

*Carol
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Review
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DRAFT

September 12, 1994

MEMORANDUM FOR THE PRESIDENT
THE VICE PRESIDENT
THE CHIEF OF STAFF

THROUGH: CAROL RASCO

FROM: Paul Weinstein

SUBJECT: Update on Unfunded Mandate Legislation

file

On Tuesday at 12:30, after the Crime Bill signing, you will be meeting with the leadership of the U.S. Conference of Mayors. It is likely that the issue of unfunded mandates will be raised by the mayors and that they will ask for a reiteration of your support for "The Federal Mandate Accountability and Reform Act of 1994" (Glenn-Kempthorne bill).

Background

Your Administration has been working hard to address effect of federal unfunded mandates on state and local governments. On October 26, 1993, you signed Executive Order 12875, "Enhancing the Intergovernmental Partnership," which is designed to prevent the issuing of any new, non-statutory unfunded regulations except in cases where the agency submits to OMB, prior to promulgation, a justification supporting the need for the regulation and includes a description of the extent of the agency's prior consultation with state, local, and tribal governments. The Executive Order also sets a deadline of 120 days for the approval or notification of waiver requests. In addition, the Administration has been working closely with Senators Glenn and Kempthorne on passage of compromise legislation that would severely limit the growth of additional federal unfunded requirements.

The Glenn-Kempthorne bill was agreed to by the Senate Committee on Governmental Affairs on June 16. The House Government Operations Subcommittee on Human Resources and Intergovernmental Relations adopted companion legislation without amendment on August 11. Neither bill has yet been scheduled for floor time in the House or Senate. As stated to you in a previous memorandum, Glenn-Kempthorne would allow a simple majority point-of-order on legislation that did not include an **authorization** fully covering the costs to state and local governments. The bill would also require that legislation include suggestions of where offsets to pay for any mandates would come from elsewhere in the budget.

Two controversial amendments were adopted in the Senate Governmental Affairs Committee. The first, offered by Senator Dorgan, requires that the Congressional Budget Office (CBO) analyze the direct private sector impacts of legislation. The Administration has resisted any efforts to require private sector analysis of legislation on the unfunded mandates bill, arguing that this effort is about assisting our state and local intergovernmental partners and because the CBO has determined that estimating these costs accurately would be impossible. Senator Glenn, Senator Mitchell, and state and local groups share our view.

The second amendment, offered by Senator Levin, would "sunset" the bill if CBO is not provided with adequate resources to conduct the analyses required by the legislation. This amendment was not expected and is viewed by the state and local groups as an attempt to kill the bill.

Talking Points

During your meeting with the mayors, you may want to emphasize the following:

- Reiterate your strong support for Glenn-Kempthorne and your commitment to seek passage of a **clean** bill this year -- without the Dorgan and Levin amendments.
- Emphasize your belief that passage of Glenn-Kempthorne, combined with Executive Order 12875, will restore greater balance to the relationship between the federal government and state and local governments.
- Ask the mayors for their active support of Glenn-Kempthorne. Remind them that passage of Glenn-Kempthorne this year cannot be attained without their vigorous support.
- Remind the mayors of your Administration's efforts on unfunded federal mandates: (1) the issuing of Executive Order 12875; (2) requesting the Advisory Committee on Intergovernmental Relationships (ACIR) to study the effect of unfunded mandates; (3) and the Administration's efforts in helping to craft the Glenn-Kempthorne compromise legislation.
- Remind the mayors of the bipartisanship that helped forge the Glenn-Kempthorne bill and the need to oppose impractical alternatives, such as including the Condit bill (the old Kempthorne legislation of "no money no mandates"), which now has 140 signatures on its discharge petition in the House. The Condit bill lacks the refinements of Glenn-Kempthorne and could create additional gridlock in Congress and damage your agenda for change. In addition, staff of the House Operations Committee has indicated to us that Chairman Conyers will not move Glenn-Kempthorne out of the full committee until the threat of a discharge petition on Condit is removed.

cc: Marcia Hale

THE WHITE HOUSE
WASHINGTON

September 12, 1994

Send cc to
Steve Roubin
from me
MAM

MEMORANDUM FOR THE PRESIDENT
THE VICE PRESIDENT
LEON PANETTA

THROUGH: CAROL RASCO

FROM: Paul Weinstein

SUBJECT: Update on Unfunded Mandate Legislation

On September 13, at 12:30 pm, after the Crime Bill signing, you will be meeting with the leadership of the U.S. Conference of Mayors. It is likely that the issue of unfunded mandates will be raised by the mayors and that they will ask for a restatement of your support for the Federal Mandate Accountability and Reform Act of 1994 "the Glenn-Kempthorne bill"

Background

Your Administration has been working hard to address the effects of federal unfunded mandates on state and local governments. On October 26, 1993, you signed Executive Order 12875, "Enhancing the Intergovernmental Partnership," which is designed to prevent the issuing of any new, non-statutory unfunded regulations except in cases where the agency submits to OMB, prior to promulgation, a justification supporting the need for the regulation and includes a description of the extent of the agency's prior consultation with state, local, and tribal governments. The Executive Order also sets a deadline of 120 days for the approval or notification of waiver requests. State and local governments praised the signing of this Executive Order.

In addition, the Administration has been working closely with Senators Glenn and Kempthorne on compromise legislation (despite some reservations) that would restrict the growth of additional federal unfunded requirements. As stated to you in a previous memorandum, Glenn-Kempthorne would allow a simple majority point-of-order on legislation that did not include an **authorization** fully covering the costs to state and local governments -- with exclusions for legislation relating to national emergency assistance for state, local, and tribal governments, national security, anti-discrimination, constitutional rights, auditing and accounting procedures, any other bill that the President and the Congress designate as emergency legislation, and legislation that the Congressional Budget Office

calculates does not create a direct mandate in excess of \$50 million annually. The bill would also require that legislation include suggestions of where offsets to pay for any mandates would come from elsewhere in the budget. The Glenn-Kempthorne bill was agreed to by the Senate Committee on Governmental Affairs on June 16. The House Government Operations Subcommittee on Human Resources and Intergovernmental Relations adopted companion legislation without amendment on August 11. Neither bill has yet been scheduled for floor time in the House or Senate.

Two controversial amendments were adopted in the Senate Governmental Affairs Committee: The first, offered by Senator Dorgan, requires that the Congressional Budget Office (CBO) analyze the direct private sector impacts of legislation. The Administration has resisted any efforts to require private sector analysis of legislation on the unfunded mandates bill, arguing that this effort is about assisting our state and local intergovernmental partners and because the CBO has determined that estimating these costs accurately would be impossible. Senator Glenn, Senator Mitchell, and state and local groups share our view.

The second amendment, offered by Senator Levin, would "sunset" the bill if CBO is not provided with adequate resources to conduct the analyses required by the legislation. This amendment was not expected and is viewed by the state and local groups as an attempt to kill the bill.

Talking Points

During your meeting with the mayors, you may want to emphasize the following:

- Remind the mayors of your Administration's efforts on unfunded federal mandates: (1) the issuing of Executive Order 12875; (2) requesting the Advisory Committee on Intergovernmental Relationships (ACIR) to study the effect of unfunded mandates; (3) and the Administration's efforts in helping to craft the Glenn-Kempthorne compromise legislation.
- Reiterate your support for Glenn-Kempthorne and your commitment to seek passage of a **clean** bill this year -- without the Dorgan and Levin amendments. However, you should also emphasize that the Administration **will go no further** than what is proposed in Glenn-Kempthorne, and that we expect the assistance of state and local groups in defeating bills or amendments that go beyond the Glenn-Kempthorne compromise.
- Emphasize your belief that passage of Glenn-Kempthorne, combined with Executive Order 12875, will restore greater balance to the relationship between the federal government and state and local governments.

- Ask the mayors for their active support of Glenn-Kempthorne. Remind them that passage of Glenn-Kempthorne this year cannot be attained without their vigorous support.
- Remind the mayors of the bipartisanship that helped forge the Glenn-Kempthorne bill and the need to oppose impractical alternatives, such as including the Condit bill (the old Kempthorne legislation of "no money no mandates"), which now has 140 signatures on its discharge petition in the House. The Condit bill lacks the refinements of Glenn-Kempthorne and could create additional gridlock in Congress and damage your agenda for change. In addition, staff of the House Operations Committee has indicated to us that Chairman Conyers will not move Glenn-Kempthorne out of the full committee until the threat of a discharge petition on Condit is removed.

cc: Marcia Hale

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Could you
please
get copy
in copy
Thanks*

THE WHITE HOUSE
WASHINGTON

September 9, 1994

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Paul Weinstein (DPC)

SUBJECT: **Talking points for phone conversations with Representatives Dingell and Waxman concerning unfunded mandates legislation.**

As part of the Administration's efforts to pass unfunded mandates legislation before the end of the current congressional session (see attached memo), you decided that the Administration should adopt an aggressive strategy on this issue. (The decrease in the number of legislative days may require a delay until next year). This included your calling Chairman Dingell and Subcommittee Chairman Waxman to ask for their cooperation in passing S. 1604, "The Federal Mandate Accountability and Reform Act of 1994" (Glenn-Kempthorne-Administration compromise bill). During your conversations with both Chairman you may want to stress the following points:

- The Administration is respectful and appreciates their strong reservations about adopting legislation that would address unfunded mandates on all bills before Congress (with some exceptions), yet political pressures and the President's sincere concern about the issue compelled the Administration to work with Senators Glenn and Kempthorne on a compromise bill.
- The Administration believes the pressure to act on unfunded mandates is increasing not decreasing, and that if we do not pass a bill now, the political environment next year may even be less hospitable for reasonable reform.
- While the unfunded mandates issue may be more rhetoric than reality, the message is too powerful to ignore.
- The President needs their cooperation in passing reasonable legislation. They can be part of the solution in helping the Administration pass a clean version of Glenn-Kempthorne -- without the Dorgan amendment requiring a CBO analysis of the direct costs of federal mandates on the private sector.
- Their support will help to insure that more radical unfunded mandate reform bills will be defeated.

cc: Carol Rasco
Martha Foley
Jennifer Palmieri

THE WHITE HOUSE
WASHINGTON

orig. CHR
XC: Weinstein

August 22, 1994

MEMORANDUM FOR LEON PANETTA

THROUGH: CAROL RASCO
FROM: Paul Weinstein
SUBJECT: **Unfunded Mandate Legislation**

Several events indicate that the unfunded mandate issue will resurface as a major issue after Labor Day. Legislation introduced by Representative Condit (the old Kempthorne legislation of "no money no mandates") is gaining support in the House. There are now 140 signatures to the discharge petition (25 democrats with a goal by Condit to get 40). If the discharge petition on the Condit bill gets 40 more democrats, republicans may move off of other unfunded mandate bills and push for the discharge on Condit. In addition, on September 20, state and local groups plan to hold another "No Unfunded Mandates (NUM)" day in Washington, six days before the deadline for signing onto discharge petitions. Finally, Senator Hollings is considering keeping a Nickles-Reid unfunded mandate amendment that would apply to the private sector, which the Administration strongly opposes, in the conference report on the "Competitiveness Act" (S.4).

Many here in the White House believe this Administration must reach a decision on whether to push aggressively for passage of unfunded mandate legislation this year or hold off until next session. As you know, the White House and the Administration are split on the issue of mandate relief legislation -- some would rather see the legislation quietly slip away while others want passage of legislation as soon as possible.

There has been some activity on unfunded mandate legislation this year. On June 16, the Senate Committee on Government Affairs passed S. 1604, "The Federal Mandate Accountability and Reform Act of 1994" (Administration-Glenn-Kempthorne compromise bill), and on August 11, the House Government Operations Subcommittee on Human Resources and Intergovernmental Relations adopted companion legislation without amendment. However, it is my belief that unless the Administration aggressively pushes for passage of S. 1604 this fall, unfunded mandate legislation will not be enacted this year. This memorandum presents the advantages and disadvantages of trying to pass S. 1604 this year. The following are the pros and cons for 1) maintaining our present efforts in support of S. 1604. or 2) an administration strategy to aggressively push for legislation this year.

Option 1: Maintaining Our Present Strategy

The Administration's current approach to unfunded mandate legislation is based on a strategy of 1) allowing the congressional process to move forward with limited White House intervention since helping to broker the Glenn-Kempthorne compromise last spring, and 2) clear, consistent, but low-key public support for S. 1604. It is unlikely that this strategy will secure passage of S. 1604 this year.

Pros

- S. 1604 is far from perfect legislation. The point-of-order clause -- despite exemptions for legislation relating to national emergency assistance for state, local, and tribal governments, national security, anti-discrimination, constitutional rights, auditing and accounting procedures, and any other bill that the President and the Congress designate as emergency legislation (plus the \$50 million threshold) -- could make it considerably more difficult for the President to pass his legislative agenda. In addition, the Dorgan amendment on private sector costs is something the Administration cannot support.
- Our actions in helping craft S. 1604 have greatly angered several key democratic chairman in the House, including Reps. Dingell and Waxman. Not aggressively pushing this legislation in the House will help reduce tensions between the Administration and these important congressmen. In addition, some feel that it is unlikely these powerful chairmen will allow S. 1604 to pass even with aggressive Administration backing. Therefore, the Administration shouldn't waste a lot of effort seeking enactment of S.1604.
- If S. 1604 doesn't pass, it is more likely that Congress will be blamed than the President, who has consistently shown his concern about the problem of burgeoning unfunded mandates as indicated by his comments to governors and mayors, the signing of Executive Order 12875, and his strong support for and the Administration's assistance in drafting S. 1604.

Cons

- The President is clearly on record in support of S. 1604. Failure to pass the bill could reflect poorly on his Administration.
- Failure to pass S. 1604 could strain relations between the President and the governors/mayors.

