Unfunded Mandates: Promoting Accountability for National Policy Actions

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Chairman Lankford, Ranking Member Heitkamp and other members of the Subcommittee,

I am pleased to be here to share my thoughts on unfunded federal mandates. This hearing provides much-needed attention to this important issue. While lurking at the foundation of much legislation and regulation, it is healthy to periodically take stock of the nature of these federal requirements and their implications for our federal system of government.

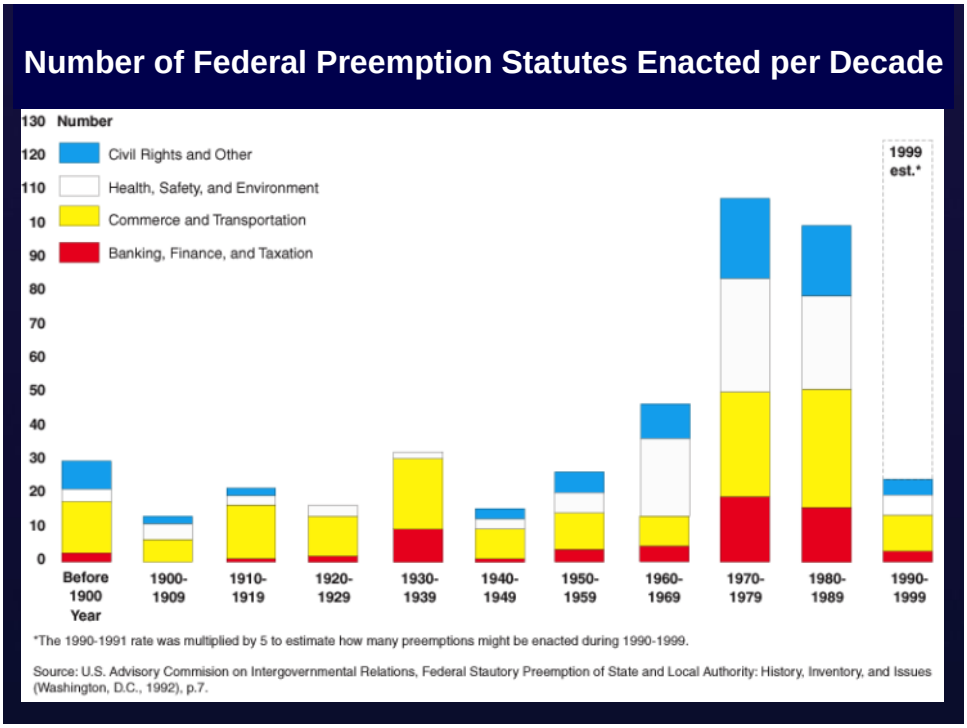
My testimony today will discuss how intergovernmental mandates have emerged as a significant tool of government at the federal level and whether and how various reforms have altered national legislative and regulatory strategies. I will conclude by offering observations on the potential utility of additional reforms in both the rules applying to unfunded intergovernmental mandates as well as broader institutional changes I believe are necessary to reinvigorate our federal system here in Washington.

The Rise of Federal Mandates

Over the past forty years, mandates and preemptions have become primary tools relied on by Congress and the President to project national priorities and objectives throughout the intergovernmental system. Generally, mandates can refer to a wide range of federal actions, from affirmative obligations for state and local governments to take action on a policy issue to a constraint preventing or preempting state or local actions.

The secular trends toward more a more coercive and centralized federalism have survived the passage of both Republican and Democratic Administrations, as well as Democratic and Republican Congresses. These trends continued through the 1990's and are reflected in following chart developed by the now-defunct Advisory Commission on Intergovernmental Relations (ACIR), which shows the growth of federal preemptions over the decades.[1]

[1] The chart ends in mid-1990's due to the demise of its institutional sponsor, the ACIR, but the trends through the end of 1990's were estimated by the Commission staff.



What forces are responsible for these trends? On one level, national leaders under growing fiscal pressure are tempted to shift costs to other levels of government and private business. The shifting of costs and imposition of new mandates and rules takes advantage of two fundamental accounting principles:

- The costs of programs to subnational governments and business are free at the national level

- Taxpayers will suffer from the fiscal illusion and fail to hold national leaders accountable for the additional costs their actions impose throughout the system

Yet, despite these perennial temptations, federal officials displayed remarkable restraint on intergovernmental mandates as late as 1960. The expansions of the federal role largely relied on grants and the tradition of cooperative federalism. The New Deal and Great Society programs populated domestic policy with numerous grant programs that sought to engage state and local governments through the carrot rather than the stick. When national regulations were imposed on the economy through such statutes as the *Fair Labor Standards Act*, the *Social Security Act* and Title VII of the *Civil Rights Act of 1964*, state and local governments were exempted. Indeed, federalism was accepted as one of the primary "rules of the game."

