reduced injury and illness rates).

Unfortunately, it is likely that CBO will score OSHA reform as an unfunded mandate. If this proves to be true, OMB and OSHA will determine what we can do to (i) change their minds, and (ii) keep the numbers small.

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

Federal Register

**Monday
October 4, 1993**

Part VIII

The President

**Executive Order 12866—Regulatory
Planning and Review**

EXECUTIVE ORDER 12866: Regulatory Planning and Review

Each Agency Shall:

- Identify the problem it intends to address and assess significance;
- Examine whether existing regulations can be modified to accomplish same goal;
- Identify and assess available alternatives to direct regulation;
- Design regulation in most cost-effective manner to achieve the regulatory objective (consider incentives for innovation, costs of enforcement and compliance, and equity);
- Assess costs and benefits of regulation -- adopt only if benefits justify costs;
- ① ● Base decisions on best reasonably obtainable scientific, technical, and economic information on need, consequences, etc.;
- Flex ● To the extent feasible specify performance objectives rather than specifying compliance;
- part ● Seek views of appropriate State, local, Tribal officials before imposing regulatory requirements;
- Assess effects of regulations on State, local, tribal governments;
- Avoid inconsistent, incompatible, or duplicative regulations;
- Tailor regulations to impose the least burden on society;
- Draft regulations to be simple and easy to understand.

in proceeding. So
e reassure you on
Minister want to
on't we take one
u on that issue?

ln't have any de-
it. I think that he
his morning. He's
breathtaking vic-
terize his position.
t we had nothing
n which made me
rse of proceeding

ational Association
in today said that
cumbersome, too
, should be scaled
into some real
nveil it tomorrow?
don't know what
ir position was re-
lay they called and

the letter, not for
ed the position.
ey called and said
osition. All I know
s are going to save
they want to look
that can be their

it back?
olutely not. If they
ns, they can keep
ng costs. It's their
anufacturers, near-
ovide health insur-
he biggest gainers
r this. Now, if they
aving their retiree
having their pre-
, that's their privi-
e constituency out
ple to look at the
ey will want to do

that. I think that all they're doing is—here, this organization is like everybody else—they're going to lobby for the best deal they can get. They're going to lobby for fewer extra services so their premiums will go down even more. But keep in mind, they're already among the big winners in this thing. And I think that they're just out there staking out a negotiating position like everybody else. We've just started this, and it will go on for several months. And you'll see a lot more of it. I'm not discouraged by that at all.

Canadian Prime Minister-Elect

Q. [Inaudible]—Mr. President, has the stunning victory made you take the pressure off the Prime Minister-elect—

The President. I would think it would be—well, he certainly had a stunning victory. It was a real referendum in Canada. The way the press characterized it this morning, I think, is fairly accurate. People want a job-generating strategy, and they want the deficit dropped down, and those are the two things that he ran on. And obviously because he has a big parliamentary majority, he has some flexibility there. But I don't think it would be right for me to characterize, in any way, his attitude, position. It's just not the right thing to do. We had a really good conversation. Our two countries are as close probably as any two countries in the world. We have differences from time to time; we always will. But I feel very good about my conversation. And I think it's a good thing that now that he's been elected, he'll have the support he needs in the Parliament to govern. I think that's a good thing.

Spending Cuts

Q. Did you make your commitment to Senator Kerry this morning, Mr. President, with the spending cuts? Did you meet your commitment to Senator Kerry?

The President. They'll have another announcement about that. That was a whole different issue. The administration promised House Members; there weren't any Senators involved in that. There were House Members who wanted a chance to vote on at least \$10 billion more in spending reductions before the end of the calendar year, without regard to what we're going to be doing next year in trying to finish the implementation

of the reinventing Government report. And so, that's what we did today. And we gave them more than that because we also would like to have some cuts to fund an expansion of the crime bill to pay for more police officers and to make sure that we fully implement that.

Q. Did he ask you about—

The President. We didn't talk about that.

NOTE: The President spoke at 11:46 a.m. in the Cabinet Room at the White House. In his remarks, he referred to Prime Minister-elect Jean Chretien of Canada. A tape was not available for verification of the content of these remarks.

Executive Order 12875—Enhancing the Intergovernmental Partnership October 26, 1993

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 State, local, and tribal governments; to streamline the application 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.

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 ap-

plication 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 party against the United States, its agencies or instrumentalities, 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.

[Filed with the Office of the Federal Register, 11:13 a.m., October 27, 1993]

NOTE: This Executive order was published in the *Federal Register* on October 28.

Administration of

**Message to the
Transmitting a
Department of
October 26, 1993.**

To the Congress of

In accordance
Law 97-449 (49
herewith the Tw
of the Departme
covers fiscal year

The White House
October 26, 1993.

**Message to the
Transmitting a
Department of
October 26, 1993.**

To the Congress of

In accordance
Law 97-449 (49
herewith the Tw
the Department
covers fiscal year

The White House
October 26, 1993.

**Message to the
Transmitting t
Federal Labor
October 26, 1993.**

To the Congress of

In accordance
Service Reform A
454; 5 U.S.C. 71
of transmitting to
Report of the Fe
thority for Fiscal

The White House
October 26, 1993

Kempthorne S-993

- Requires the Federal Government to pay to State and local governments the direct costs incurred by those entities in complying with Federal mandates.
- 53 Co-sponsors, including most Republicans and Bryan, Boren, Breaux, Campbell, Feinstein, Heflen, Johnson, Mosely-Braun, Nunn, and Shelby.
- Debate over OSHA coverage of public employees could prompt Senator Kempthorne to tack his bill on as an Amendment to another piece of legislation that is important to the Administration (the EPA Cabinet bill?).

THE WHITE HOUSE
WASHINGTON

October 25, 1993

MEMORANDUM FOR THE PRESIDENT

THROUGH: THE VICE PRESIDENT
CAROL RASCO

FROM: JACK QUINN (OVP)
KUMIKI GIBSON (OVP)
PAUL WEINSTEIN (DPC)

RE: UNFUNDED MANDATES

This memorandum is to follow-up on the Vice President and Carol Rasco's October 19, 1993 memorandum to you regarding unfunded mandates and your October 20, 1993 directive to us to (1) develop a presidential directive limiting the creation and imposition of unfunded mandates and encouraging the grant of (discretionary) waivers and (2) pursue legislation regarding waivers and the consolidation of grant programs.