Option 2: An Aggressive Administration Strategy For Passage Of S. 1604

This option would require the Administration to conduct an aggressive strategy for passage of S. 1604 in both houses. Option 2 would demand: 1) active White House/OMB staff interaction with congressional staff; 2) the personal involvement of OMB Director Rivlin and other high White House officials in lobbying Congress for adoption of S. 1604; 3) aggressive public outreach to state and local groups; 4) reinstating regular White House strategy meetings between DPC, NEC, OVP, OMB, OEP, Legislative Affairs, and Intergovernmental Affairs; and 5) a personal visit from you with Reps. Dingell and Waxman seeking at a minimum their neutrality.

Pros

- The growing financial burden on state and local budgets exacerbated by federal requirements is a legitimate problem (although not to the extent that governors and mayors claim). S. 1604, combined with Executive Order 12875 (signed by the President last September) would provide some relief to state and local governments.
- S. 1604 is the best deal we probably can get without alienating state and local groups and Republican moderates. If we don't push for passage of S. 1604 now, possible changes in the makeup of Congress may mean that next year's legislative compromise would be less appealing to the Administration. For example, a more conservative Congress might pass unfunded mandate legislation that would apply to appropriated as well as authorized funds. This would place the President in the difficult position of having to choose whether or not to veto legislation that would be very popular with the governors and the mayors.
- Passage of S. 1604 will be very popular with the governors and mayors. (Except Mayor Rendell of Philadelphia, who has advised us privately that he thinks it won't have any affect on the growth of unfunded mandates because it doesn't apply to appropriations. However, Rendell has also recommended that it is in the Administration's best interest to support S. 1604.)
- Passage of S. 1604 will remove the threat (at least in the short term) of unfriendly unfunded mandate amendments on Administration bills.
- The President will be able to take credit for passage of S. 1604.
- Passage or significant movement on S. 1604 would quell support for Condit.

Cons

- Despite the fact that S. 1604 is moderate legislation compared to some of the other unfunded mandate bills introduced and is a far cry from the original Kempthorne bill, it is nevertheless flawed. For example, the requirement that mandates above \$50 million have an authorization covering the cost to state and local governments remains problematic. In addition, the Dorgan private sector amendment, which the Congressional Budget Office has stated would be too difficult to accurately calculate, would provide ammunition to opponents of Presidential initiatives on the false grounds that they include a tax on the private sector.
- Passing S. 1604 only makes sense if we can secure a commitment from Republicans that they will not pursue additional legislation anytime soon (this year and beyond).
- With such a busy legislative calendar, this might not be the best use of Administration and congressional time and resources.
- Even if the Administration aggressively backed this legislation, there is no guarantee that it would actually pass. Staff of the House Government Operations Committee has indicated that Chairman Conyers will not move the House version of S. 1604 until the threat of a discharge petition on the Condit bill is removed.
- Despite 140 signatures, the Condit bill is still 78 votes short of filing status (218) with only about one month left for the bill to be discharged.

Recommendation

There is a cost to adopting either options 1 or 2 -- choosing between the state and locals versus powerful democratic chairman -- and in the end the decision between the two is essentially a political one. Nevertheless, despite reservations about certain provisions in S. 1604 and even though an aggressive strategy in support of the legislation does not insure passage this year, my recommendation is to adopt option 2. However, this recommendation has the following conditions. We should only agree to legislation if we can 1) obtain assurances from state and locals and congressional proponents such as Kempthorne and Condit that additional unfunded mandate legislation will not be forthcoming next Congress and 2) if we can get agreement to drop the Dorgan private sector amendment. This recommendation is based more on political rather than policy concerns: a desire for the Administration to stay out in front on this issue rather than being perceived as reactive and defensive; because of the President's commitment to the mayors and governors to actively

seek passage of legislation this year; and to prevent more problematic legislation from being adopted by Congress.

Decision

Option 1



Option 2

Discuss Further

THE WHITE HOUSE
WASHINGTON

June 10, 1994

*Unfunded
Mandates
file*

MEMORANDUM FOR THE PRESIDENT

THROUGH: MARCIA HALE
CAROL RASCO

FROM: Paul Weinstein

SUBJECT: Update on Unfunded Mandates Legislation for Interactive Satellite Meeting
with U.S. Conference of Mayors

As you directed on May 5, 1994, a working group of White House and OMB staff held a series of meetings with key hill staff on unfunded mandates legislation. These meetings have been held with two groups. One with the staff of the House and Senate authors of the Fiscal Accountability and Intergovernmental Reform (FAIR) bill (Senators Dorgan and Domenici, and Representatives Moran and Goodling); the other has been with Senator Kempthorne's staff. Staff from Senator Glenn's Committee on Government Affairs have participated in all of the meetings.

Originally, we hoped that final compromise language would be centered on the approach laid forth in the FAIR bill (subjecting legislation that lacked a Congressional Budget Office analysis of the cost of unfunded mandates to a point-of-order). However, after some preliminary conversations, it became evident that the consensus position on the hill was closer to Glenn and Kempthorne.

Today, Senators Glenn and Kempthorne reached an agreement in principle on compromise language. This legislation would allow a simple majority point-of-order on any legislation that did not include an authorization fully covering any costs to State and local governments (the legislation would not affect appropriations bills). The bill would also require all legislation to include some notion of where offsets to pay for any mandates would come from elsewhere in the budget. Senator Kempthorne believes he can deliver the support of the various groups representing state and local governments for this compromise bill. However, Senator Mitchell has indicated that he cannot support the provision regarding the offsets and Glenn has let Kempthorne know that his support is contingent upon resolving this disagreement with Mitchell. Senator Glenn will be meeting with the Majority Leader on Monday to discuss this further.

Despite serious concerns about the precedent of allowing point-of-orders on authorizations, the working group believes the Glenn-Kempthorne compromise -- assuming the offset provision is dropped and state and local groups support this approach -- is acceptable. At your interactive satellite meeting with the U.S. Conference of Mayors, you may want to express optimism that an agreement will be reached, but that some issues still remain to be resolved.

THE WHITE HOUSE

WASHINGTON

February 17, 1994

File

TO: Vice President Gore

FROM: Carol H. Rasco *CHR*
Assistant to the President for Domestic Policy

SUBJECT: Unfunded mandates

At the recent roundtable discussion with the National Governors' Association, the issue of unfunded mandates was, as you know, discussed by numerous governors. One of the President's responses was to point out that you are working on this issue through the National Performance Review.

The issue is one that I find very perplexing; certainly from the state perspective I remember only too well what these "mandates" do to the state budget and the ability of the governor to set priorities. On the other hand, I also know that prohibition of all unfunded mandates will tie our hands in the federal government in carrying out priorities we feel are important.

It seems that frequently I hear of divisions within the administration discussing the unfunded mandate issue. I would like to suggest that we try to inventory all divisions working on this issue and call a meeting. I do know that the NGA has forwarded a proposal for a meeting on the matter, and at a minimum we need to discuss that proposal.

Please advise. Thank you.

File: Unfunded mandates

OCT 21 REC'D

THE WHITE HOUSE
WASHINGTON

DATE: 10/20/93

THE VICE PRESIDENT
CAROL RASCO

NOTE FOR:

The President has reviewed the attached, and it is forwarded to you
for your:

- Information
- Action x

Thank you.

JOHN D. PODESTA
Assistant to the President
and Staff Secretary
(x2702)

cc: Kumiki Gibson
Marcia Hale

THE WHITE HOUSE

WASHINGTON

October 20, 1993

MR. PRESIDENT:

The attached memo from Carol Rasco and the Vice President discusses the need to develop an Administration proposal on unfunded mandates that would serve as a viable alternative to a draconian unfunded mandate bill that Senator Kempthorne of Idaho apparently plans to offer as an amendment to the Administration's October package of budget cuts and rescissions.

Carol and the Vice President would like to be able to announce an Administration alternative by October 27 -- Unfunded Mandates Day.

The memo sets forth five suggestions, some or all of which could make up, or be included in, the Administration alternative.

Carol and the Vice President do not make specific recommendations concerning the five suggestions. Rather, they are seeking your guidance on which of the five to include in an Administration package.

Marcia Hale has also reviewed this memo.

John Podesta *JP*
Todd Stern *TS*

cc: George Stephanopoulos
Leon Panetta
Mack McLarty

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:

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AS

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.

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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
- Summary PS*
→ Summary Notes
→ Naylor

~~SECRET~~

"Unfunded
Mandates"
file

NOTE TO CAROL RASCO
FROM SALLY KATZEN

Carol,

per your conversation with Sally
this morning, does this example
(added) help clarify the issue?

pg 2, footnote 5

Please respond to Sally
Thank you.

- 2 -

1. Coverage.

E.O. 12875 applies to all Federal agencies, with the exception of independent regulatory agencies. The independent regulatory agencies are requested to comply with the Order on a voluntary basis (Sec. 5). Those agencies that have been exempted from complying with E.O. 12866, "Regulatory Planning and Review," need not submit the E.O. 12875 documentation to OMB, but they should otherwise adhere to the provisions of E.O. 12875.³ The Chief Operating Officer⁴ of each agency is responsible for ensuring the implementation of E.O. 12875 (Sec. 3).

By its terms, section 1 of E.O. 12875 applies to "any regulation that is not required by statute and that creates a mandate upon a State, local or tribal government" (Sec. 1(a)). We interpret "not required by statute" to refer to any regulatory provision imposing a mandate that is not specifically and explicitly compelled by a statute, i.e., any regulatory provision that reflects an exercise of policy discretion by the federal agency.⁵

2. Background.

E.O. 12875 demonstrates the President's commitment to minimize unfunded mandates, to the extent feasible and permitted by law.

³ E.O. 12875 is to supplement but not supersede the requirements in E.O. 12866 (Sec. 4 of E.O. 12875). See October 12, 1993 memorandum from the Administrator of the Office of Information and Regulatory Affairs (OIRA), entitled "Guidance for Implementing E.O. 12866," pp. 1-2, and Appendix A. A current list of agencies exempted from complying with E.O. 12866 is attached.

⁴ See section 1 of the President's October 1, 1993, Memorandum, entitled "Implementing Management Reform in the Executive Branch" (58 Fed. Reg. 52393 (October 7, 1993)).

⁵ For example, a Federal statute may require an agency to have States provide a designated service to each household with an annual income of less than \$10,000. An agency may seek to issue a regulation requiring States to provide that service to households with an annual income of less than \$25,000, or to provide additional services to households with an annual income of less than \$5,000. In either such case, the agency would be exercising policy discretion by providing benefits beyond that "required by statute;" that regulation would be subject to E.O. 12875.



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

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

January 4, 1994

MEMORANDUM FOR: PHILIP LADER
MARCIA HALE
JOEL KLEIN
KATIE MCGINTY
JOHN PODESTA
CAROL RASCO ✓
BOB RUBIN
JACK QUINN
CHRISTINE VARNEY
MAGGIE WILLIAMS

FROM: SALLY KATZEN *Sally Katzen*

SUBJECT: Guidance for Implementing E.O. 12875, Section 1,
"Reduction of Unfunded Mandates" *file*

The President signed Executive Order No. 12875, "Enhancing the Intergovernmental Partnership," on October 26, 1993. Section 1 of that Order, "Reduction of Unfunded Mandates," calls on Federal agencies that impose unfunded mandates upon State, local, or tribal governments either (1) to assure that funds necessary to pay the costs of compliance are provided by the Federal government, or (2) to describe the extent of the agency's prior consultations with affected units of government, the nature of their concerns, any written submissions from them, and the agency's position supporting the need to issue the regulation containing the mandate. The Order takes effect on January 24, 1994.

Agencies have called OMB (OIRA), seeking guidance on how to comply with E.O. 12875. Attached is a draft guidance memo that has been reviewed by the Director. I would appreciate any comments you may have by noon, Thursday, January 6.

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND
INDEPENDENT REGULATORY AGENCIES

FROM: Sally Katzen
Administrator, Office of
Information and Regulatory Affairs

SUBJECT: Guidance for Implementing E.O. 12875, Section 1,
"Reduction of Unfunded Mandates"

The President issued Executive Order No. 12875, "Enhancing the Intergovernmental Partnership," on October 26, 1993.¹ Section 1 of that Order, "Reduction of Unfunded Mandates," calls on Federal agencies that impose unfunded mandates upon State, local, or tribal governments either (1) to assure that funds necessary to pay the costs of compliance are provided by the Federal government, or (2) to describe the extent of the agency's prior consultations with affected units of government, the nature of their concerns, any written submissions from them, and the agency's position supporting the need to issue the regulation containing the mandate. The Order takes effect on January 24, 1994.²

¹ 58 Fed. Reg. 58093 (October 28, 1993).

² We remind agencies that Section 2(a) of E.O. 12875, "Increasing Flexibility for State and Local Waivers," states "each agency shall review its waiver application process and take appropriate steps to streamline that process." Section 2(b) sets forth the circumstances under which agencies are to consider an application by a State, local, or tribal government for a waiver of statutory or regulatory requirements. Section 2(c) sets a deadline of 120 days after the filing of a complete waiver application for an agency decision. These provisions arise from the recommendation of the National Performance Review: "Give all cabinet secretaries and agency heads authority to grant states and localities selective waivers from federal regulations or mandates" (Creating a Government That Works Better & Costs Less, September 7, 1993 Report of the National Performance Review, p. 39). E.O. 12875 does not provide for OMB review of this waiver

1. Coverage.

E.O. 12875 applies to all Federal agencies, with the exception of independent regulatory agencies. The independent regulatory agencies are requested to comply with the Order on a voluntary basis (Sec. 5). Those agencies that have been exempted from complying with E.O. 12866, "Regulatory Planning and Review," need not submit the E.O. 12875 documentation to OMB, but they should otherwise adhere to the provisions of E.O. 12875.³ The Chief Operating Officer⁴ of each agency is responsible for ensuring the implementation of E.O. 12875 (Sec. 3).

By its terms, section 1 of E.O. 12875 applies to "any regulation that is not required by statute and that creates a mandate upon a State, local or tribal government" (Sec. 1(a)). We interpret "not required by statute" to refer to any regulatory provision imposing a mandate that is not specifically and explicitly compelled by a statute, *i.e.*, any regulatory provision that reflects an exercise of policy discretion.