The shift toward the reliance on more coercive forms of national action began in the 1960's, accelerating through the next several decades. The era of chronic deficits that began in the late 1960's was at least partly responsible for the turn away from cooperative federalism. But underlying shifts in the party system, interest groups and the economy itself also were forcing greater centralization in the federal system.

The position of state and local governments in the federal system was protected by a decentralized party system where candidates for national owed their nominations and political allegiances to state and local party leaders, embedding a sensitivity to the prerogatives of state and local officials in fundamental political incentives. In recent decades, candidates have been on their own to assemble independent coalitions to support and finance campaigns, as state and local parties have lost their prominent place in electoral politics. National elected officials now have to balance their natural allegiance

to state and local governments with the need to establish their own visible policy profiles to appeal to a diverse coalition of voters, interest groups, and media outlets.

Strong forces have promoted the nationalization of problems that have been deposited on the federal doorstep. The growth of national media institutions focused on Washington created a powerful resource for those groups wishing to nationalize problems and issues, and reporting increasingly sought to find national dimensions or applications for state and local problems or solutions. The growing integration of business throughout the nation and the world has converted the business community from advocates of state authority to promoters of national preemption. As corporations increasingly operate in a global environment, coping with separate state regulatory regimes is seen as a hindrance to economic efficiency and competitiveness.

With strong national forces at work, the position of groups representing state and local governments became pivotal to their prospects in Washington. While they have at times succeeded in modifying mandates to reduce costs, in many cases states and local leaders are neutralized and even champion particular mandates and preemptions.[2] Facing strong groups pressing for national mandates or preemptions, state and local groups are often disarmed by their lack of political cohesion on key policy issues; lacking agreement they often unable to articulate positions in national debates. The compelling appeal of major federal mandates and preemptions, whether they be elections reform, education

[2] Paul L. Posner, *The Politics of Unfunded Mandates* (Washington, D.C., Georgetown University Press, 1998)

standards or homeland security requirements, indeed puts many elected officials on the defensive.

The recent trend toward party polarization has mixed effects on federal mandates. On the one hand, polarization has deepened the conflicts among states and localities in taking positions on mandates. Indeed, the National Governors Association was unable to take positions on such vital legislation as welfare reform of 1996 and the 2010 health reform legislation. However, polarization has stiffened the resolve of some states to resist federal mandates in recent years. The states' resisted the Real ID Act passed in 2005 by refusing to issue new hardened drivers licenses or conform to other provisions of this national legislation. Restive leaders in some states have pushed back against Medicaid expansion under health reform, even though this costs states much needed federal reimbursement for health care costs.

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Reforms to curb the use of unfunded mandates

As the foregoing suggests, the imposition of mandates and other forms of cost shifting is a complex process with deep, and at times conflicting, fiscal, political and economic roots. Those seeking to reverse these trends must find ways to change incentives and institutions that are responsible for current trends in the intergovernmental allocation of power and responsibilities.

UMRA of 1995: A Modest Reform With Modest Results

Information alone had proven to be ineffectual to thwart these trends. In 1981 legislation, Congress required CBO to provide cost estimates on all proposed legislation approved by committees.. Paralleling the "fiscal note" processes used by state legislatures, these estimates provided some public notification of the cost impacts of legislative proposals before they are voted on by the House or the Senate. However, GAO and CBO studies have shown that the cost estimates had little traction in the Congress, as witnessed by the explosion of mandates following its enactment.

Congress went beyond pure information strategies when it passed the Unfunded Mandates Reform Act of 1995.. It strengthened requirements for CBO to estimate the costs of all major legislation reported by committees affecting both state and local governments and the private sector. It also required executive agencies to review the costs of mandates before they issue regulations, a process that was already largely in place due to Presidential orders. Most importantly, it provided a point of order that can be raised by any member against a bill reported out of committee that CBO estimates is an unfunded mandate with major costs.

Title 1 affecting the Congressional enactment of mandates has achieved some modest results in deterring or modifying proposed mandates thanks to the point of order

provision. Taking a cue from federal budget points of order, it enabled mandate opponents to raise a point of order against proposed unfunded intergovernmental mandates in pending legislation under consideration by the Congress. The point of order does not prevent mandates from being enacted since it can be overridden in each chamber, but it does promote accountability by prompting a separate vote on the issue of mandating itself. As such, it was not an impenetrable barrier, but more of a "speed bump" that could potentially embarrass mandate proponents and rally opponents.