In summary, we have drafted an Executive Order on unfunded mandates and waivers. (A copy of the Order and a section-by-section analysis are attached.) Beyond this, we will continue to develop legislation that broadens the Executive branch's authority to waive statutory mandates and the power of States and localities to consolidate grant programs. (These proposed initiatives complement and follow-up on the related directives that you issued through the Executive Order on Regulatory Planning and Review, which are outlined below.)

During your October 26, 1993 meeting with governors and mayors, you should (1) remind them of the steps we took to address unfunded mandates in the Executive Order on Regulatory Planning and Review, (2) sign the Executive Order on unfunded mandates and waivers, (3) discuss the possible upcoming legislation on consolidation and statutory waiver authority, and (4) assure them that we are reviewing Ronald Reagan's Executive Order on Federalism.

Outlined below is a brief description of the relevant existing directives with respect to unfunded mandates, the proposed Executive Order, and the possible legislation on mandates and waivers.

I. Executive Order on Regulatory Planning and Review

As you will recall, on September 30, 1993, you signed Executive Order No. 12866, "Regulatory Planning and Review." Through this Order, you created a regulatory planning and review process that is more streamlined and effective -- thus, ensuring that agencies regulate only when necessary and promulgate regulations that are cost-effective and sensible.

Executive Order No. 12866 also addresses the issue of unfunded mandates. Specifically, one of the principles of that Order requires each agency to (1) consult with appropriate State, local, and tribal officials "before imposing regulatory requirements that might significantly or uniquely affect those governmental entities"; (2) assess the effects of Federal regulations on those governmental entities, including, specifically, "the availability of resources" to fulfill any mandates; (3) strive to minimize burdens that uniquely or significantly affect such governmental entities; and (4) seek to harmonize Federal regulatory actions with related State, local, and tribal actions. The Executive Order on Regulatory Planning and Review also directs the Administrator of the Office of Information and Regulatory Affairs ("OIRA") to "meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities." (On December 6, 1993, OIRA will convene its first conference with representatives of State, local, and tribal governments to discuss, among other things, unfunded mandates.)

II. Executive Order on Unfunded Mandates and Waivers

Attached at Tab A is an Executive Order, entitled "Enhancing the Intergovernmental Partnership." A section-by-section analysis of this proposed Order is attached at Tab B. This Order addresses the issue of both unfunded mandates and waivers. Specifically, it attempts to reduce the imposition of mandates that are not required by law and increases the availability of, and streamlines the application process for, (discretionary) waivers. (The Staff Secretary's Office will provide you with the actual Executive Order, which you will sign in your meeting with the governors and mayors.)

III. Possible Legislation

A. H.R. 2856, "Local Flexibility Act of 1993"

The House Government Operations Committee is planning to mark-up within the next few weeks H.R. 2856, "The Local Flexibility Act of 1993." Introduced jointly by Reps. John Conyers and William Clinger, H.R. 2856 would provide the Federal government with the authority both to waive regulations and to consolidate grant programs to local governments approved by a Congressionally-created committee.

H.R. 2856 is similar in concept to the Administration's original empowerment zone legislation, in that it provides for consolidation and waivers for a local community whose integrated assistance plan (which is akin to the strategic plan discussed in the empowerment zones legislation) is approved by the committee. There are, however, some substantive differences, which include:

- H.R. 2856 would create a new entity, the Interagency Review Council ("Council"), to approve waiver and consolidation requests. The original empowerment zone legislation charged the Community Enterprise Board ("Board") with this responsibility.
- The Council would be comprised of eight agencies, and the chairperson would be appointed by the President. Fifteen agencies, however, sit on the Board, with the Vice President serving as Chair and the Assistants to the President for Economic and Domestic Policy serving as Vice-Chairs. Treasury, Commerce, Transportation, the Small Business Administration, the Office of National Drug Control Policy, the Council of Economic Advisers, and the Office of Management and Budget would not serve on the Council.
- H.R. 2856 would grant the Council the authority to grant waivers from Federal regulations in six areas: education, employment training, health, housing, nutrition, and other social services. In order to ensure the success of the designated empowerment zones and enterprise communities, it is critical that economic development programs also be subject to waiver authority -- as proposed in the original empowerment zone legislation. In addition, we would make clear (as we did in the original empowerment zone legislation) that waiver authority does not extend to laws and regulations concerning, among other things, health, safety, civil rights, and environmental protection.
- Under H.R. 2856, grant programs to States would not qualify for waivers of exemptions.

As you know, the empowerment zone legislation that was adopted by Congress in the Budget Reconciliation Act did not include consolidation or waiver authority. The Conyers/Clinger bill, with modifications, would give the Administration the kind of waiver authority envisioned in the President's original proposal. We recommend that we explore the possibility of working with the Committee in seeking passage of compromise legislation that addresses these issues and specifically merges the Conyers/Clinger integrated assistance plan with our community empowerment approach.

No companion bill to H.R. 2856 has yet been introduced in the Senate; however, because of concerns regarding Senator Kempthorne's legislation, Senators Glenn and Lieberman are interested in preparing an alternative bill that could include waiver authority. Their staffs are planning to meet with us early next week to discuss their ideas.

B. NPR Recommendation Regarding Consolidation of Grants

In addition, the National Performance Review ("NPR") is encouraging the Administration to propose its own legislation that would allow States and localities to consolidate Federal grant programs in order to enhance flexibility and to encourage result-oriented performance at the State and local levels. The Office of Management and Budget ("OMB") is currently working on this effort. Specifically, OMB is working with agency counsel to identify legislation that would be affected by such consolidation. OMB will then draft an amendment to each statute for each categorical grant. OMB hopes to have these amendments drafted by the State of the Union address.

IV. Executive Order on Federalism

As you will recall, during the final stages of the drafting of the Executive Order on Regulatory Planning and Review, we recommended that we review more carefully the Executive Orders on the Family, Federalism, Civil Justice Reform, and Takings -- all of which touch upon regulations in some way. We suggested that it would be politically dangerous for us to revoke these Orders without issuing substitute Orders or directives that endorse family values, states' rights, streamlined litigation procedures, and property rights.