*This needs
2 words.*

2. Background.

E.O. 12875 demonstrates the President's commitment to minimize unfunded mandates, to the extent feasible and permitted by law.

application process.

³ E.O. 12875 is to supplement but not supersede the requirements in E.O. 12866 (Sec. 4 of E.O. 12875). See October 12, 1993 memorandum from the Administrator of the Office of Information and Regulatory Affairs (OIRA), entitled "Guidance for Implementing E.O. 12866," pp. 1-2, and Appendix A. A current list of agencies exempted from complying with E.O. 12866 is attached.

⁴ See section 1 of the President's October 1, 1993, Memorandum, entitled "Implementing Management Reform in the Executive Branch" (58 Fed. Reg. 52393 (October 7, 1993)).

The Order arises from a recommendation of the National Performance Review: "The President should issue a directive limiting the use of unfunded mandates by the administration."⁵ The NPR report explained:

As the federal deficit mounted in the 1980s, Congress found it more and more difficult to spend new money. Instead, it often turned to "unfunded mandates" -- passing laws for the states and localities to follow, but giving them little or no money to implement these policies. As of December 1992, there were at least 172 separate pieces of federal legislation in force that imposed requirements on state and local governments. Many of these, such as clean water standards and increased public access for disabled citizens, are unquestionably noble goals. But the question remains: How will state and local governments pay to meet those goals?⁶

Executive Order No. 12875 expands upon a provision in E.O. 12866 that requires agencies to assess the effects of Federal regulations on State, local, and tribal governments, "including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens ... consistent with achieving regulatory objectives" (Sec. 1(b)(9) of E.O. 12866).

3. The Terms of the Order Relating to Consultations with State, Local, and Tribal Governments.

Section 1 of E.O. 12875 calls upon each agency to establish a meaningful mechanism for consultation with State, local, and tribal government officials in the development of regulatory

⁵ NPR Report, p. 37.

⁶ NPR Report, pp. 37-8.

proposals containing significant unfunded mandates. The Order contemplates that the funds for compliance may be provided by the Federal government. However, in the event such funds are not made available, the agency is directed to consult with officials of the affected governmental units and then to justify the need for any unfunded mandate in the regulation subject to the Order as part of the E.O. 12866 review.

A. When Should Intergovernmental Consultations Take Place?

Consistent with both E.O. 12866⁷ and E.O. 12875,⁸ the intergovernmental consultation should take place before publication of the notice of proposed rulemaking or other regulatory action proposing the mandate. Consultations may continue after publication of the regulatory action initiating the proposal, but in any event they must occur "prior to the formal promulgation" in final form of the regulatory action "containing the proposed mandate" (Sec. 1(a)(2) of E.O. 12875).⁹

B. With Whom Should Agencies Consult?

(1) Heads of Government. The Federal agency should seek to consult with the highest levels of the pertinent government

⁷ "In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials)" (Sec. 6(a)(1) of E.O. 12866).

⁸ E.O. 12875 calls for "meaningful and timely" intergovernmental "input in the development of regulatory proposals containing significant unfunded mandates" (Sec. 1(b)).

⁹ Under the Administrative Procedure Act, if material new factual information, on which the agency will base its regulatory action, is made available to the agency after the public comment period closes, the agency may need to insert such material in its rulemaking record and reopen the proceeding for additional public comment.

units, e.g., the Office of the Governor, Mayor, or Tribal Chief. These officials are responsible for balancing the competing claims on the governments' tax (revenue) base from among the many program responsibilities they already face.

(2) Both Program and Financial Officials. Many regulatory agencies have functional counterparts in State, local, and tribal governments, e.g., those government officials responsible for implementing or enforcing regulatory responsibilities required in whole or in part by the Federal agency. These local officials tend to be those most familiar with the Federal agency's regulatory program, and should be consulted as a source of important information concerning the likely effectiveness of Federal regulatory proposals.

In some cases, however, the regulatory authority, and even the jobs, of these State, local, or tribal regulatory officials may be dependent upon the existence of one or more Federal regulatory mandates. As a result, it is critical that the Federal agency also consult with those State, local, and tribal officials more directly responsible for the funding of compliance with the Federal mandate, e.g., the applicable treasury, budget, tax-collection, or other financial officials. These officials are institutionally or even statutorily responsible for balancing the competing claims for scarce State, local, or tribal resources.

(3) Both Washington Representatives and Elected Officials. It is important that Federal agencies consult with the Washington representatives of the various units of government. Representatives often know which local officials are the most knowledgeable or interested in specific issues, and can ensure that a broad range of government officials learn of a proposed unfunded mandate.

Because many State, local, and tribal governments do not have Washington representatives and some of the representatives that are available do not themselves possess sufficient technical and financial expertise, agencies need to ^{also} consult directly with elected officials for the affected governmental units.

C. How Much Consultation Should There Be? The focus and scope of intergovernmental consultation should be based on common sense and proportionality. The more expensive, the more potentially disruptive, the more broadly applicable, the more controversial the proposed unfunded mandate -- the more consultation there should be.

D. What Kind of Consultation Should There Be? At a minimum, an agency must first estimate the direct costs to be incurred by the State, local, or tribal governments in complying with the mandate (including the costs required by the statute, where the proposed regulation is based both on a statute and agency discretion) and then inform the affected governmental units of these cost estimates (Sec. 1(a)(2) of E.O. 12875 and Sec. 6(a)(3)(B)(ii) of E.O. 12866). Estimates should cover both up-front and recurring costs, for a reasonable period of years after the effective date of the regulatory action. The agency should make reasonable efforts to disaggregate these cost estimates to government-by-government units, or otherwise provide the affected units of government the criteria by which they can disaggregate the cost estimates in order to determine the potential costs to themselves.

An agency should also provide, during the consultative process, as much detail as possible with respect to the expected method of compliance. E.O. 12866 encourages agencies to seek to "harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions" (Sec. 1(b)(9)). Even where this harmonization is not fully feasible,

governmental units may have suggestions as to how to achieve the Federal regulatory objective in a more cost-effective manner.

Intergovernmental coordination is not new to Federal agencies. The Order states it should be "an effective process" (Sec. 1(b)). The procedures by which this should be done are, in the first instance, best determined by the agencies.

E. Integration of Intergovernmental Consultations into the Rulemaking Process. It is important for the agency to integrate its consultation activities into the ongoing rulemaking process. The cost estimates and the agency plan to carry out the intergovernmental consultation should be included in the preamble to the notice of proposed rulemaking along with any viable suggestions received during the pre-notice consultations. Publication of the cost estimates and the intergovernmental consultation plan in the Federal Register will assure that those governmental units that are not contacted directly will have access to the same cost estimates as the others, and the opportunity to make their concerns known. In addition, the materials discussed below, which include the remainder of the documentation and justification of need to be sent to OMB, should be included in the public rulemaking record, and described and analyzed in the preamble to the final rulemaking document.

4. Requisite Documentation to OMB.

A. Which Regulations Should be Submitted for OIRA Review under E.O. 12866? Under E.O. 12866, OIRA is to review regulatory actions that raise policy issues "arising out of legal mandates" (Secs. 3(f)(4) and 6 of E.O. 12866). Accordingly, in light of the policy issues that arise in connection with unfunded Federal mandates on State, local, and tribal governments, any regulatory action that contains an unfunded mandate should be submitted to OIRA for review under E.O. 12866.

B. Documentation of Intergovernmental Consultations to OIRA. The documentation and justification called for should accompany the review package submitted for OIRA review under E.O. 12866.

The documentation should include (1) a brief description of the unfunded mandate, (2) a copy of the statutory language that requires or authorizes the mandate, (3) the cost estimates provided to the State, local, and tribal governments, (4) a summary of the consultations undertaken (together with the identity and position of each of those with whom the agency consulted), (5) a summary of the concerns expressed by those consulted, (6) any written communications provided by affected units of government, and (7) "the agency's position supporting the need to issue the regulation containing the mandate" (Sec. 1(a)(2)).

We do not suggest a specific format. It would facilitate review to begin with an appropriate title, e.g., "Unfunded Mandates in [Title of Regulation]: Consultations with State, Local, and Tribal Governments."¹⁰

C. Timing of Agency Submission to OIRA. Regulatory actions are submitted to OIRA for review at both the proposed and final stage. Even when the agency has not begun, let alone concluded its intergovernmental consultation before publication of the proposed notice, the agency should provide to OIRA as part of its submission for review of the proposed notice at least (1) a brief description of the unfunded mandate, (2) a copy of the statutory language that requires or authorizes the mandate, (3) the cost

¹⁰ This is in addition to any assessments and analyses required for economically significant regulations required by Sec. 6(a)(3)(C) of E.O. 12866. These assessments and analyses are not limited to the direct costs of a mandate; they include the indirect impacts of the regulation as well.

estimates to be provided to the affected units of government, (4) the agency plan to carry out the intergovernmental consultation, and (5) "the agency's position supporting the need to issue the regulation containing the mandate." The full documentation and justification should be submitted at the same time as the final regulatory action is submitted for review.¹¹

D. Documentation of Federal Funding to OIRA. If, consistent with section 1(a)(1), an agency chooses to assure funding of "the direct costs incurred" by the affected units of government, the agency only needs to provide OIRA, with the applicable review package submitted for review under E.O. 12866, its estimates of the direct costs that are to be funded for the next ten years, and the source (the appropriation accounts) for that Federal funding.

* * * * *

E.O. 12875 states that "the cumulative effect of unfunded mandates has increasingly strained the budgets of State, local, and tribal governments." E.O. 12866 states that agencies need to "minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives" (Sec. 1(b)(9) of E.O. 12866).

These consultations should help both Federal agencies and State, local, and tribal governments to understand better the need and justification for newly imposed unfunded mandates.

¹¹ Even if an agency has concluded its consultations prior to publication of a notice of proposed rulemaking, the agency is likely to receive additional comments from State, local, and tribal governments during the public comment period. The agency will therefore most likely have to update the documentation and justification it has previously provided.

AGENCIES EXEMPT FROM E.O. 12866
(as of December 31, 1993)

Advisory Council on Historic Preservation
African Development Foundation
Alaska Natural Gas Transportation System,
Office of the Federal Inspector
American Battle Monuments Commission
Arms Control and Disarmament Agency
Board for International Broadcasting
Central Intelligence Agency
Commission of Fine Arts
Committee for Purchase from the Blind
and Severely Handicapped
Export-Import Bank of the United States
Farm Credit System Assistance Board
Federal Financial Institutions Examination Council
Federal Labor Relations Authority
Federal Mediation and Conciliation Service
Harry S. Truman Scholarship Foundation
Institute of Museum Services
Inter-American Foundation
International Development Corporation Agency
James Madison Memorial Fellowship Foundation
Japan-United States Friendship Commission
Merit Systems Protection Board
Navajo Hopi Indian Relocation Commission
National Capital Planning Commission
Office of Special Counsel
Overseas Private Investment Corporation
Panama Canal Commission
Pennsylvania Avenue Development Corporation
Peace Corps
Selective Service System
Tennessee Valley Authority
United States Metric Board
United States Information Agency
United States International Development Cooperation Agency
United States National Commission
on Libraries and Information Science

file: Unfunded Mandates

EXECUTIVE OFFICE OF THE PRESIDENT

11-Jan-1994 05:51pm

TO: Sally Katzen
FROM: Carol H. Rasco
Economic and Domestic Policy
SUBJECT: Condit letter you sent

I am fine on the letter except that now that I have begun to absorb just what the unfunded mandate E.O. does and does not do, I think we have some education to do so as not to have people really yelling at us. I would suggest we come up with a phrase to use in letters/talks/etc. like this letter that says something like "The Order stresses the importance of reducing non-statutory unfunded mandates....."

Thanks.



EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Washington, D.C. 20503

FAX Transmittal Cover Sheet

Pages in this FAX including cover sheet 3

*See Paul's
Comments
mam
1/11/94*

Date:

1/11/94

To:

Carol Lacey's Office

Fax Number:

456-5878

Voice Number:

Comments:

For Sally Katzen's office, please have
Carol to review this signed letter to Cordit
before we forward to him. If any questions
Sally Katzen can be reached on 395-4852.

From:

Tina

Voice Number:

(202) 395-3160

FAX Number:

(202) 395-3888



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

THE DIRECTOR

Honorable Gary A. Condit
U.S. House of Representatives
Washington, D.C. 20515-6131

Dear Congressman Condit:

Thank you for your letter on the issue of unfunded Federal mandates, a matter of great importance to this Administration.

As you noted, during my testimony before the House Government Operations Committee on October 21st, I commented that there was a group within the White House that was considering what steps, if any, the Administration should take. One of the results of that effort was Executive Order No. 12875, "Enhancing the Intergovernmental Partnership," which the President signed on October 26, 1993. The Order stresses the importance of reducing unfunded mandates and increasing flexibility for State and local waivers.

We have continued to follow the issue of unfunded mandates and are committed to working with State, local and tribal officials early in the development of Federal regulatory policy. As you know, on December 6th, we held the first of a series of conferences on the Federal government's regulatory partnership with State, local, and tribal governments.

We would be happy to arrange a meeting for the Congressional Caucus on Unfunded Mandates with interested persons in the White House to hear what you are doing. I will have my staff call your contacts to decide on a mutually convenient time.

Sincerely,

Leon Panetta
Director

*Statutory
non-mandates*

*stet
Condit
L. Panetta*

GARY A. CONDIT
18TH DISTRICT, CALIFORNIA



1125 LONGWORTH BUILDING
WASHINGTON, DC 20515-0518
(202) 225-6131

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920 13TH STREET
MADERA, CA 95354
(209) 627-1914

18TH DISTRICT
TOLL FREE:
1-800-366-6424

COMMITTEE ON AGRICULTURE

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COTTON, RICE, AND SUGAR

SUBCOMMITTEE ON
LIVESTOCK, DAIRY, AND POULTRY

COMMITTEE ON
GOVERNMENT OPERATIONS

SUBCOMMITTEE ON
GOVERNMENT INFORMATION,
JUSTICE, AND AGRICULTURE

SUBCOMMITTEE ON
GOVERNMENT ACTIVITIES
AND TRANSPORTATION

Congress of the United States
House of Representatives
Washington, DC 20515-0518

November 17, 1993

Director Leon E Panetta
Director
Office of Management and Budget
Old Executive Office Building
17th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Dear Director Panetta:

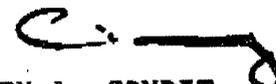
I am following up with you on the issue of unfunded federal mandates, a matter of great importance to me and many other members of Congress.