In the 20 years since the advent of the Act, numerous cost estimates were prepared by CBO for both private sector and intergovernmental mandates as shown in Table 1. The table shows that mandates covered under the Act appeared in 12 to 15 percent of major legislation reported by committees. Relatively few bills had fiscally significant mandates, but the most important ones had significant fiscal effects.

Table 1, Cost estimates prepared under UMRA, 1996-2016

	Total cost estimates	Total with mandates	Total major mandates
Intergovernmental	10.932	1357	107
Private Sector	10,810	1714	394

Source: Robert J. Dilger and Richard S. Beth, *Unfunded Mandates Reform Act: History, Impact and Issues* (Washington, D.C.: Congressional Research Service, 2016)

The actual effect of points of order on congressional behavior can be achieved through several pathways. The first involves the actual raising of points of order by members to stop mandates in their legislative tracks.. This pathway has not been particularly productive from the state and local standpoint – a CRS report found that as of January,

2016, 60 points of order had been raised in the House and 3 in the Senate since the passage of UMRA. The point of order was sustained only one time in the House and twice in the Senate – both on bills raising the minimum wage votes.

The second pathway is where the CBO cost estimate and the potential for a point of order work as a deterrent to prompt mandate advocates to temper or withdraw their proposals. This certainly has worked in recent years in several notable occasions. For instance, legislation reported out of the House Ways and Means Committee would have narrowed the authority of states to impose taxes on businesses that lacked physical nexus in their states. (HR 1956, Business Activity Tax Simplification Act) When CBO estimated annual revenue costs exceeding $3 billion over time, the leadership of the House was persuaded to pull the bill from the calendar.[3] However, this "worked" only as part of an effective state and local lobbying campaign that adroitly used the CBO estimate to sidetrack the proposed tax preemption. More broadly, of 59 mandates above the point of order threshold proposed in late 1990's, 9 were amended before enactment to reduce their costs below the threshold.[4] Thus, the efficacy of the point of order stems at least in part from the shame that can still be mustered when legislation can be labeled as violating the state and local fiscal commons.

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Having said this, we must also acknowledge one major weakness - the limited coverage of UMRA, exempting many of the mandates passed in the past years. Specifically,

[3] Congressional Budget Office, Cost estimate, July 11, 2006.

[4] U.S. Government Accountability Office, *Unfunded Mandates: Analysis of Reform Act Coverage* GAO-04-637, May, 2004.

UMRA primarily covers only statutory direct orders, excluding most grant conditions as well as preemptions whose fiscal effects fall below the threshold; and statutory direct orders dealing with constitutional rights, prohibition of discrimination, national security, and social security are among those excluded from coverage. Moreover, the CBO cost estimate requirements do not generally apply to appropriations bills or floor amendments which have become increasingly prevalent ways to pass legislation in recent years. Prominent mandates of recent years were not considered to be unfunded mandates under the Act including the No Child Left Act, the Help America Vote Act, and a portion of the Real ID Act requiring states to impose a new national ID as part of their drivers licenses.

Title II dealing with administrative rule making has had little additional impact on agency behavior. In addition to the exclusions from UMRA coverage cited above, additional activities are exempt from Title II coverage including rules issued by independent regulatory agencies, rules issued without a notice of proposed rulemaking and rules such as the Clean Air Act whose underlying statute prohibits the consideration of costs. Moreover, revenue preemptions are not considered mandates for purposes of Title II.

GAO found that these exemptions excluded 80 of 110 economically significant rules from UMRA cost estimates during the first several years of UMRA's implementation. The exclusion for federal grant conditions constituted nearly 40 percent of these exemptions. Moreover, for those rules where UMRA applied, agencies typically were already providing cost estimates under Executive Order 12866 or other executive orders.

Reforming UMRA

Mr. Chairman, the foregoing suggests that UMRA has worked better than naysayers might have predicted, but it nonetheless fails to provide sufficient accountability and incentives to address unfunded mandates within both legislative and executive branch deliberations. The Unfunded Mandates Information and Transparency Act (HR 50) passed by the House in 2015 and its Senate companion (S189) contain many useful changes that promise to enhance coverage and promote consultation. In the intergovernmental area, the bills expand coverage to include mandates issued by independent regulatory agencies, regulations issued without advanced notice of proposed rulemaking, and the costs of conditions of federal assistance requested by the chair or ranking member of a committee.