We are still in the process of reviewing these orders -- including the Executive Order on Federalism that promotes states' rights -- and, thus, are not yet prepared to make any recommendations as to how they should be addressed. Needless to say, it is likely that we will affirm (through an Executive Order or some other policy statement) some of the concepts and ideas reflected in Reagan's Federalism Order.

* * *

In sum, we believe that the existing Executive Order on regulatory planning and review, the Executive Order on unfunded mandates and waivers, and the possible legislation on grant consolidation and waiver authority should address some of the problems created by unfunded mandates.

cc: Marcia Hale

ORDER ON UNFUNDED MANDATES AND WAIVERS: SECTION-BY-SECTION ANALYSIS

The Preamble

The Preamble of this Order makes clear that the Federal Government is concerned with unfunded mandates (which "have increasingly strained the budgets of State, local, and tribal governments") and with "the cost, complexity, and delay in applying for and receiving waivers from federal requirements." The Preamble then sets forth the goals of the Order: (1) "reduce the imposition of unfunded mandates," (2) increase the availability of and streamline the application process for waivers, and (3) establish a meaningful partnership between the Federal Government and State, local, and tribal governments.

Section 1: Reduction of Unfunded Mandates

In Section 1 of the Order, you essentially implement the recommendation of the National Performance Review ("NPR") to "issue a directive limiting the use of unfunded mandates by the administration." Specifically, this Section prohibits the imposition of unfunded mandates "that are not required by statute" unless (1) the Federal Government provides the funds necessary to pay the direct costs of the proposed mandates or (2) the agency provides the Director of the Office of Management and Budget with a description of the extent of the agency's consultation with State, local, and tribal governments prior to the proposal; written communications submitted to the agency by such governmental entities; a statement of the concerns expressed by those governmental entities; and the agency's justification for the proposal. You also direct each agency to develop an effective means to involve State, local, and tribal governments in "the development of regulatory proposals containing significant unfunded mandates."

Section 2: Increasing Flexibility For Waivers

Section 2 addresses the issue of waivers from statutory or regulatory requirements "of programs that are discretionary and subject to waiver by the agency." Specifically, in this provision, you direct each agency to streamline its waiver application process. You also make clear that each agency is to consider an application for a waiver "with a general view toward increasing opportunities for utilizing flexible policy approaches" by State, local, and tribal entities. Finally, Section 2 requires each agency to render a decision on a waiver application within 120 days from receipt of a waiver application.

Section 3: Chief Operating Officer

In Section 3, you direct the Chief Operating Officer for each agency to ensure the implementation of and compliance with this Order.

Section 4: Executive Order 12866

As noted above, the Executive Order on Regulatory Planning and Review (Executive Order No. 12866) sets forth several directives to address the issue of unfunded mandates. Section 4 of the new Order makes clear that it complements the recently-issued Executive Order on Regulatory Planning and Review.

Section 5 (Scope) and Section 6 (Judicial Review)

In Section 5, the term "agency" is defined so as to apply only to Executive branch departments and agencies. In this provision, you do, however, ask independent agencies to comply with the provisions of the Order.

Section 6 makes clear that the Order creates no private rights or benefits.

Section 7: Effective Date

The effective date of this Order is 90 days from the date on which the Order is signed.

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

103^D CONGRESS
1ST SESSION

H. R. 140

To end the practice of imposing unfunded Federal mandates on State and local governments and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1993

Mr. CONDIT (for himself, Mr. MORAN, Mr. ROHRBACHER, Mr. POMBO, Mr. COX, Mr. PETE GEREN of Texas, Mr. PORTER, Mr. LEWIS of Florida, Mr. ORTON, Mr. STENHOLM, Mr. BREWSTER, Mr. PENNY, Mr. LAUGHLIN, and Mr. PACKARD introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To end the practice of imposing unfunded Federal mandates on State and local governments and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Mandate Re-

5 lief Act of 1993”.

through the Vice President's Task Force on Reinventing Government, of reexamining the way the federal government relates to the cities and the states.

And if I might make a specific suggestion, I think it would be very helpful if you, or Mayor Abramson, if that's the appropriate person to do it, would designate a group of mayors to make a very specific proposal to our task force because -- and obviously, we'll have to invite people who might disagree to do the same thing -- but I think it's very important that we examine this because one of the things that I'm concerned about is the colossal amount of money we waste every year trying to micro-manage these grants, trying to have extra layers of regulation. And I think that a lot of these things need to be reexamined.

So I think the proper forum for us to do that in is this one. And it's on a very fast track because the report is due in September, so it's not anything we're going to dilly-dally around about. And I would like you to make a proposal to our commission. (Applause.)

Q With the Commission and assent of our President, I would be delighted to do that. I can demonstrate with respect to ISTEA, for instance, that in excess of \$300 million flowed to the state and we got \$4.3 million.

Q I'm very glad you're able to join us. And I might just mention I was a strong supporter of your stimulus package, and I caught quite a lot of flack about that from other Republicans. One of the reasons that I supported the package was -- and one of the things I pointed out to people was that as the federal government requires us to do things through mandates, I thought it was appropriate for us to seek the money to pay for those things.

THE PRESIDENT: Absolutely.

Q Yesterday the conference passed a strong resolution calling for the President and Congress to pass legislation to end the practice of unfunded federal mandates. Senator Dirk Kempthorne, who is the former mayor of Boise, was here with us and indicated that he had introduced legislation that states very simply that if Congress gives a federal mandate, then Congress should also give us the money to pay for that mandate. Now, this is a bipartisan issue; it's one that affects city government, county government, state government, too. And we'd like to know what your position is with regard to unfunded mandates, and whether you're willing to join us in supporting Dirk Kempthorne's bill.