On October 21, in testimony before the House Government Operations Committee, you informed me that the Administration is in the process of assembling a task force to study this issue. It is my understanding that the task force will include the National Economic Council, the Office of Management and Budget and the president's advisor for intergovernmental affairs.

As you know, I have formed the Congressional Caucus on Unfunded Mandates, a bipartisan group of 83 members of Congress who are committed to finding a remedy to this growing problem. In order to achieve a consensus on solutions to this issue, I would like to arrange a meeting between the Administration's task force and the membership of the Congressional Caucus on Unfunded Mandates.

Should a meeting between the Administration's task force and the Congressional Caucus on Unfunded Mandates be possible, please contact me or have your staff contact either Steve Jones or Mike Dayton of my staff at (202) 225-6131.

Sincerely,


GARY A. CONDIT
Member of Congress

GAC/sj

743987

JAN 13 REC'D

OFFICE OF DOMESTIC POLICY

THE WHITE HOUSE

FROM THE OFFICE OF: **CAROL H. RASCO**
ASSISTANT TO THE PRESIDENT
FOR DOMESTIC POLICY

TO: _____

DRAFT RESPONSE FOR CHR BY: _____

PLEASE REPLY (COPY TO CHR): _____

PLEASE ADVISE BY: _____

LET'S DISCUSS: _____

FOR YOUR INFORMATION: _____

REPLY USING FORM CODE: _____

FILE: *Unfunded Mandates*

RETURN ORIGINAL TO CHR: _____

SCHEDULE: _____

REMARKS: _____

JAN 12 1994

JAN 13 REC'D

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U.S. House of Representatives
Washington, D.C. 20515-6131

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We would be happy to arrange a meeting for the Congressional Caucus on Unfunded Mandates with interested persons in the White House to hear what you are doing. I will have my staff call your contacts to decide on a mutually convenient time.

Sincerely,

Original Signed By
Leon E. Panetta

Leon E. Panetta
Director

cc: Official File -A/OIRA
DO Records - #043987
Ms. Hale
Ms. Rasco
DO Chron
LA
Mr. Damus
Mr. Angell
Ms. Katzen
Mr. MacRae
Mr. Morrall

OIRA:SKatzen/01/10/93

Wesley Group

11/19/93

OMB CORRESPONDENCE TRACKING SYSTEM
CORRESPONDENT CONTROL SHEET

HANDLING: REGULAR

OMB CONTROL NUMBER: 043987

CORRESPONDENT: REP GARY CONDIT
AFFILIATION: CA

SUBJECT: FEDERAL, MANDATE

LEAD TO: ~~EAD OIRA~~

CROSS REFERENCE: UNFUNDED, MANDATES

INFO COPIES: DO, DD, FOLEY, LA, DD/M, GC, AD/B, A/OIRA, EP, MARINO, AD/LRA

SHORT SUMMARY OF MATERIAL

HANDLING INSTRUCTIONS

FOR SIGNATURE OF DIRECTOR BY 12/03/93

cleared
Carol Rasco
WH

	PREPARED	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED
NAME AND DIVISION	Katzen OIRA	Damus GC	LA	Angell EAD	Rivlin DO	Murr DO	Panetta DO	M. Pale WH
INITIALS AND DATE								

GARY A. CONDIT
18TH DISTRICT, CALIFORNIA



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(202) 225-6131

COMMITTEE ON AGRICULTURE

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GOVERNMENT INFORMATION,
JUSTICE, AND AGRICULTURE

SUBCOMMITTEE ON
GOVERNMENT ACTIVITIES
AND TRANSPORTATION

Congress of the United States
House of Representatives
Washington, DC 20515-0518

November 17, 1993

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18TH DISTRICT
TOLL FREE:
1-800-356-6424

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Director
Office of Management and Budget
Old Executive Office Building
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On October 21, in testimony before the House Government Operations Committee, you informed me that the Administration is in the process of assembling a task force to study this issue. It is my understanding that the task force will include the National Economic Council, the Office of Management and Budget and the president's advisor for intergovernmental affairs.

As you know, I have formed the Congressional Caucus on Unfunded Mandates, a bipartisan group of 83 members of Congress who are committed to finding a remedy to this growing problem. In order to achieve a consensus on solutions to this issue, I would like to arrange a meeting between the Administration's task force and the membership of the Congressional Caucus on Unfunded Mandates.

Should a meeting between the Administration's task force and the Congressional Caucus on Unfunded Mandates be possible, please contact me or have your staff contact either Steve Jones or Mike Dayton of my staff at (202) 225-6131.

Sincerely,

GARY A. CONDIT
Member of Congress

GAC/sj

12987

GARY A. CONDIT
18TH DISTRICT, CALIFORNIA

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Congress of the United States
House of Representatives
Washington, DC 20515-0518

November 17, 1993

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Sincerely,

GARY A. CONDIT
Member of Congress

GAC/sj

43557

THE WHITE HOUSE
WASHINGTON

February 17, 1994

TO: Vice President Gore *Filed*

FROM: Carol H. Rasco *CH*
Assistant to the President for Domestic Policy *file*

SUBJECT: Unfunded mandates

At the recent roundtable discussion with the National Governors' Association, the issue of unfunded mandates was, as you know, discussed by numerous governors. One of the President's responses was to point out that you are working on this issue through the National Performance Review.

The issue is one that I find very perplexing; certainly from the state perspective I remember only too well what these "mandates" do to the state budget and the ability of the governor to set priorities. On the other hand, I also know that prohibition of all unfunded mandates will tie our hands in the federal government in carrying out priorities we feel are important.

It seems that frequently I hear of divisions within the administration discussing the unfunded mandate issue. I would like to suggest that we try to inventory all divisions working on this issue and call a meeting. I do know that the NGA has forwarded a proposal for a meeting on the matter, and at a minimum we need to discuss that proposal.

Please advise. Thank you.

*Put w/ my cc
of memo to
Gov on
unfunded
mandates.
If I haven't heard
from you by Tues*

CLINTON LIBRARY PHOTOCOPY

on this I want to
check on it.

THE WHITE HOUSE

Marcia L. Hale

Carol,

Who else needs
to see this? Do we
want to set up a
meeting?

M.

MEETING ON FEDERALISM

The Issue

American federalism is built on the mutual trust and respect of federal, state, and local governments. This produces a partnership based on the voice of the people. Our governments work for the people through elected officials with highly decentralized methods of administration, and management, whereby state and local governments actually run most government programs. The system also demands great flexibility to adjust to new priorities, policies, and economic circumstances.

These principles are now being seriously eroded by a philosophy that one size fits all, that federal elected officials know better what is right for 50 very different states and 39,000 local governments.

Our system of government is being eroded by an increasing separation between those who make the law and those who implement the law. Unfunded federal laws are now being imposed on state and local governments by the federal government and the courts that dramatically distort locally-determined priorities.

The differences are not over goals and objectives, but methods, procedures, and resources to meet the goals. Nearly all elected officials strongly support national goals for clean air and water, safe highways and workplaces, voting rights, and specific attention to the poor and those with special needs. However, they differ substantially on methods and what level of government should fund programs.

The strong national influence of non-elected public and special interest groups, the cost of campaign finance, and instantaneous sound-byte journalism only add to the current problems of

federalism, especially the unique partnership. The basic tenants of federalism are also being seriously challenged in this era of a real freeze in spending by all governments. This is increasing the shifts to lower levels of governments and "credit card federalism."

If Congress can no longer pay its fair share of the governance partnership, the payment issue cannot be left to the courts to referee state and local cost allocations. This is now breeding resentment and rebellion against the original lawmakers -- Congress itself.

State and local resistance is now focused on unfunded federal mandates with an emphasis on "unfunded." There is a new House Caucus on unfunded mandates with 84 members that recently and successfully insisted on a cost-benefit analysis for EPA mandates. This effort is supported by every state and local organization of elected officials. Congress cannot ignore such a coalition!

Now is the time to convene a meeting of the elected members of our government to discuss these problems and unfunded mandates in particular.

Purpose

The purpose of the meeting would be to adopt a concept that could be enacted as a bill that would do the following.

1. Establish a consultation process with state and local officials that Congress would follow in enacting legislation. While, this obviously could not be enforced, it would help to change the "culture": of Congress. It could be similar to the mandates executive order that was released by the administration. This consultation process could become the preamble of a mandate bill.
2. Provide guidelines to significantly reduce the number of unfunded mandates. It could include the following provisions:

- a. Language that would state that Congress would no longer enact mandates without the appropriate revenues.
 - b. Requirement that CBO would provide a cost estimate on all mandates above e.g. 25 million. There would be a point of order on the floor of the House and Senate in there was no cost estimate.
 - c. Establishment of a pargo tracking system for mandates whereby CBO would provide a baseline on the cost of mandates and Congress could only enact additional mandates if they were to repeal others of equal costs.
3. The legislation would also include clarifying language that state and local elected officials and their organizations may consult with federal agencies on proposed legislation or regulations without violating the federal Advisory Committee Act or the Administrative Procedure Act.

The intent would be to have a concept paper on this proposed bill which would be the basis of the meeting. It would be hoped that an agreement would be made in the meeting on the broad parameters of the legislation coupled with a timeframe to enact the proposed legislation.

Participating, Convening, and Timing

The 2-4 hour meeting would be convened jointly by the President and Congressional leadership on a bipartisan basis. It could be held late spring or early summer, but prior to the July NGA meeting. The President, Senator Mitchell, Senator Dole, Speaker Foley, Minority Leader Michael, and the chairman and ranking minority members of the two Government Operations Committees, which have jurisdiction over the legislation would be involved. Finally, it would include two representatives of each of the seven state and local organizations.

April 27, 1994

APR 28 REC'D

MEMORANDUM FOR JACK QUINN
CAROL RASCO
MARCIA HALE
SALLY KATZEN
BARBARA CHOW

FROM:

PAUL WEINSTEIN *PW*
KUMIKI GIBSON *KG*

file

SUBJECT:

UNFUNDED MANDATES: PROPOSED SECOND DEGREE
AMENDMENT

Pursuant to our discussion at last week's meeting, attached is draft language that may serve as an alternative amendment to the Kempthorne unfunded mandates bill. Title I simply codifies portions of Executive Order No. 12875, "Enhancing Intergovernmental Partnerships."

Title II is a derivative of Moran's unfunded mandates bill in that it requires a Congressional Budget Office ("CBO") analysis for all bills and resolutions. It differs from Moran, however, in one important respect: our language limits the use of a point of order. Under Moran's bill, a point of order can be raised if the costs of an unfunded mandate is not included in the CBO report accompanying a proposed bill or resolution. Our language allows such a point of order only where CBO has conducted an analysis of the benefits of the mandates to society and the costs of not imposing the mandate.

This approach tightens present law by requiring some type of CBO analysis, but limits through an escape clause the potential for Congressional gridlock that exists in Kempthorne's and Moran's bills. We believe that this approach may be an acceptable alternative for certain supporters of Kempthorne and Moran.

Please review the language and let us know what you think.

SECOND DEGREE AMENDMENT ON UNFUNDED MANDATES

BE IT ENACTED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

■ PURPOSE: 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 REQUIREMENTS HAS INCREASINGLY STRAINED THE BUDGETS OF STATES, LOCAL, AND TRIBAL GOVERNMENTS.

■ TITLE I

SECTION 101: REDUCTION OF UNFUNDED NON-STATUTORY FEDERAL REQUIREMENTS

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 --

(A) 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

(B) THE AGENCY, PRIOR TO THE FORMAL PROMULGATION OF THE REGULATION 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.

■ TITLE II

SECTION 101: BUDGETARY ANALYSIS AND INTERGOVERNMENTAL REFORM ACT

(1) EXCEPT AS PROVIDED IN PARAGRAPH (2), WHENEVER A COMMITTEE OF EITHER HOUSE REPORTS A BILL OR RESOLUTION OF A PUBLIC CHARACTER TO ITS HOUSE THAT IMPOSES AN UNFUNDED REQUIREMENT UPON STATE, LOCAL, OR TRIBAL GOVERNMENTS, THE REPORT ACCOMPANYING THE BILL SHALL CONTAIN AN ANALYSIS PREPARED BY THE CONGRESSIONAL BUDGET OFFICE ("CBO") DETAILING, TO THE EXTENT FEASIBLE, THE FOLLOWING --

(A) THE STATE, LOCAL, AND TRIBAL EXPENDITURES NECESSARY TO COMPLY WITH THE PROPOSED UNFUNDED REQUIREMENT;

(B) THE BENEFITS TO THE AMERICAN PEOPLE OF IMPOSING THE PROPOSED UNFUNDED REQUIREMENT UPON STATE, LOCAL, AND TRIBAL GOVERNMENTS; AND

(C) THE COSTS TO THE AMERICAN PEOPLE OF NOT IMPOSING THE PROPOSED UNFUNDED REQUIREMENT UPON STATE, LOCAL, AND TRIBAL GOVERNMENTS.

(2) THE REQUIREMENTS OF PARAGRAPH (1) SHALL NOT APPLY TO ANY BILL OR RESOLUTION WITH RESPECT TO WHICH THE DIRECTOR OF THE CBO CERTIFIES IN WRITING TO THE CHAIRMAN OF THE COMMITTEE REPORTING THE BILL OR RESOLUTION THAT THE EXPENDITURES NECESSARY TO IMPLEMENT SUCH LEGISLATION DURING THE FIRST THREE YEARS WILL NOT EXCEED \$50,000,000 IN THE AGGREGATE AND DURING THE FIRST FIVE YEARS WILL NOT EXCEED \$100,000,000 IN THE AGGREGATE. FOR THIS PURPOSE, A YEAR SHALL BE A PERIOD OF THREE HUNDRED AND SIXTY-FIVE CONSECUTIVE DAYS.