THE PRESIDENT: Well, I haven't reviewed the bill, Paul, but I certainly think that we shouldn't have unfunded mandates. I spoke out against them as a governor. I told the mayors that I would be opposed to adding to your burdens. I don't believe in that. And I do want to -- I'll be glad -- I'll review the bill and see whether or not we should support the bill, too. But I have told our administration clearly that I don't want us up there on the Hill supporting bills to load up a bunch of new burdens on the mayors and the governors when they're broke, when we're not increasing funding to the states and the cities as we should. And I've sent a very clear signal on it. And I will review the legislation.

I also want to thank you and Bill Althaus and many other Republican mayors for supporting the jobs stimulus program. And let me say that, I think after we pass this budget, we'll be able, together, in a very bipartisan fashion, to try to make the argument that was made there again, which is that there is a difference between investment and consumption spending; and that while the federal government may be spending too much on regulation, on the programs of the past and on uncontrolled health care costs, we are

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

103D CONGRESS
1ST SESSION

S. 993

To end the practice of imposing unfunded Federal mandates on States and local governments and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations.

IN THE SENATE OF THE UNITED STATES

MAY 20 (legislative day, APRIL 19), 1993

Mr. KEMPTHORNE (for himself, Mr. COVERDELL, Mr. GREGG, and Mr. CRAIG) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To end the practice of imposing unfunded Federal mandates on States and local governments and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Community Regulatory
5 Relief Act”.

DRAFT

AMENDMENT TO NGA POLICY ON FEDERALISM

INTRODUCED BY GOVERNOR GEORGE V. VOINOVICH, OHIO

1.4.4 UNFUNDED FEDERAL MANDATES. ALTHOUGH UNFUNDED FEDERAL MANDATES MAY REFLECT WELL INTENTIONED POLICY GOALS, THEY OFTEN IMPOSE SUBSTANTIAL COST AND REGULATORY BURDENS ON STATES. FEDERAL ACTION INCREASINGLY HAS RELIED ON STATES TO CARRY OUT POLICY INITIATIVES WITHOUT PROVIDING NECESSARY FUNDING TO PAY FOR THESE PROGRAMS, THEREBY ROBBING STATES OF THEIR RIGHT AND RESPONSIBILITY TO SET PRIORITIES AND DEVELOP POLICIES THAT BEST MEET LOCAL NEEDS.

IN NEW YORK V. UNITED STATES, THE UNITED STATES SUPREME COURT UNEQUIVOCALLY REAFFIRMED THE VITALITY OF STATE GOVERNMENTS IN THE FEDERAL SYSTEM AS SEPARATE AND INDEPENDENT POLITICAL ENTITIES. THE COURT HELD THAT STATE GOVERNMENTS CANNOT AND SHOULD NOT BE TREATED AS MERE SUBDIVISIONS OR AGENTS OF THE FEDERAL GOVERNMENT. STATES MUST BE FREE TO MAINTAIN THE INTEGRITY OF THEIR GOVERNMENTAL STRUCTURES AND GOVERNING PROCESSES.

STATE GOVERNMENTS CANNOT, HOWEVER, FUNCTION AS FULL PARTNERS IN OUR FEDERAL SYSTEM IF THE FEDERAL GOVERNMENT APPROPRIATES THE STATES' ABILITY TO DEVISE AND LEGISLATE THEIR OWN SOLUTIONS TO DOMESTIC PROBLEMS BY REQUIRING STATES TO DEVOTE THEIR LIMITED RESOURCES TOWARD COMPLYING WITH UNFUNDED FEDERAL MANDATES.

THE GOVERNORS CALL ON MEMBERS OF CONGRESS TO OPPOSE, AND THE PRESIDENT TO VETO, LEGISLATION THAT IMPOSES FURTHER MANDATES WITHOUT ALSO PROVIDING ADEQUATE FUNDING TO COVER THE COSTS OF IMPLEMENTATION. THE FOLLOWING ADDITIONAL ACTIONS ARE RECOMMENDED:

DRAFT

- * ENACT LEGISLATION TO REQUIRE THE CONGRESSIONAL BUDGET OFFICE TO REPORT ON THE COSTS IMPOSED BY UNFUNDED MANDATES ON STATES AND LOCAL GOVERNMENTS PRIOR TO CONGRESSIONAL ACTION BY A FULL COMMITTEE AND THE FULL HOUSE OR SENATE. THE COST ANALYSIS MUST SEPARATE STATE AND LOCAL COSTS OVER A FIVE YEAR PERIOD.
- * ENACT LEGISLATION TO PROVIDE STATE AND LOCAL GOVERNMENTS WITH REAL, PERMANENT RELIEF FROM THE MANDATE BURDEN. THESE MEASURES SHOULD INCLUDE A REQUIREMENT THAT UNLESS THE COSTS ASSOCIATED WITH ALL NEW UNFUNDED MANDATES ARE REIMBURSED BY THE FEDERAL GOVERNMENT, THE MANDATE REQUIREMENT IS WAIVED.
- * ADDITIONALLY, CONGRESS SHOULD EXTEND THE PAY-AS-YOU-GO, REVENUE NEUTRAL REQUIREMENT, NOW USED FOR FEDERAL ENTITLEMENT PROGRAMS, TO ANY NEW STATE AND/OR LOCAL MANDATE.
- * PROVIDE A POINT OF ORDER AGAINST ANY UNFUNDED MANDATE IMPOSED ON STATE OR LOCAL GOVERNMENTS THAT VIOLATES THE THE PAY-AS-YOU-GO OR REIMBURSEMENT MECHANISMS, WITH A THREE-FIFTHS MAJORITY NECESSARY TO OVERRIDE THE POINT OF ORDER.
- * EXEMPT STATE AND LOCAL OFFICIALS OF GENERAL PURPOSE GOVERNMENTS AND THEIR REPRESENTATIVE NATIONAL ORGANIZATIONS FROM THE FEDERAL ADVISORY COMMITTEE ACT AND THE ADMINISTRATIVE PROCEDURES ACT.
- * ENACT THE NATIONAL PERFORMANCE REVIEW RECOMMENDATIONS FOR BROAD AGENCY WAIVER AUTHORITY AND BOTTOM-UP GRANT CONSOLIDATION.
- * ENACT THE PAPERWORK REDUCTION ACT TO REDUCE UNNECESSARY PAPERWORK BURDENS.

DRAFT

- * THE GOVERNORS URGE THE FORMATION OF A SUMMIT CONFERENCE ON FEDERALISM TO INCLUDE THE PRESIDENT, APPROPRIATE REPRESENTATIVES OF HIS ADMINISTRATION, THE CONGRESSIONAL LEADERSHIP, AND REPRESENTATIVE GOVERNORS, STATE LEGISLATORS, COUNTY OFFICIALS, MAYORS, AND CITY OFFICIALS, TO DISCUSS THE BREAKDOWN OF FEDERALISM AND TO RENEW OUR NATIONAL COMMITMENT TO THE FEDERALIST SYSTEM OUR FOUNDING FATHERS ENVISIONED.

ONLY CONSTITUTIONAL OR STATUTORY RIGHTS OF INDIVIDUALS WOULD BE EXEMPT FROM THESE PROVISIONS.

**Talking Points for Meeting
to Sign the Executive Order
on Enhancing Intergovernmental Partnerships**

- ♦ Thank you, today I am signing an Executive Order titled Enhancing the Intergovernmental Partnership.
- ♦ This Executive Order attempts to reduce the imposition of mandates that are not required by law and increases the availability of and streamlines the application process for discretionary waivers.
- ♦ I believe this is a step in the right direction concerning federal unfunded mandates.
- ♦ As President, but most importantly as a former Governor, I know first-hand the strain unfunded mandates impose on state and local governments.
- ♦ I think that it is important that we establish a meaningful partnership between the Federal government and the State and Local governments.
- ♦ I believe today's Executive Order on Enhancing the Intergovernmental Partnerships and the Executive Order on Regulatory Planning and Review, which I signed in September, begin this process.
- ♦ As you may know, in early December OMB will sponsor a day-long session in Washington on regulations that affect state and local governments. I hope that all of you will participate in this conference, which will include a session on the burdens imposed on state and localities by federal regulation, including unfunded mandates.
- ♦ In addition, I have recently made eleven appointments to the ACIR, with former Governor William Winter as the Chair, which I believe can become an instrumental vehicle to promoting cooperation among state and local governments.
- ♦ I would like to thank the Vice President for all of his work on his re-inventing government initiative, which has done the hard work necessary to bring about this Executive Order.
- ♦ I know that Mayor Abramson would like to share the findings of the Price-Waterhouse survey with us and then I would like to hear from any of you about your concerns on unfunded mandates.

October 19, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: THE VICE PRESIDENT
CAROL RASCO

SUBJECT: Unfunded Mandates and Waiver Authority

On Tuesday, October 7, 1993, representatives from our staff met with staff from the Senate Committee on Government Affairs; its Subcommittee on Oversight of Government Management; its Subcommittee on General Services, Federalism, and the District of Columbia; and its Subcommittee on Regulation and Government Information. The purpose of the meeting was to discuss the issue of unfunded mandates and the upcoming Unfunded Mandates Day on October 27, 1993. These staffers are concerned that when the Administration's package of budget cuts and rescissions is considered on the floor of the Senate, Senator Kempthorne of Idaho will offer as an amendment his legislation on unfunded mandates. The Kempthorne bill would require the Federal Government to pay to State and local governments the direct costs incurred by these governmental entities in complying with (future) Federal mandates. Needless to say, Senator Kempthorne's legislation would make the passage of health, safety, and environmental initiatives difficult because of prohibitive costs.

Because of the obvious problems with Kempthorne's bill and the desire of many in Congress to address the issue of unfunded mandates, these Senate staffers urged the Administration to develop a reasonable alternative to the Kempthorne bill. These staffers believe the leadership will be unable to prevent Kempthorne from offering his legislation as an amendment to the Administration's budget reduction bill and that the Kempthorne bill is likely to pass unless the Administration and the leadership can offer an alternative.

We think that Kempthorne's impending legislation presents us with an opportunity to promote the passage of some of the recommendations of the National Performance Review (NPR) on empowering State and local governments as well as the proposal on waiver authority crafted by the working group on community empowerment. Specifically, we may now be able to obtain, among other things, legislative authority to grant temporary, programmatic waivers for empowerment zones and for States and localities seeking relief from unfunded mandates. Last spring, Democrats in the Senate and the House were not

interested in such legislation. According to the staffers with whom we met, the environment on the Hill has changed and as a result of Kempthorne's (extreme) legislation, they believe a waiver proposal, as part of a bigger strategy to address unfunded mandates, would be welcome in the Senate. It is unclear at this juncture, however, the extent to which Members of the House will welcome such legislation.

Background

When the working group on community empowerment first introduced the Administration's empowerment zone legislation, we included language that would have provided to the Community Enterprise Board broad waiver authority for all localities designated as empowerment zones and enterprise communities. Under our proposal, the Board would have been authorized to waive any provision of Federal law or regulation, administered by the Secretaries of HUD, Agriculture, HHS, Labor, or Education, where the Board determined such waiver to be necessary for the successful implementation of a designated community's strategic plan. Under our proposal, the Board would consult with the relevant agency before granting any waivers. We excluded from this waiver authority rules for eligibility and benefits under the Social Security Act and Food Stamp Act, and laws and regulations concerning public or individual health, safety, civil rights, environmental protection, labor relations, labor standards, occupational health or safety, pensions, taxation, and any other law specifically excluded by the Attorney General.

Unfortunately, this piece of the your empowerment legislation was not included in the final version of the bill adopted by Congress. Without such legislation, it will be difficult to effectively respond to the needs of empowerment zones and enterprise communities, as well as to the problems created by unfunded mandates. Most existing waiver authority is focused in the areas of welfare and health care, not economic development or spending flexibility.

Discussion

The Senate staff discussed several alternatives that they believed should be considered as part of an unfunded mandates package, including the following:

- **Issue a presidential directive limiting the use of unfunded mandates** -- In its report, the NPR recommends that you issue a directive limiting the use of unfunded mandates by the Administration. To this end, NPR is drafting an Executive Order that will underscore this Administration's commitment to addressing State and local governments' concerns in this area. Specifically, this Executive Order will, among other things, (1) assign each agency's Chief Operating Officer the responsibility of ensuring agency compliance with the federalism considerations and requirements contained in the Executive Order; (2) direct agencies to look for opportunities, to the extent permitted by law, to make their waiver process less burdensome and more flexible; and (3) identify an appropriate forum -- perhaps the Community Enterprise Board or the

President's Management Council -- to hear federalism concerns presented by representatives of State and local governments about particular administration policy initiatives.