(3) THE BILL OR RESOLUTION UNDER CONSIDERATION SHALL BE SUBJECT TO A POINT OF ORDER WHERE CBO HAS NOT PREPARED THE ANALYSIS REQUIRED IN PARAGRAPH (1)(A) PROVIDED THAT THE CBO REPORT INCLUDES THE ANALYSIS REQUIRED UNDER PARAGRAPHS 1(B) AND 1(C).

SECTION 102: EXERCISE OF RULEMAKING POWERS

THE PROVISIONS OF THIS TITLE ARE ENACTED BY CONGRESS --

(1) AS AN EXERCISE OF THE RULEMAKING POWER OF THE HOUSE OF REPRESENTATIVES AND THE SENATE, RESPECTIVELY, AND AS SUCH THEY SHALL BE CONSIDERED AS PART OF THE RULES OF EACH HOUSE, RESPECTIVELY, AND SUCH RULES SHALL SUPERSEDE OTHER RULES ONLY TO THE EXTENT THAT THEY ARE INCONSISTENT THEREWITH; AND

(2) WITH FULL RECOGNITION OF THE CONSTITUTIONAL RIGHT 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.

SEC. 103 EFFECTIVE DATE.

THIS TITLE SHALL APPLY TO ANY BILL OR RESOLUTION ORDERED OR REPORTED BY ANY COMMITTEE OF THE HOUSE OF REPRESENTATIVES OR OF THE SENATE AFTER THE DATE OF ENACTMENT OF THIS ACT.

THE PRESIDENT HAS SEEN
THE PRESIDENT HAS SEEN

5-5-94

THE WHITE HOUSE

WASHINGTON

May 5, 1994

MR PRESIDENT:

file

Attached is a decision memo from Carol Rasco, Bob Rubin, Jack Quinn and Leon Panetta on a recommended approach for dealing with unfunded mandates legislation that is likely to be marked up by Senator Glenn's Government Affairs Committee by the end of the month.

Two principal alternatives have been introduced, a Kempthorne bill that your advisors regard as unacceptable, and a more moderate bill known by its acronym: FAIR.

Carol, Bob, Jack and Leon are seeking your approval to open up discussions with the key sponsors of the FAIR bill to see if they would agree to certain modifications in exchange for Administration backing. Marcia Hale and the NEC principals support this strategy.

I have circulated this memo to George, Gergen, Gearan, Marcia, Pat Griffin and Katie. I am sending it up to you now because I understand that you are meeting with Leon and Bob this afternoon.

Approve _____
discussions _____ Disapprove _____ Discuss _____

Todd Stern
Todd Stern

THE WHITE HOUSE
WASHINGTON

THE PRESIDENT HAS SEEN

94 MAY 5 All : 03

May 4, 1994

MEMORANDUM FOR THE PRESIDENT
THE VICE PRESIDENT

FROM: CAROL RASCO
ROBERT RUBIN
JACK QUINN
LEON E. PANETTA

SUBJECT: UNFUNDED MANDATES LEGISLATION

ACTION-FORCING EVENT

Later this month, Senator Glenn is planning to markup unfunded mandates legislation that we believe is likely to pass the Senate this year. In the House two bills are coming close to having enough cosponsors for a discharge petition. The National Governors Association (NGA), U.S. Conference of Mayors, and other State and local organizations have been seeking our position on a variety of legislative proposals. While all the bills introduced to date have considerable drawbacks, we believe it is important that the Administration become engaged in the process. The objective would be to propose amendments to more moderate bills that would make them acceptable to the Administration, improve their chances for passage, and therefore, prevent more extreme legislation from moving through the House and Senate.

BACKGROUND

As you know, there has been growing support on Capitol Hill for legislation that would stop (or at least slow down) federal legislation and regulations that impose unfunded mandates on State, local and tribal governments. The momentum is being fueled by conservative Members of Congress (who are not great fans of the underlying legislation that provoke unfunded mandates in the first place); the associations of state and local elected officials (including the NGA and the U.S. Conference of Mayors) who are under great pressure to meet increasing demands with increasingly limited resources; and, more recently, some of the more moderate Members of Congress who want to be able to cast a vote against federal mandates and/or in favor of local prerogatives before facing reelection this fall.

Kempthorne Bill

The most popular is Senator Kempthorne's bill, which now has 54 cosponsors in the Senate and 221 cosponsors for the House counterpart. This bill provides that a state or local government need not comply with a Federal unfunded mandate unless the Federal Government pays the direct cost of the mandate -- i.e., no money, no mandate. The White House advisors who have followed this issue agree that this is totally unacceptable.

FAIR Bill

Several more moderate Members of Congress (Moran, Goodling, Dorgan and Domenici) have sponsored an alternative entitled the "Fiscal Accountability and Intergovernmental Reform Act" (the "FAIR Act"), which has some real problems but is clearly preferable to the Kempthorne bill. The sponsors of the FAIR bill (which has 243 cosponsors in the House and 6 in the Senate) believe that if the Administration supports their bill, they can attract enough of the moderates to enable FAIR to be a viable alternative to Kempthorne. They are willing to make some changes to their bill to get our support, but they warn that there is not a lot of room to negotiate because some of their supporters are already saying that the FAIR bill is too weak in comparison with Kempthorne.

PROPOSED AMENDMENTS

We set forth below a list of proposed changes to the FAIR bill which we believe would limit its potential for creating Congressional gridlock. It must be recognized that if some of these are accepted by the FAIR sponsors (we have no illusions that all would be accepted), the Administration would be expected to announce its support for the modified FAIR bill. While Administration support for FAIR may please some Governors and Mayors, only your support for Senator Kempthorne's bill would satisfy them completely. In addition, endorsing FAIR or Senator Kempthorne's bill will not be well received by the public interest groups and the more liberal Members of Congress, even if we undertake a substantial outreach effort.

Provisions Relating to the Legislative Branch

Title I of the FAIR bill involves legislation and requires that Committee reports accompanying bills with unfunded mandates include a Congressional Budget Office (CBO) analysis of 1) compliance costs for State and local governments and for private businesses, and 2) the effects on economic growth and competitiveness. The analysis is required if the costs exceed \$50 million in three years or \$100 million in five years. Lack of the CBO analysis would subject a bill to a point-of-order.

Proposed Changes

- Specify that only bills with unfunded mandates that exceed the dollar threshold of at least \$100 million per year would require an estimate of the cost of the mandate -- This would be consistent with the dollar threshold in the Executive Order on Regulatory Planning and Review.
- Delete the requirement to study the macroeconomic effects -- the effect would hardly be measurable unless the bill had effects of billions of dollars a year.
- Delete the requirement to study private sector costs -- the focus of the legislation should be on reducing mandates on State and local governments.
- Modify the point-of-order provision to require the committee(s) that report the bill to provide an estimate of the costs; charge CBO with the responsibility of reviewing that estimate and reporting back to the Congress; permit a point-of-order if the CBO review is not completed within 30/45 days after the bill is reported -- otherwise non-elected officials could block elected officials from voting on important legislation indefinitely); clarify that the point-of-order can be overruled by a simple majority; and provide an escape clause for emergency legislation.
- Add as a requirement an analysis of the benefits to the public of imposing the proposed unfunded mandate and the cost to the public of not imposing the mandate -- to ensure that the floor debate includes consideration of the advantages of the mandate and is not based solely on cost data.
- Delay the effective date of the Act for one year or until the term "mandate" is defined and protocols are developed for estimating the costs/benefits of such mandates -- there are very difficult questions of definition, methodology and development of data bases, some of which we have asked the Advisory Commission on Intergovernmental Relations (ACIR) to study.
- Include a three year sunset provision after the effective date of the Act.

Provisions Relating to the Executive Branch

Title II of the FAIR bill requires agencies to prepare for each notice of proposed rulemaking and each final regulation, and for each "other major federal action affecting the economy" an estimate of the effects of the proposed rule or action on local government resources, an estimate of the costs of private sector compliance, and the effect on economic growth, full employment, and international competitiveness.

Proposed Changes

- Impose a dollar threshold -- \$100 million annual effect on the economy, the same as in our Executive Order.
- Delete the requirement to study the macroeconomic effects -- see above.
- Delete "other major federal action affecting the economy" -- too broad, covering enforcement actions, etc.
- Provide that nothing required by this section can be the basis for judicial review -- standard protection from nuisance suits or generally clogging the courts with process-based suits.

RECOMMENDATION

It is our recommendation that the Administration immediately begin discussions with the chief sponsors of the FAIR bill -- to be preceded by a consultation with the NGA and Conference of Mayors -- to see if they would be willing to accept our proposed changes to the legislation. In return for consenting to our changes, we would offer our support for FAIR as modified. We have discussed this approach with Marcia Hale and the NEC principals, and they concur in this recommendation.

DECISION

Please indicate below how you would like us to proceed.

_____ Approve

_____ Discuss Further



CENTER ON BUDGET AND POLICY PRIORITIES

MANDATE RELIEF FOR STATE AND LOCAL GOVERNMENTS

by Jim St. George

State and local governments across the country have been struggling for several years with budget deficits. Although the recent recession was partially responsible for the fiscal problems state and local governments have faced, fiscal difficulties will last in many areas even as the recovery continues. A range of potential causes for these structural deficits have been identified, including loss of federal funds, escalating costs of Medicaid and other health care costs, and outdated state tax systems that do not reflect the economy of the 1990s and are unable to generate needed revenue efficiently and effectively.¹

Another potential cause of the fiscal distress state and local governments have faced, and the focus of much recent attention, is the growth of *unfunded federal mandates* — requirements on state and local governments imposed by the federal government without accompanying funds. State and local officials point out that the practice of requiring state and local governments to meet federally-established goals has increased substantially in the last two decades. In response, a number of these officials are supporting legislative proposals that would release state and local governments from any legal obligation to obey mandates for which the federal government does not provide full funding and, in the Senate version, require the Congressional Budget Office to estimate the cost to individual state and local governments of any bill that would impose a mandate on them. Such a solution raises serious concerns.

The requirement for cost estimates identifying the impact of mandate legislation on each state government and local government would prove impossible to accomplish in practice. Moreover, the major proposals, Senator Dirk Kempthorne's

¹ See in particular *Financing State Government in the 1990s*, National Governor's Association, et al., 1994. The study suggests that one cause of state fiscal problems is the fact that states have not updated their revenue systems to reflect the changing American economy. For example, consumers buy a far larger share of services relative to goods than they did 30 years ago. Yet state sales taxes typically apply to only a limited number of services. One result — along with a potential tax advantage for providers of services over those who produce goods — is that most states' sales taxes generate less revenue for each dollar of total consumption than they previously did. Another example of economic change cited in the report that has not been matched by appropriate fiscal reforms is the increasing prevalence of businesses operating across state and national borders.

"Community Regulatory Relief Act" (S-993) and Representative Gary Condit's "Federal Mandate Relief Act of 1993" (H.R. 140), would likely lead to increased gridlock, seriously limiting the federal government's ability to respond to certain needs. They also would open the door to costly litigation and greater judicial intervention in policymaking. And they could create perverse incentives for states and localities to avoid addressing problems in areas that might become the subject of fully-funded federal mandate legislation sometime in the future. Jurisdictions that have done the least to address various problems would be more generously funded than those that have acted in advance of federal requirements. State and local governments would likely become less willing to act as "laboratories for democracy;" instead they likely would delay initiatives until Congress required and paid for them, and when Congress did so, states and localities would have incentives to exaggerate the cost of compliance.

Types of Federal Mandates

Before describing the practical problems of the Kempthorne and Condit proposals, it may be useful to identify some of the more recent federal actions that are considered unfunded mandates. All told, the National Conference of State Legislatures has identified nearly 200 mandates in federal law. Many of the most important pieces of legislation in recent years have at least some impact on state and local governments and would have been covered by a Kempthorne- or Condit-type ban on unfunded mandates.

A number of unfunded mandates apply to state and local governments as employers; thus the Family and Medical Leave Act applies to state and local governments as well as private employers.² Several recent unfunded mandates stem from legislation designed to reduce crime and enhance public safety. Examples include the Brady bill, which requires that states provide an on-line, computerized criminal records data base to facilitate a national criminal background check system over the next five years, and the National Child Protection Act, which requires states to report child abuse information to the same background check system. Improving access to government services and guaranteeing civil rights may also be considered unfunded mandates. Thus the "Motor Voter" bill and the Americans with Disabilities Act, each of which places various requirements on state and local governments, are identified as unfunded mandates. Finally, a major category of often-controversial

² The National Conference of State Legislature's *Mandate Catalogue* also identifies unfunded mandates that have been in effect for many years. Other federal legislation identified as unfunded mandates that is associated with states' role as employers includes compliance with child labor, minimum wage, and anti-discrimination laws.

mandates relate to environmental concerns, such as the Clean Air Act that requires state and local officials to establish pollution control strategies.

Cost Estimates for Mandates

Central to any requirement for full funding of federal mandates is the need for timely, accurate projections of the costs to state and local governments. The Kempthorne proposal requires CBO to prepare "an economic analysis" of the effects of complying with a proposed mandate "by each State government and by each local government."³ While CBO currently estimates the *aggregate* cost to state and local governments for a large number of proposals each year, the requirement for a cost estimate for *individual* state and local governments would be a massive expansion of responsibilities for CBO.⁴

Estimating the costs of various proposals on a state-by-state basis requires detailed information on the specific issue at hand for each state, data that often are simply unavailable. Moreover, because of the lack of appropriate data bases with state-level information and the wide range of issues that affect state and local governments, it is not possible to establish a single estimating methodology applicable to most or all bills. Instead, CBO staff would have to address each bill or subject area separately to identify and locate relevant data. This can be a timely and costly endeavor, the results of which are sometimes of marginal value.