- **Give Cabinet secretaries and agency heads authority to grant States and localities selective waivers from Federal regulations or mandates** -- In its report, NPR also recommends that Cabinet secretaries and agency heads be given legislative authority to waive selected Federal mandates. This proposal would provide the Executive branch with broad programmatic waiver authority. In order for such legislation to pass, the authority may have to be limited to waivers from unfunded mandates and for the purpose of community empowerment. The waiver authority should include a sunset provision and some level of performance measures. Finally, we believe the following areas should be excluded from waiver authority: rules for eligibility and benefits under the Social Security Act and Food Stamp Act, and laws and regulations concerning public or individual health, safety, civil rights, environmental protection, labor relations, labor standards, occupational health or safety, pensions, taxation, and any other law excluded specifically by the Attorney General.
- **Allow States and localities to consolidate separate grant programs from the bottom up** -- NPR also has recommended that we seek legislation that would allow States and localities to consolidate separate grant programs. The Senate staffers with whom we met appeared to be sympathetic to the idea of allowing States to consolidate grant programs under \$10 million into one block grant. This would permit States and localities to more flexibly, and efficiently, use their Federal funds, allowing them to shift dollars to areas where there is a need to cover the costs of Federal unfunded mandates.
- **Targeted Federal assistance** -- Senator Sasser is apparently considering establishing a targeted assistance program for States and localities burdened by direct unfunded mandates, authorized at \$1 or \$2 billion per year. The Sasser legislation would allocate funds based on the financial needs of the State or locality and on the extent of the direct mandate. The problem with this approach is its cost, which may be higher than the costs associated with the Kempthorne bill. In order to pay for such a new program, OMB would have to find some off-sets.
- **Federal technical assistance for implementing new regulation imposing unfunded mandates** -- Another approach, which would be less costly than targeted assistance, would be to provide to States and localities technical assistance for the implementation of new Federal regulations imposing unfunded mandates.

Obviously, these staffers represent only a few senior Democratic Members. Before taking any action, including developing recommendations, the Office of Legislative Affairs will discuss this issue with the Majority Leader to see if the views presented to us on October 7, 1993 are consistent with those of the Senate Leadership. The Office of legislative Affairs will also need to conduct the same consultation with the Speaker of the House.

Recommendation

Provided that the leadership in the House and Senate agree, we would like to develop by Unfunded Mandates Day a strategy encompassing some or all of the recommendations outlined above. Please indicate below how you would like us to proceed:

- ☐ Develop entire package -- Presidential directive, legislative authority for waivers, consolidate grant programs, etc. -- for your review
- ☐ Develop presidential directive to limit use of unfunded mandates
- ☐ Develop legislation regarding waivers
- ☐ Develop legislation regarding grant programs
- ☐ Develop legislation regarding targeted Federal assistance
- ☐ Develop legislation regarding technical assistance
- ☐ Discuss further

THE WHITE HOUSE
WASHINGTON

August 19, 1993

Dear Senator Kempthorne:

Thank you for your letter regarding unfunded federal mandates and for sharing a copy of S. 993, the proposed "Community Regulatory Relief Act."

The practice of unfunded federal mandates is a concern. As a former governor, I have had firsthand experience dealing with burdensome unfunded federal requirements. Too often, laws and regulations have the unintended result of disproportionately burdening state and local governments. As a former mayor of Boise, Idaho, you know how hard it is to find the resources for unfunded federal mandates. We need to work closely with governors, mayors, and other local officials to minimize local burdens and maximize flexibility.

Consistent with these goals, in evaluating legislative and regulatory proposals, my Administration will help identify federal mandates so that potential burdens can be minimized. I appreciate your interest in this issue.

Sincerely,



The Honorable Dirk Kempthorne
United States Senate
Washington, D.C. 20510

LETTERS TO THE EDITOR

TON POST

By William Claiborne
Washington Post Staff Writer

Some U.S. senators and representatives soon will be called on the carpet—literally—by their home state legislatures to justify a principle that goes to the heart of the federal-state relationship: the growing number of unfunded federal mandates that are severely straining state budgets.

Two states, Alabama and South Dakota, have passed laws summoning lawmakers from Washington to joint sessions of their legislatures to explain why they have imposed costly federal regulations on the state governments without providing funds to implement them. Similar bills are being considered in at least 14 other states.

Those bills and many other "mandate consultation acts" being introduced across the country are challenging Congress's increasing propensity to use its budget leverage to force states to fulfill national goals.

States' advocates say that the federal social agenda is driving state spending priorities and bankrupting local budgets as the mandates are passed down through the state, county and municipal levels. The cost of implementing a growing list of rules that regulate federal programs ranging from environmental protection to Medicaid is especially ruinous to state budgets, they say.

While states cannot force their congressional delegations to appear before joint sessions of their legislatures, it seems unlikely that the annual "invitations" could be ignored without considerable political cost.

"It won't change anything, obviously, but it definitely will increase public awareness of one of the biggest causes of budgetary distress out there," said John E. Berthoud, director of tax and fiscal policy for the American Legislative Exchange Council, a Washington-based state public policy group.

"Unfunded mandates are an insidious way for governments at one level to pass onto governments at a lower level responsibility for the funding of programs. Governments at the higher level can take credit for instituting the program, but lower levels of government have to produce the funding," Berthoud added.

Andrew J. Cowin, a Heritage Foundation expert in regulatory affairs, noted that before the 17th Amendment of 1913, U.S. senators were elected by state legislatures and, consequently, were directly accountable to them in an arrangement designed to avoid such uses of federal power as unfunded mandates.

"Given the huge burdens that federal mandates place on the states today, state legislatures would do well to demand formal and public reports from their two U.S. senators on the effects of Washington policies on the states," Cowin said.