A related difficulty in estimating the state-by-state cost of fully funding mandates is that the best — and often the only — source of information on the specific characteristics of a state or region may be state officials themselves. If officials know that the cost will be fully funded by the federal government, they clearly will have an interest in inflating the potential cost. Using such self-interested sources could affect the accuracy of estimates.

³ The major practical difference between the Condit and Kempthorne proposals is the absence of any mention of cost estimates from the Condit bill. In order to fully fund mandates, however, Congress would clearly require more accurate cost estimates than currently produced by CBO.

⁴ The requirement for "economic analysis" could be interpreted as requiring estimates not just on the direct cost of a mandate, but also on the economic impact of policies insofar as they are likely to have an impact on state and local revenue. Such analysis would include potential job gains or losses, changes in property use and value, and changes in consumption levels or patterns. The economic impact of policy is extraordinarily difficult to ascertain even on a national level; CBO attempts such estimates on only a few major bills each year. No amount of new resources would enable CBO — or any other agency — to estimate such impacts accurately.

The difficulty of doing state-by-state analysis, however, is only the tip of the iceberg. Analyzing the potential cost to each of the more than 80,000 local governments in the United States would be a task of unimaginable proportions; CBO director Reischauer has called it "impossible in any practical sense."⁵ Although such cost estimates, if feasible to produce, would entail an enormous increase in workload for CBO, the Kempthorne proposal includes no increase in funding for the agency. One might say that the bill itself is an unfunded mandate, albeit on CBO rather than on state and local governments. In practice, the requirement would frequently bring the legislative process to a halt.

The Cost — and Inefficiency — of Full Funding

Even if the availability of data and appropriate models were not insurmountable hurdles, requiring full funding for all federal mandates could ultimately increase the total cost to society of accomplishing national goals. The Kempthorne and Condit proposals establish an open-ended commitment for federal funds: a law would be binding on states and localities only if "all funds necessary" are provided. For instance, establishing a computerized national background check envisioned in the Brady bill and supported by many gun control advocates and opponents alike requires the full cooperation of every law enforcement agency in the country. If Congress is serious about having such a system operational in five years, it cannot allow local sheriffs just to opt out, claiming their funding did not fully cover their costs. If the ban on unfunded mandates had been in effect when the Brady bill were enacted, Congress would have to ensure that it fully supported the *reported* cost of compliance. Failure to support the cost reported by local officials could leave the effort to establish the background check system in limbo as courts attempted to determine whether individual local governments were obligated to participate or whether more federal funds would be required. This would be akin to establishing a new entitlement for state and local governments, with all the well-known difficulties in limiting the cost of such open-ended commitments.

The total cost of full funding of federal mandates could also be driven up by the perverse incentives state and local governments would face under an unfunded mandate ban. The Kempthorne bill, for instance, defines the cost of a mandate as the amount in excess of what "the State or local government would incur in carrying out that activity in the absence of the regulation." What a governmental body *would* do in the absence of federal action is, in fact, impossible to know. Instead, the practical effect of such a requirement is to reimburse state and local governments for the full

⁵ Testimony of Robert D. Reischauer, Director, Congressional Budget Office, before the U.S. Senate Committee on Governmental Affairs, April 28, 1994.

cost of compliance less any costs they were bearing before the mandate was imposed. Since the greatest subsidies for any mandate would go to governments that have previously done the least in the area in question, there would be an incentive for state and local governments to delay action on issues they otherwise would plan to address if there were a reasonable chance of federal action in the future. More timely action would reduce their ultimate federal reimbursement, presumably in perpetuity.

Suppose, for instance, that Congress passes a health reform bill requiring employers, including state and local governments, to provide health care to their employees. If a Kempthorne- or Condit-style ban on unfunded mandates passes first, such a reform bill would be considered a mandate requiring federal funding if it is to be binding. States that already meet the minimum standards established in such a bill would get no funding, while other states would be rewarded for not providing health care benefits to their employees in the past. It would not take long for state and local government officials to recognize that there are financial advantages to letting problems fester — creating a national issue that requires a federally funded mandate — and penalties for solving problems too promptly.

Another issue stems from the fact that while state and local officials believe federal policies are often too controlling in the way they prescribe how particular goals are to be met, such restrictions tend to be more severe when the federal government provides most or all of the funding. To ensure that federal money is not squandered and to protect against the cynicism associated with financial abuses, federal policymakers often place particularly tight restrictions on how federal grants are monitored and spent. Sometimes this reduces state flexibility in experimenting to find the most cost-effective way of meeting various goals.

For example, CBO surveyed a number of local governments to estimate the cost of requiring that all handicapped people have access to polling places. The estimates ranged from \$845 per county in Georgia, where voters with mobility impairments would have their polling place changed to an accessible building, to \$10,000 for the city of Minneapolis, where city officials indicated they would install a ramp at every polling place. Arriving at a cost estimate to enable full funding in a broad range of similar situations would require deciding exactly how local governments should comply. The practical result in some future cases could be increased federal prescriptiveness, with the mandates specifying the particular solutions to be employed. In some cases this could result in greater cost than if state and local officials acted independently to achieve the intent of the legislation.

Finally, the federal costs of various pieces of mandate legislation could grow beyond the amount necessary to accomplish the identified goal as state and local governments "game" the system to maximize their federal payments. If the federal government must reimburse all direct costs of compliance, state legislators might, for

instance, allocate the time they and their staffs spend researching and debating implementing legislation to the cost of the mandate. Establishing and maintaining the necessary "cost centers" to allocate the time that was to be reimbursed could be considered a cost of the mandate as well!

One example of how state officials have manipulated federal reimbursements in recent years is through use of special taxes on health care providers to increase federal Medicaid reimbursements. A number of states have been highly creative in their use of these provider taxes, sufficiently creative that the practice employed by a number of states was widely considered to be a scam. Ultimately, Congress and the executive branch had to act to restrict the use of provider taxes. Episodes such as this, where states acted aggressively to increase the amount of federal dollars coming to them, should give pause to anyone who doubts that state or local officials would manipulate funding opportunities inappropriately.

Gridlock and Litigation

Given the tight fiscal constraints under which the federal government is operating, one impact of an unfunded mandate ban would be to hamstring federal activity across a broad array of policy areas. The time needed to identify specific fiscal impacts in over 80,000 jurisdictions, along with uncertainty over the accuracy of those estimates, would be a powerful weapon for those whose primary agenda is to obstruct legislation.

Advocates of the ban point out that the proposals would not affect current legislation, applying only to future proposals. One of the difficulties in recognizing the full implications of a ban on *future* unfunded mandates, however, is that the items affected would be those for which, by definition, no consensus currently exists. If a consensus had already developed and been recognized, the mandate would likely already be in place. This suggests that the intent of the legislation may have more to do with inhibiting further federal action than with actually addressing current fiscal constraints faced by state and local governments.

Furthermore, it is not entirely true that current mandates would not be affected by the Kempthorne and Condit proposals. Existing legislation would be affected when it was reauthorized or amended. Such action would constitute new legislation; it would cause the existing mandate to fall under the obligation for full funding. In that way the ban on unfunded mandates could begin to roll back legislation that requires reauthorization and inhibit amending legislation that includes mandates already in place. This could even go to the extent of obstructing passage of a bill that *reduces* the cost of compliance for state or local governments. Imagine, for instance, a mandate that state and local leaders believe places unnecessary and

inefficient burdens on them. An amendment could address some of their concerns, but it would trigger a requirement for full funding for any mandate that remained. The likely course of action would be to leave the existing, more burdensome requirements in place.

Troubling implications also arise over the implementation of mandates. A new mandate would be binding on state and local governments only if full funding is provided. It may not be immediately apparent, however, whether full funding is in fact available; the federal government may think it is funding the mandate, but state or local governments could end up with greater-than-anticipated costs. If an audit, for example, found that the cost of compliance with a mandate in the previous year exceeded the federal funds received for that purpose, would that mean that the law was not in force, even though officials as well as businesses and individuals acted as though it had been? One can imagine a whole new field of litigation opening up to determine what the direct costs of a mandate actually were, in order to determine whether state or local laws were indeed in force. Moreover, individuals and businesses might be inclined to delay or avoid compliance with mandates altogether until it was determined that funding was in fact adequate and the law was binding. Such inaction would, of course, increase the cost of enforcement for states and localities. Higher enforcement costs, however, could increase the likelihood that federal funding — premised on an assumption of voluntary compliance — would prove inadequate.

Benefits to State and Local Governments from Federal Tax Expenditures

Proponents of a ban on unfunded federal mandates argue that any justification for unfunded mandates evaporated with the demise of general revenue sharing. They portray the federal government as imposing burdens without providing any financial support to state and local government. Such an analysis, however, fails to acknowledge the substantial subsidy for state and local income and property taxes implicit in allowing such taxes to be deducted in determining federal income tax liability. In fiscal year 1994, federal tax expenditures associated with the deduction of state and local taxes, together with the exclusion of interest income from various forms of state and local debt, amounted to \$66 billion. By comparison, the U.S. Conference of Mayors has estimated the cost of 10 of the largest and most prominent unfunded mandates in over 300 cities at \$6.5 billion.⁶ Given that the population in

⁶ U.S. Conference of Mayors, *Impact of Unfunded Federal Mandates on U.S. Cities*, October 26, 1993. The 10 unfunded mandates in the survey covered the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Asbestos Hazard Emergency Response Act of 1988, the Residential Lead-Based Paint Hazard Reduction Act of 1992, the

(continued...)

these cities account for half the total population of all cities with at least 30,000 residents, as well as the possibility that the self-assessment of burden was overstated, it is certainly possible that the total cost of all unfunded mandates is less than the benefit of the tax expenditures.⁷

While the savings from these tax expenditures is received directly by taxpayers rather than state and local governments, the tax expenditure reduces the cost of state and local income and property taxes to taxpayers who itemize on their federal returns. The federal government effectively pays up to 40 percent of the state and local income and property taxes for high-income taxpayers. This is thought to increase the willingness of taxpayers to support politically taxes for state and local services. Periodic suggestions that the federal tax expenditures for state and local taxes should be reduced or limited are met with protests from state and local government officials, evidence of their awareness of the subsidy the tax expenditures provide for state and local taxes.

Alternatives to Consider

Nothing in this analysis should be construed as diminishing the difficulties state and local governments encounter in meeting the obligations they face, whether they are obligations established by state and local officials themselves or mandates established by the federal government.⁸ While part of this difficulty is the result of structural flaws in state revenue systems over which state officials have control, the national government should take seriously its role in ensuring the efficient and effective operation of the federal system.

One small step Congress could take in that direction would be to pass legislation submitted by Senator David Pryor that would allow states to require mail-order companies to withhold the state sales tax on items sold to that state's residents. Such legislation would allow states to raise an additional \$3 billion to \$3.5 billion

⁶ (...continued)

Underground Storage Tank Act, the Endangered Species Act, the Americans with Disabilities Act, and the Fair Labor Standards Act.

⁷ Other estimates also suggest that the cost of federal mandates is less than the value of these tax expenditures. An analysis by the Advisory Commission on Intergovernmental Relations of unfunded mandates passed between 1983 and 1990 conservatively estimates the cost to state and local governments in fiscal year 1990 as between \$2.2 billion and \$3.6 billion. See ACIR, *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s*, July 1993, pp. 63-67.

⁸ It should be noted that local governments struggle under the burden of unfunded state mandates as well.



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

THE DIRECTOR

MAY 3 1994

MEMORANDUM FOR THE NEC

FROM: LEON PANETTA

SUBJECT: UNFUNDED MANDATES LEGISLATION

Background

As you know, there has been growing support on Capitol Hill for legislation that would stop (or at least slow down) the flow of federal legislation and regulation that impose unfunded mandates on State, local and tribal governments. The momentum is being fueled by conservative Members of Congress (who are not great fans of the underlying legislation in the first place), by the associations of state and local elected officials (NGA, the U.S. Conference of Mayors, etc.) who are under great pressure to meet increasing demands with increasingly limited resources, and, more recently, by some of the more moderate Members of Congress who want to be able to cast a vote against federal mandates and/or in favor of local prerogatives before having to run for reelection this fall.

The driving force is Senator Kempthorne's bill, which now has 54 cosponsors in the Senate and 221 cosponsors for the House counterpart. It provides that if the Federal Government does not supply the funds, the state or local government need not comply with the requirement -- i.e., no money, no mandate. The White House advisors who have followed this issue agree that this is totally unacceptable. Several moderate Members of Congress (Moran, Goodling, Dorgan and Domenici) have sponsored the "Fiscal Accountability and Intergovernmental Reform Act" (the "FAIR

Act"), which has some real problems but is clearly preferable to the Kempthorne bill. The sponsors of the "FAIR" bill (which has 243 cosponsors in the House and 6 in the Senate) believe that if the Administration supports their bill, they can attract enough of the moderates to be a viable alternative to Kempthorne. They are willing to make some changes to their bill to get our support, but they warn that there is not a lot of room to negotiate because some of their supporters are already saying that the "FAIR" bill is too weak in comparison with Kempthorne.

We set forth below a list of proposed changes to the "FAIR" bill, but it must be recognized that if some of these are accepted by the "FAIR" sponsors (we have no illusions that all would be accepted), the Administration would be expected to announce its support for the modified "FAIR" bill. While such an announcement would be a plus with the Governors, Mayors, etc., it would not be well received by the public interest groups and the more liberal Members of Congress, even if we undertake a substantial outreach effort.

Provisions Relating to the Legislative Branch

Title I of the "FAIR" bill involves legislation and requires that Committee reports accompanying bills with unfunded mandates include a CBO analysis of 1) compliance costs for State and local governments and for private businesses, and 2) the effects on economic growth and competitiveness. The analysis is required if the costs exceed \$50 million in three years or \$100 million in five years. Lack of the CBO analysis is subject to a point-of-order objection.

Proposed Changes

1. Increase the dollar threshold to \$100 million per year -- using the dollar threshold in the Executive Order on Regulatory Review.

2. Delete the requirement to study the macroeconomic effects -- the effect would hardly be measurable unless the bill had effects of billions of dollars a year.

3. Delete the requirement to study private sector costs -- the rallying cry is to protect State and local governments, not the business community.