Alabama state Rep. Perry O. Hooper Jr. (R), who introduced the first Mandate Consultation Act, said the purpose is not to embarrass senators and representatives but rather to make them aware that while they are basking in the glow of favorable publicity for having enacted worthwhile social legislation, the cost of regulating it is being quietly passed down to state governments.

"All these programs look good, but there's no free lunch. Somebody's got to pay for it, and the thing to do is pass it down to us," said Hooper.



BY PETER HOEY FOR THE WASHINGTON POST

Alabama, the first state to enact mandate consultations, has not formally summoned any U.S. lawmakers yet, although state legislative leaders have talked with congressional representatives, who indicated a willingness to cooperate, state officials said.

States that have introduced similar legislation or are considering it include Arizona, Delaware, Florida, Georgia, Louisiana, Massachusetts, Michigan, Nebraska, New Jersey, New York, Oregon, Pennsylvania, West Virginia and Wisconsin.

The Heritage Foundation, a conservative think tank, estimates that during the 1990s, state and local governments will spend more than \$200 billion to comply with current federal wastewater mandates alone. For some cities, the cost is so high that they may have to reduce spending on essential services to afford the mandates, the foundation said.

An oft-cited example is Columbus, Ohio, a city of 633,000 that is faced with costs of \$1 billion to comply with the Clean Water Act and the Safe Drinking Water Act. The Columbus Health Commission estimated that compliance will cost each household an additional \$685 each year throughout the 1990s.

Similarly, New York officials estimated that mandates requiring the retrofitting of elevators in subways to accommodate the handicapped will cost more than \$1.3 billion—with no help from the federal government.

One of the leaders in the fight against unfunded mandates has been Michigan Gov. John Engler (R). Officials there estimate that one-third of the state government's revenue growth—\$95.3 million—will be consumed by the cost of Medicaid mandates. It also is estimated that Medicaid mandates will grow at an annual rate of 49.1 percent through 1995, while the state's general fund will grow by only about 5.5 percent.

Lawrence W. Reed, president of the Mackinac Center for Public Policy, a conservative think tank in Midland, Mich., said of the mandates and states' relationship with their federal legislators: "You have to hold their feet to the fire in a very public way and say, 'Okay, explain why you voted for this.'"

United States Senate

WASHINGTON, DC 20510-1204

June 23, 1993

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

93 JUN 29 P5:13

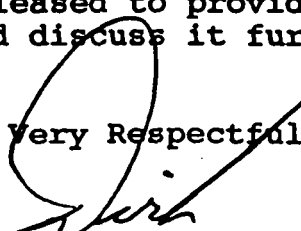
Dear Mr. President:

I applaud the strong position you have taken regarding unfunded federal mandates. It is very encouraging to read the text of your comments to the United States Conference of Mayors during their annual meeting in New York. I especially appreciate your pledge to review my legislation, S.993 "Community Regulatory Relief Act". Copies of S.993 and a fact sheet of the bill is submitted for your consideration.

Your interest in this very important issue is appropriate, timely and very much appreciated. The impact of unfunded mandates has reached epidemic proportions for the communities of America, and a solution must be found. I believe my bill addresses this problem in a reasonable and effective manner.

Your specific support for this legislation is sought and encouraged. I would be pleased to provide you with any additional information and discuss it further at your convenience.

Very Respectfully,


DIRK KEMPTHORNE
United States Senator

DK/gar

*Thank you, Mr. President.
I look forward to hearing
from you. Best wishes.*

**Fact Sheet: Kempthorne Community Regulatory Relief Act (CRRA)
of 1993**

Current Law:

There currently are no limits to the burdens which state and local governments must bear in order to comply with federal mandates. In addition to no limitation on the number or type of mandates, the federal government also does not assume any of the costs incurred by local governments in order to comply with those mandates.

Proposed Legislation:

The bill requires that any federal law that creates a federal mandate shall only apply to a state or local government if the federal government assumes all of the direct compliance costs.

Why The Kempthorne Legislation Should Be Enacted:

1. State and local government officials across America voice bitter complaints about being forced to comply with unfunded federal mandates. They say these mandates are inefficient, ill-conceived, costly, and often times force communities to reprioritize budget decisions.
2. There is bipartisan support for ending federally funded mandates. Chicago's Democratic Mayor Richard Daley calls unfunded mandates "hidden federal taxes, bleeding our limited resources and cutting into direct services." Arizona Governor Fife Symington says unfunded mandates have stripped the people of their right to representative government at the state level." Anchorage, Alaska estimates that the cost of federal environmental regulations this decade alone will exceed \$429 million. The state legislature in my own state of Idaho passed a resolution that says in part, "the mandates imposed by the federal government on the states are becoming increasingly numerous and onerous."
3. This legislation is an effective but simple solution to eliminating the federal mandates that are strangling America's communities. Requiring Congress to pay for the mandates it imposes, will force them to live in the real world. And the real world is balancing budgets, providing services as efficiently as possible, being fiscally responsible, and making tough decisions among competing priorities.

THE WHITE HOUSE

WASHINGTON

July 8, 1993

MEMORANDUM FOR GERRI RATLIFF

FROM:

Ellen Seidman

 → National Economic Council

SUBJECT:

LRM I-791 - Kempthorne bill on unfunded state mandates

Since Bob Rubin has been known to state that unfunded state mandates are the last refuge of cowards, let me assure you that the NEC's general position is that something that would reduce their frequency would be a good idea. Having said that, however, this isn't it.

The major problem is that in its quest for simplicity and breadth, the bill becomes totally unworkable. For example, as to statutes, what does "shall apply to the state or local government only if" mean? Say a new program is created in which states can get money to fund a police corps if they develop certain procedures to ensure that minority candidates have an equal opportunity to become part of the force. If money isn't appropriated to cover the procedure development and implementation costs, does the police corps money go away, or do the states get the money without the minority equal opportunity requirement? (The wording of the bill suggests the latter.) What if the authorizing committee would not have created the program without the equal opportunity requirement but, for general deficit cutting reasons, the [minor] amount needed for the equal opportunity requirement isn't appropriated by the appropriations committee? One might say that this should lead to better coordination between authorizing and appropriating committees, but both timing and general budgetary processes make that difficult. I'll admit, however, that with respect to statutes, it wouldn't be impossible.