4. Modify the point-of-order provision to require the committee(s) that report the bill to come up with an estimate of the costs; charge CBO with the responsibility of reviewing that estimate and reporting back to the Congress; permit a point-of-order if the CBO report is not available (up to a 30/45 day period after the bill is reported -- otherwise non-elected officials could block elected officials from voting on important legislation indefinitely); clarify that the point-of-order can be overruled by a simple majority, and provide an escape clause for emergency legislation.

5. Add to the requirement for an estimate of costs, an estimate of the benefits to the public of imposing the proposed unfunded mandate and the cost to the public of not imposing the mandate -- so that the floor debate is not based solely on cost data, but would include benefit data as well.

6. Delay the effective date of the Act for one year or until the term "mandate" is defined and protocols are developed for estimating the costs/benefits of such mandates -- there are very difficult questions of definition, methodology and development of data bases.

7. Require a sunset three years after the effective date of the Act.

Provisions Relating to the Executive Branch

Title II of the "FAIR" bill requires agencies to prepare for each notice of proposed rulemaking and each final regulation, and for each "other major federal action affecting the economy," an estimate of the effects of the proposed rule or action on local government resources, an estimate of the costs of private sector compliance, and the effect on economic growth, full employment, and international competitiveness.

Proposed Changes

1. Impose a dollar threshold -- \$100 million annual effect on the economy, the same as in our Executive Order.
2. Delete the requirement to study the macroeconomic effects -- see above.
3. Delete "other major federal action affecting the economy" -- too broad, covering enforcement actions, etc.
4. Provide that nothing required by this section can be the basis for judicial review -- standard protection from nuisance suits or generally clogging the courts with process-based suits.

FEDERALISM

Gov. Nelson Urges An End to Unfunded Mandates

States can no longer absorb the costs of unfunded federal mandates, Gov. E. Benjamin Nelson of Nebraska told the Senate Committee on Government Affairs last week on behalf of NGA and the Council of State Governments. "In today's no-tax environment, new and expanded government programs at all levels of government must be deficit-neutral."

Gov. Nelson said the governors want Congress to pass legislation that requires five-year fiscal notes on the cost to all levels of government of new or expanded

programs, requires that financing for new or expanded mandates on state and local governments be included in the legislation; and requires that the President's executive orders on regulatory review and unfunded mandates also include new legislative and regulatory proposals by the executive branch.

"There is a massive resistance effort now underway at all levels of state and local government against more federal mandates without adequate funds to meet them. In this time of no new taxes at every level of government, it is time for all of us

to do vigorous cost benefit-analysis and relative risk assessments on everything we do," said Gov. Nelson.

Gov. Nelson told the committee that by separating spending decisions from revenue decisions, unfunded mandates undercut the public accountability that is fundamental to a democratic system. If federal decisionmakers do not have to bear the cost of their decisions, they become less responsive to concerns and priorities of their own local constituents.

Continued on page 3

STATE BUDGETS

Fiscal Health Improves Despite Uncertainty

The outlook for state budgets for fiscal 1995 is the most favorable since the start of the national recession in 1990, according to a new report released today by NGA and the National Association of State Budget Officers (NASBO). However, despite the positive trend, uncertainty about the impact on states of national health care reform, welfare reform, and limits on federal expenditures clouds the fiscal picture.

The April 1994 edition of *The Fiscal Survey of States* shows that with revenues rebounding from recession levels, governors are proposing tax reductions for fiscal 1995, mostly by reducing personal income and sales taxes. Proposals for tax increases primarily affect cigarette taxes.

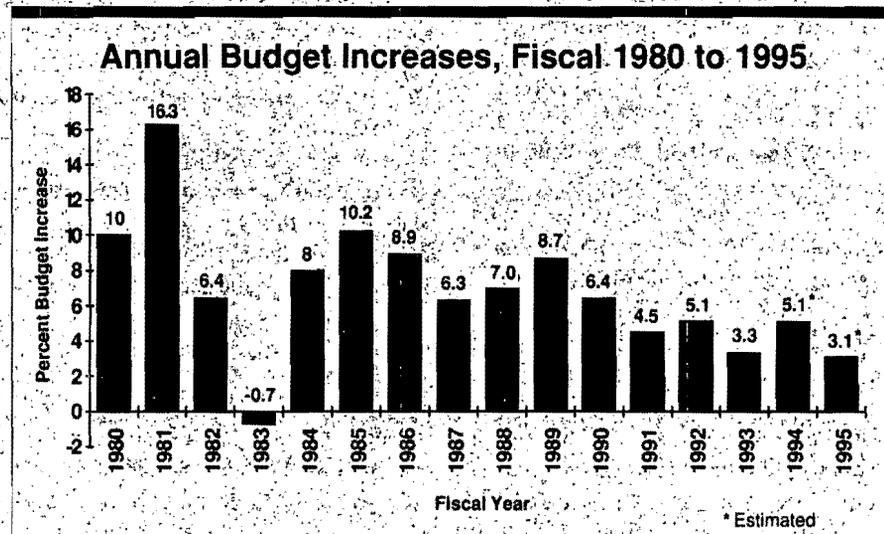
NGA Executive Director Raymond C. Scheppach said that "with the economy in most parts of the nation showing improvement over the previous year, states are able to use increases from existing

revenue sources to fund modest program increases. Many of the initiatives proposed by governors focus on public safety issues, especially ways to curb violent juvenile crime, and reforming state wel-

fare and health care systems."

NASBO Executive Director Brian Roherty said that states are projecting

Continued on page 2



In this issue . . .

STATE BUDGETS

State outlook improves, but impact of federal reforms clouds picture, according to a new NGA/NASBO report. *Page 1*

STATE EXPENDITURES

Health care and education accounted for the states' largest expenditures in 1993, according to a recent report. *Page 3*

BRIEFLY STATED

South Dakota and Arkansas welfare reform initiatives receive federal waiver approval. *Page 4*

With the prospect of better growth, states continue to stabilize their budgets, restructure major services, and improve their operations through extensive reviews.

STATE BUDGETS

Fiscal Survey

Continued from page 1

budget stability, with midyear revenue and budget shortfalls no longer posing a problem for the majority of states. "After several years of cutbacks in state budgets, the outlook for fiscal 1995 is for continuation of the stability of fiscal 1994, with a minimum of new services and new taxes. However, continued corporate downsizing is producing an uneven impact in some regions and state."

Projected year-end balances for fiscal 1994 and anticipated balances for fiscal 1995—one important sign of economic stability—are at 2.6 percent and 2.4 percent, respectively, slightly below fiscal 1993 levels.

State Spending

States are limiting their general fund budget growth to 5.1 percent in fiscal 1994 and plan to limit it to 3.1 percent for fiscal 1995. These increases are slightly above the rate of inflation over the two years. Key findings include the following:

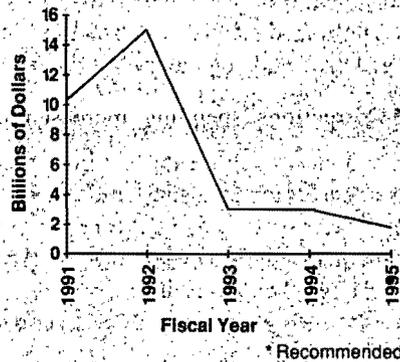
- Only ten states have reduced or plan to reduce their fiscal 1994 enacted budgets, by less than \$1 billion in total. This is a marked change from the number of states forced to reduce their fiscal 1993 and fiscal 1992 enacted budgets—twenty-two and thirty-five, respectively.

- Initiatives in state budgets center around crime prevention, with a number of states targeting violent juvenile offenders.

- Restructuring welfare programs, to emphasize work is the major change in the Aid to Families with Dependent Children (AFDC) program. Similar to the past two years, proposed AFDC benefit levels would remain at the same level as the previous year for virtually all states. Instead of making changes to benefit levels, states are experimenting with time-limited programs, greater incentives for work, and training and education as a means to provide assistance to those in need. In governors' proposed budgets for fiscal 1995, only six states would change

benefit levels, while forty-four states would maintain the same levels as are in effect in fiscal 1994. Of the six states proposing changes, only California would lower benefit payments.

State Revenue Increases



- Medicaid spending is growing at a much slower rate than in previous years and is easing budgetary pressures. Nevertheless, at a projected growth rate of 8.2 percent for fiscal 1995, this growth still exceeds the rate of most states' revenue forecasts. The projected increase in Medicaid spending is 13.6 percent for fiscal 1994, after increases of 11.2 percent in fiscal 1993, 28 percent in fiscal 1992, and 31.7 percent in fiscal 1991. National health care reform could place additional burdens on state health care budgets depending upon the outcome of federal legislation later this year.

- Almost all states propose pay raises for fiscal 1995, with the increase averaging 4.0 percent. In a number of states, this increase is the first in several years.

Tax Changes and Revenue Growth

States' general fund revenue growth is estimated at 2.4 percent in fiscal 1994 and is expected to be 4.2 percent in governors' proposed fiscal 1995 budgets.

Thirty-one states and Puerto Rico are proposing net revenue changes for fiscal 1995, with the majority proposing revenue decreases. Net taxes and fees would decrease by \$1.3 billion in governors' proposed budgets, excluding Michigan's

\$3.1 billion increase. Michigan increased state-levied taxes to offset the elimination of local property taxes used to finance schools. Seven states are proposing sales tax changes for fiscal 1995. Sixteen states are proposing changes in personal income taxes; of these, fifteen are proposing reductions. Proposed tax increases center around the cigarette tax and taxes on health care.

Shifts in State Spending

Although states are now on a path of economic recovery, the slow revenue growth, coupled with the rapid growth of Medicaid, has resulted in significant shifts in state spending over the last few years. Although Medicaid's double-digit growth has subsided, its share of state spending increased from 10 percent in fiscal 1987 to 18 percent in fiscal 1993. Medicaid surpassed higher education as the second largest component of state spending in fiscal 1990 and continues to grow faster than all other state programs. All major state functions except Medicaid and corrections declined as a percent of state budgets from fiscal 1987 to fiscal 1993.

State Restructuring

With the prospect of better growth, states continue to stabilize their budgets, restructure major services, and improve

Continued on page 3

May 2, 1994

Vol. 28, No. 9

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The *Bulletin* is printed on recycled paper.

South Carolina Gov. Carroll A. Campbell Jr.,
Chairman
Raymond C. Scheppach, Executive Director
Rae Young Bond, Director of Public Affairs
Shelley Borysiewicz, Assistant Editor
Lisa Lackovic, Staff Writer

Medicaid spending is threatening the ability of decisionmakers to use the budget as a tool for implementing public policy.

STATE EXPENDITURES

Health, Education Still Biggest Items in State Budgets

Health care and education accounted for the states' largest expenditures in 1993. According to the *1993 State Expenditure Report* by the National Association of State Budget Officers, states spent \$631 billion in 1993 from all funding sources.

The report found that shares of state spending by functional category have shifted in recent years. Elementary and secondary education, combined with higher education, account for one-third of state spending. Medicaid (18.4 percent), transportation (9 percent), cash assistance (4.9 percent), and corrections (3.3 percent) combined represent another one-third of state spending. All other state expenditures account for the remaining one-third.

Medicaid surpassed higher education as the second largest state program in 1990, and the gap between the two continued to widen in 1993. Medicaid far outpaced overall spending growth; health care remains the single most important cost factor for states.

Medicaid spending is threatening the ability of decisionmakers to use the budget as a tool for implementing public policy.

Elementary and secondary education's share of state spending dropped slightly from 22 percent in 1991 to 21.2 percent in 1993. Higher education has maintained its share of state spending, primarily due to tuition increases. Cash assistance, transportation, and corrections have all maintained fairly stable shares of state spending. Corrections and Medicaid are the only programs that received a larger share of total state spending in 1993 than they did in 1987.

The general fund increase between 1992 and 1993 was about 3 percent, significantly lower than the average annual general fund increase of 8 percent during the 1980s. Total state spending, including federal funds, increased 6.5 percent.

The survey found that:

- Medicaid's share of state spending has grown from just over 10 percent of state spending in 1987 to 18.4 percent in 1993. Medicaid spending is the second largest state spending category, next to elementary and secondary education spending.

- Elementary and secondary education increased by 6.6 percent from 1992-1993.

- Corrections spending increased by

7 percent from 1992 to 1993. Corrections as a share of state spending increased just 0.2 percent between 1992 and 1993.

- Higher education increased by 3.3 percent between 1992 and 1993. ■

Copies of the report are available for \$30.00 plus \$6.95 shipping, from NGA Publications, P.O. Box 421, Annapolis Junction, MD, 20701.

FEDERALISM

Gov. Nelson

Continued from page 1

Gov. Nelson said that the governors' opposition to unfunded environmental mandates must not be interpreted as an effort to discontinue environmental legislation and regulations or oppose any individual's civil or constitutional rights.

"The governors consider the protection of public health and state natural resources as among the most important responsibilities of our office. We have passed strong legislation at the state level, and we have worked with Congress over the years to enact strong federal environ-

mental laws. The state share of expenditures on environmental protection programs is 86 percent; federal expenditures represent less than 14 percent. The ratio is 82 to 18 percent for transportation and 92 to 8 percent for education," said Gov. Nelson.

"State programs often go beyond federal minimum requirements in order to meet unique environmental needs within the state. It is in addressing these needs that states have become noted sources of innovation in the environmental protection field, and we intend to continue our leadership in this area. It is time for elected officials to join together for the public interest," he concluded. ■

STATE BUDGETS

Fiscal Survey

Continued from page 2

their operations through extensive reviews. States are using the return to better economic times as an opportunity to improve services and procedures, with the knowledge that resources are limited. Examples include the following.

- States are restructuring major state functions, including social services, corrections, and environmental programs, to improve the management and efficiency of state government. Other restructuring focuses on changes in service delivery, such as contracting with the private sector to provide government services.

- States are conducting statewide re-

views of expenditures and revenues as part of an effort to maintain long-term balance in their budgets. Some of these efforts involve commissions to evaluate programs and delivery systems, while others focus on modifying the revenue structure used to finance state government.