The real rub comes with regulations required by statute, which are also covered by the bill. Here, you could easily get into a situation in which Congress passes a bill with mandatory regulatory requirements that the Executive Branch must implement, but the funds for states to meet those regulatory requirements are not appropriated, in which case, I guess, the states don't have to follow the regulations -- again, not at all what the authorizing committee (and enacting Congress) intended or, frankly, will hold the Executive Branch to. At the very least, the bill should state that no statutory requirement to promulgate regulations what would cause an unfunded state mandate will be effective unless Congress has previously appropriated the funds. The same probably should be true of court ordered regulations, although there may be constitutional issues here.

As to non-statutory regulations, I suspect the interplay between the reg-writing process and the budgetary process would make virtually any regulation in this category take years to implement. Finally, as to all statutes and regulations, the proposed mechanism to establish costs would ensure that it would never be done (costs for each local government must be estimated) and there is nothing preventing enactment of the legislation without the cost estimate.

There are a number of other bills on this subject pending, generally sponsored by Republicans (H.R. 886) or conservative Democrats (H.R. 140). H.R. 886, in particular, is more thoughtful than S.993. If the Administration is going to seriously consider supporting one of these initiatives, I suggest we work from H.R. 886 or something similar.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

12-Jul-1993 10:10am

TO: Gerri L. Ratliff

FROM: Daniel J. Chenok
 Office of Mgmt and Budget, OIRA

SUBJECT: RE: Comments on Community Regulatory Relief Act

Jeff has handed the project over to me. We will be speaking with Sally this morning.

Some informal views -- as I see it, the two main problems with the bill are:

-- Its definitions of "Direct costs" and "Federal mandates" are too broad. In the former, the "or" should be "and" on line 4, meaning compliance costs that are also in excess of normal payments. In the latter, subparagraph (B) should indicate that mandates are costs of compliance with specified conditions that are not covered by the Federal assistance received.

-- It does not reflect the reality that in a Federal-State system, certain costs will be shared between the two levels of government. The goal should be to consult States early in the development of Federal requirements on them, to ensure that sharing of costs is reasonable. Because the President's statement opposes unfunded mandates, the point made above is the one we may support at this time.

I will send you official word later.



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

0 5 AUG 1993

Honorable Leon E. Panetta
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Panetta:

Thank you for your request for the views of the Department of Justice on S. 993, the "Community Regulatory Relief Act." Our comments are limited to a legal issue concerning the purported effect of provisions of the legislation on future Congresses.

Section 4 of the bill provides:

Notwithstanding any other provision of law, any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the State or local government only if all funds necessary to pay the direct costs incurred by the State or local government in conducting the activity are provided by the Federal Government for the fiscal year in which the direct cost is incurred.

Section 6 of the bill then provides:

No statute enacted after the date of enactment of this Act shall supersede this Act unless the statute does so in specific terms, referring to this Act, and declares that that statute supersedes this Act.

It is doubtful that these provisions would accomplish their intended result. As a general matter, statutory restrictions are not viewed by the courts as binding upon subsequent Congresses and "may be repealed, amended, or disregarded by the legislature which enacted [them]." Manigault v. Springs, 199 U.S. 473, 487 (1905). See also Peterson v. U.S. Dept. of Interior, 899 F.2d 799, 808 (9th Cir. 1990); United States v. National Garment Co., 10 F. Supp. 104, 106 (E.D. Mo. 1935) ("Nothing is better settled than that one legislative body cannot, irrevocably, and unchangeably bind succeeding Legislatures." [sic]).

We recognize that it may be argued that these provisions are intended to establish a rule of construction for interpretation of potentially conflicting statutes by the executive and judicial branches, rather than to bind future Congresses. We doubt, however, that the provisions would be legally effective in that regard. Long-established judicial canons of statutory construction militate against the ability of a general, cross-cutting statute such as S. 993 to prevail over the contrary specific provisions of subsequently enacted legislation. As stated by the court in Nat'l. Resources Defense Council v. EPA, 824 F.2d 1258, 1278 (1st Cir. 1987), "[T]he most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute."

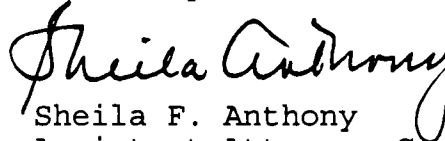
For example, if a future Congress were to enact a statute expressly imposing unfunded mandates on State and local governments with respect to a specific federal program, this rule of construction would require the conclusion that the subsequent statute would be legally effective, even if the requirements of section 6 of S. 993 were not satisfied. This rule is based not only on the premise that the "latest expression of legislative will" should generally prevail, 2B Sutherland Stat. Const. § 51.02 (5th ed.), but also on the principle that the courts "cannot ignore evidence that Congress intended to address a specific situation through special legislation." Stewart v. Smith, 673 F.2d 485, 492 (D.C. Cir. 1982). Thus, the courts are reluctant to give broad application to an earlier statute "if it would result in the circumvention of the comprehensive remedial scheme provided by a later statute." Holt v. Michigan Dept. of Corrections, 771 F. Supp. 201, 204 (W.D. Mich. 1991).

In sum, legislative restrictions of the type proposed in S. 993 are of questionable efficacy when enacted in the form of statutes dependent upon judicial enforcement. They may be more effective if they are instead made part of the rules of the Senate and House of Representatives. Indeed, it may be that these provisions are not intended to be enforced through the courts, but rather are to be limited to congressional enforcement.

To make that clear, the bill could be modified to indicate that these provisions "are enacted as an exercise of the rulemaking power of the House of Representatives and the Senate" and "with full recognition of the constitutional authority of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House." This language is modeled after § 271(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 (popularly known as "Gramm-Rudman-Hollings"), Pub. L. 99-177, 99 Stat. 1038.

We appreciate the opportunity to provide you with our views. Please feel free to call upon us if we may of additional assistance in this or any other matter.

Sincerely,

A handwritten signature in cursive script that reads "Sheila Anthony". The signature is written in black ink and is positioned above the printed name and title.

Sheila F. Anthony
Assistant Attorney General