- States are changing budget procedures to implement performance-based budgeting and integrate strategic planning in budget decisions. These changes involve developing systems to link budget decisions to specific goals and outcomes as a way of managing scarce resources. ■

Copies of the report are available for \$25.00 plus \$5.50 shipping, from NGA Publications, P.O. Box 421, Annapolis Junction, MD, 20701.

Briefly Stated

Health Reform

Casey Expands Children's Coverage

Pennsylvania Gov. Robert P. Casey recently announced an expansion of the Children's Health Insurance Program (CHIP), which will offer free health coverage to as many as 76,000 Pennsylvania children. Effective April 1, 1994, uninsured children ages 6-13 who are not eligible for Medicaid will qualify for free health insurance if their family's income is less than \$27,380 for a family of four (185 percent of the federal poverty guideline). CHIP will cover physician visits; preventive care; immunizations; up to 90 days of hospitalization; dental, vision, and hearing care; and prescriptions with a \$5 copayment. CHIP will start to cover mental health services on July 1, 1994.

Contact: Bob Fisher,
Governor's Press Office,
717/783-1116

Jones' Health Reform Legislation Passed

Kentucky Gov. Brereton C. Jones' health care reform legislation was recently passed by the state legislature. To contain health care costs, the legislation establishes a five-member Health Policy Board to oversee the state's health

care system. It also provides insurance reform that includes portability from job to job and guaranteed insurability; insurance rate review and approval until July 1, 1996; greater purchasing power and accessibility to health care through a health purchasing alliance; and consumer education through data collection and the mandatory posting of rates by all health care providers.

Contact: Mindy Shannon-Phelps, Governor's Press Office, 502/564-2611

Welfare Reform

South Dakota Wins Federal Approval

South Dakota recently received federal approval for a comprehensive welfare reform plan that allows the state to enter into social contracts with Aid to Families with Dependent Children (AFDC) recipients. The plan includes a time limit on payment of benefits after education and employment opportunities, and recipients who voluntarily quit their jobs will lose some benefits. It offers employment and savings incentives for teenagers. "Most families turn to welfare to help them through a short-term crisis, not for long-term dependency," Gov. Walter D. Miller said. "Now we have the tools we need to help AFDC families solve their problems,

so they can get off welfare and stay off." The state also will continue offering a one-time cash payment to help newly hired AFDC recipients make the transition from welfare to work.

Contact: Janelle Toman,
Governor's Press Office,
605/773-3212

Arkansas' Reform Project Approved

Under Arkansas' recent federally approved demonstration project, a family's AFDC benefits will not be increased when a child is conceived and born while the mother is already receiving AFDC benefits for other children. According to the state's human services department, about 8 percent of families receiving AFDC benefits have additional children after qualifying. Gov. Jim Guy Tucker is hoping to implement the demonstration project by July 1, 1994. The state has previously received federal waivers to implement a managed care program for Medicaid recipients and is continuing its efforts to implement an electronic benefit transfer system and a general welfare reform program that focuses on welfare to work programs.

Contact: Max Parker,
Governor's Press Office,
501/682-2345

Ms Carol Rasco
Assistant to the President
for Domestic Policy
White House
Washington
DC 20500-0001

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THE WHITE HOUSE
WASHINGTON

August 22, 1994

✓ Orig: CLR
✓ XC: Weinstein
Pr
8/25

MEMORANDUM FOR LEON PANETTA

THROUGH: CAROL RASCO
FROM: Paul Weinstein
SUBJECT: Unfunded Mandate Legislation file

Several events indicate that the unfunded mandate issue will resurface as a major issue after Labor Day. Legislation introduced by Representative Condit (the old Kempthorne legislation of "no money no mandates") is gaining support in the House. There are now 140 signatures to the discharge petition (25 democrats with a goal by Condit to get 40). If the discharge petition on the Condit bill gets 40 more democrats, republicans may move off of other unfunded mandate bills and push for the discharge on Condit. In addition, on September 20, state and local groups plan to hold another "No Unfunded Mandates (NUM)" day in Washington, six days before the deadline for signing onto discharge petitions. Finally, Senator Hollings is considering keeping a Nickles-Reid unfunded mandate amendment that would apply to the private sector, which the Administration strongly opposes, in the conference report on the "Competitiveness Act" (S.4).

Many here in the White House believe this Administration must reach a decision on whether to push aggressively for passage of unfunded mandate legislation this year or hold off until next session. As you know, the White House and the Administration are split on the issue of mandate relief legislation -- some would rather see the legislation quietly slip away while others want passage of legislation as soon as possible.

There has been some activity on unfunded mandate legislation this year. On June 16, the Senate Committee on Government Affairs passed S. 1604, "The Federal Mandate Accountability and Reform Act of 1994" (Administration-Glenn-Kempthorne compromise bill), and on August 11, the House Government Operations Subcommittee on Human Resources and Intergovernmental Relations adopted companion legislation without amendment. However, it is my belief that unless the Administration aggressively pushes for passage of S. 1604 this fall, unfunded mandate legislation will not be enacted this year. This memorandum presents the advantages and disadvantages of trying to pass S. 1604 this year. The following are the pros and cons for 1) maintaining our present efforts in support of S. 1604. or 2) an administration strategy to aggressively push for legislation this year.

Option 1: Maintaining Our Present Strategy

The Administration's current approach to unfunded mandate legislation is based on a strategy of 1) allowing the congressional process to move forward with limited White House intervention since helping to broker the Glenn-Kempthorne compromise last spring, and 2) clear, consistent, but low-key public support for S. 1604. It is unlikely that this strategy will secure passage of S. 1604 this year.

Pros

- S. 1604 is far from perfect legislation. The point-of-order clause -- despite exemptions for legislation relating to national emergency assistance for state, local, and tribal governments, national security, anti-discrimination, constitutional rights, auditing and accounting procedures, and any other bill that the President and the Congress designate as emergency legislation (plus the \$50 million threshold) -- could make it considerably more difficult for the President to pass his legislative agenda. In addition, the Dorgan amendment on private sector costs is something the Administration cannot support.
- Our actions in helping craft S. 1604 have greatly angered several key democratic chairman in the House, including Reps. Dingell and Waxman. Not aggressively pushing this legislation in the House will help reduce tensions between the Administration and these important congressmen. In addition, some feel that it is unlikely these powerful chairmen will allow S. 1604 to pass even with aggressive Administration backing. Therefore, the Administration shouldn't waste a lot of effort seeking enactment of S.1604.
- If S. 1604 doesn't pass, it is more likely that Congress will be blamed than the President, who has consistently shown his concern about the problem of burgeoning unfunded mandates as indicated by his comments to governors and mayors, the signing of Executive Order 12875, and his strong support for and the Administration's assistance in drafting S. 1604.

Cons

- The President is clearly on record in support of S. 1604. Failure to pass the bill could reflect poorly on his Administration.
- Failure to pass S. 1604 could strain relations between the President and the governors/mayors.

Option 2: An Aggressive Administration Strategy For Passage Of S. 1604

This option would require the Administration to conduct an aggressive strategy for passage of S. 1604 in both houses. Option 2 would demand: 1) active White House/OMB staff interaction with congressional staff; 2) the personal involvement of OMB Director Rivlin and other high White House officials in lobbying Congress for adoption of S. 1604; 3) aggressive public outreach to state and local groups; 4) reinstating regular White House strategy meetings between DPC, NEC, OVP, OMB, OEP, Legislative Affairs, and Intergovernmental Affairs; and 5) a personal visit from you with Reps. Dingell and Waxman seeking at a minimum their neutrality.

Pros

- The growing financial burden on state and local budgets exacerbated by federal requirements is a legitimate problem (although not to the extent that governors and mayors claim). S. 1604, combined with Executive Order 12875 (signed by the President last September) would provide some relief to state and local governments.
- S. 1604 is the best deal we probably can get without alienating state and local groups and Republican moderates. If we don't push for passage of S. 1604 now, possible changes in the makeup of Congress may mean that next year's legislative compromise would be less appealing to the Administration. For example, a more conservative Congress might pass unfunded mandate legislation that would apply to appropriated as well as authorized funds. This would place the President in the difficult position of having to choose whether or not to veto legislation that would be very popular with the governors and the mayors.
- Passage of S. 1604 will be very popular with the governors and mayors. (Except Mayor Rendell of Philadelphia, who has advised us privately that he thinks it won't have any affect on the growth of unfunded mandates because it doesn't apply to appropriations. However, Rendell has also recommended that it is in the Administration's best interest to support S. 1604.)
- Passage of S. 1604 will remove the threat (at least in the short term) of unfriendly unfunded mandate amendments on Administration bills.
- The President will be able to take credit for passage of S. 1604.
- Passage or significant movement on S. 1604 would quell support for Condit.

Cons

- Despite the fact that S. 1604 is moderate legislation compared to some of the other unfunded mandate bills introduced and is a far cry from the original Kempthorne bill, it is nevertheless flawed. For example, the requirement that mandates above \$50 million have an authorization covering the cost to state and local governments remains problematic. In addition, the Dorgan private sector amendment, which the Congressional Budget Office has stated would be too difficult to accurately calculate, would provide ammunition to opponents of Presidential initiatives on the false grounds that they include a tax on the private sector.
- Passing S. 1604 only makes sense if we can secure a commitment from Republicans that they will not pursue additional legislation anytime soon (this year and beyond).
- With such a busy legislative calendar, this might not be the best use of Administration and congressional time and resources.
- Even if the Administration aggressively backed this legislation, there is no guarantee that it would actually pass. Staff of the House Government Operations Committee has indicated that Chairman Conyers will not move the House version of S. 1604 until the threat of a discharge petition on the Condit bill is removed.
- Despite 140 signatures, the Condit bill is still 78 votes short of filing status (218) with only about one month left for the bill to be discharged.

Recommendation

There is a cost to adopting either options 1 or 2 -- choosing between the state and locals versus powerful democratic chairman -- and in the end the decision between the two is essentially a political one. Nevertheless, despite reservations about certain provisions in S. 1604 and even though an aggressive strategy in support of the legislation does not insure passage this year, my recommendation is to adopt option 2. However, this recommendation has the following conditions. We should only agree to legislation if we can 1) obtain assurances from state and locals and congressional proponents such as Kempthorne and Condit that additional unfunded mandate legislation will not be forthcoming next Congress and 2) if we can get agreement to drop the Dorgan private sector amendment. This recommendation is based more on political rather than policy concerns: a desire for the Administration to stay out in front on this issue rather than being perceived as reactive and defensive; because of the President's commitment to the mayors and governors to actively

seek passage of legislation this year; and to prevent more problematic legislation from being adopted by Congress.

Decision

Option 1



Option 2

Discuss Further

THE WHITE HOUSE
OFFICE OF DOMESTIC POLICY

CAROL H. RASCO
Assistant to the President for Domestic Policy

To: _____ Weinstein
_____ cc: Ben-Ami

Draft response for POTUS
and forward to CHR by: _____

Draft response for CHR by: _____

Please reply directly to the writer
(copy to CHR) by: _____

Please advise by: _____

Let's discuss: _____

For your information: _____

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Remarks: _____

F41 Karzen testimony on
unfunded mandates

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JAN - 6 1995

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Route slip

To: Carol Rasco	Take necessary action []
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	Comment []
	Prepare reply []
	Discuss with me []
	For your information []
	See remarks below [x]

From: Sally Katzen

Date: January 6, 1995

Here is a copy of my oral statement to the Senate Governmental Affairs Committee on unfunded mandates.

**STATEMENT OF SALLY KATZEN
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE
THE COMMITTEE ON GOVERNMENTAL AFFAIRS AND
THE COMMITTEE ON THE BUDGET
UNITED STATES SENATE**

January 5, 1995

Good morning, Messrs. Chairmen and Members of the Committee. I greatly appreciate the opportunity to testify today on an issue of great importance to you, to the Administration, and to State, local, and tribal governments.

I have prepared a written statement. You have a number of people to hear from, so let me just emphasize our support for your efforts and our determination to help solve this difficult problem of unfunded mandates.

As a former governor, President Clinton understands and is sympathetic to the concerns of State, local, and tribal governments. He knows that we cannot continue to add to the burdens placed on them by Federal requirements for which Federal funding is not forthcoming. At the same time, however, there are matters of national policy at stake, and we cannot impair the Federal government's ability to carry out its legitimate functions. The challenge, therefore, is to improve the process of dealing with unfunded mandates without introducing any unintended consequences.

Last year, we worked hard, with the President's active encouragement, to enact S. 993. It was a bipartisan effort, led by Senators Kempthorne and Glenn. It was carefully crafted to be productive and workable.

S. 993 has served as the basis of S. 1, and S. 1 has continued to be a bipartisan effort. We appreciate that we have been able to discuss various drafts of S. 1 with Senators Kempthorne and Glenn, as well as their staffs and the staffs of a number of other Senators.

We obviously support those provisions of S. 1 that are based on S. 993. Some of the provisions that have been added to S. 1 are clear and helpful. But a few issues remain, more of drafting than of

principle. As you know, some of the language was added late last week and we have not been able to read and, more importantly, to think through some of the language that would give us a high degree of confidence that the bill is workable and will not have unintended adverse consequences.

What we are doing will bind us -- as it should -- for the foreseeable future; we should thus make sure that it really achieves our shared objectives. A great deal of progress has been made. The bipartisan efforts last term, as well as through the holiday season, have been productive, and we are optimistic that we can work together to achieve a productive and workable solution. We cannot abandon or unwittingly impair our ability to govern, but so too we cannot continue as we have in the past. The complaints that have been raised concerning unfunded mandates are real. The President had heard them, and he wants to respond to them. He has supported unfunded mandates legislation and has made it very clear to us that we are to continue our work together, on an expedited basis.

This hearing helps with understanding the underlying structure and intent behind the new provisions of S. 1 and provides an opportunity to consider and resolve concerns that are raised by them.

I appreciate the opportunity to appear here today before you,
and I look forward to working with you on this important matter.

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