The coverage of conditions of grants is an important change for intergovernmental mandates. The UMRA adopted a view of grants similar to that of the courts – grants are technically voluntary and thus do not constitute the imposition of federal rules and requirements on recipients. In recent years, the Court has placed limits on the use of direct federal power to directly order or "commandeer: the states in achieving national goals, but, until recently, it has been reluctant to limit grant conditions and the spending power in general. The argument is that states are grants are voluntary agreements freely entered into by the state government that vitiates their coercive nature.

Thus, it is not surprising that most federal mandates are carried out not by direct order but by conditions of aid. With federal assistance approaching nearly $700 billion, the federal government uses the Trojan Horse of grants to project a wide range of requirements on the states and localities. When one looks at recent controversies between federal and states governments, it is the grant conditions that states protest most vehemently - No Child Left Behind, Medicaid mandates predating health reform, and emergency management requirements are examples.

The Supreme Court's historic decision upholding the President's health reform rebuffed the new Medicaid health reform mandates to expand coverage to additional populations, arguing that these grant conditions have become equivalent to direct commandeering of states by federal officials in the service of national goals. [5] In writing for the Court, Justice Roberts opined that the sheer amount of funds at risk and the potential loss of not only the new Medicaid matching funds but, possibly, existing Medicaid funding ratchets up the stakes and makes it virtually impossible for states to resist the federal carrot. The Court's decision failed to provide bright lines to distinguish which kinds of grant conditions fall into the prohibited category but it appears that the imposition of new requirements that put long standing funding streams at risk are particularly suspect under this new doctrine. The Congress should follow the Court's new doctrine by placing grant conditions under greater scrutiny.

[5] National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services 648 F 3d 1235

Another important intergovernmental issue covered by the legislation involves enhancements to consultation by federal agencies with affected parties before issuing rules. OMB has guidelines for federal agency consultation with state and local governments under UMRA, including requirements for early consultation before the issuance of proposed rules and seeking out state and local views on costs, benefits, risks and alternative approaches to compliance. [6] However, most observers including several OMB directors themselves, would characterize consultation as inconsistent or haphazard. This was true both for the initial development of regulations as well as the retrospective reviews of existing regulations, as reported by GAO. [7] The previous history of intergovernmental consultations reveals that federal agencies were highly inconsistent, but also that state and local groups often did not respond to the opportunity to provide their views on regulatory proposals. [8]

One way to strengthen intergovernmental consultation would be to centralize consultation in an Office of Intergovernmental Advocacy. Patterned after the Office of Advocacy in the Small Business Administration, this organization could provide more systematic intervention at earlier stages in agency rulemaking than is the case today. As with the SBA Office, the intergovernmental advocate could undertake the following functions

--Provide more systematic data on intergovernmental finance and costs for agencies to utilize in regulatory cost analysis

[6] OMB, *2015 Draft Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities*, October, 2015, p. 62.
[7] GAO, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July, 2007
[8] Advisory Commission on Intergovernmental Relations, *Improving Federal Grants Management*, A-53, February, 1977.

--Deliver training to agencies in measuring state and local regulatory costs and benefits

--Intervene and engage with federal agencies at pre-proposal stages

--Engage with state and local governments to ascertain positions and find agreement on proposals

Conclusions: The Need for Stronger Intergovernmental Institutions

The Unfunded Mandates Reform Act illustrates the potential, and limitations of institutional reform. It had a modest impact by raising the federalism dimension in policy deliberations that still attracts residual support from members of Congress. However, let me be quick to add that while a federalism dimension may be still alive, it is nonetheless weak and easily trumped by other national values and interests.

Strengthening UMRA should be high on the congressional agenda. Yet, even a stronger set of procedures needs the backing of institutions that reinforce information and incentives to focus on intergovernmental consequences of national policy. However, it is sobering to report that the institutions that grew up with the evolution of cooperative federalism have largely been eliminated.

The most important and preeminent institution was the Advisory Commission on Intergovernmental Relations (ACIR), created in the late 1950s during the Administration of President Eisenhower. With members from all levels of government appointed by the

President and the Congress, its research and policy recommendations found their way into path-breaking federal grants legislation including the Intergovernmental Cooperation Act of 1968, the Intergovernmental Personnel Act of 1970, the General Revenue Sharing program enacted in 1972, and the unfunded mandates reform legislation passed in 1995. The ACIR was also instrumental in Presidential federalism initiatives, with major involvement in Nixon Administration's block grant proposals and in the Reagan Administration's New Federalism program turn-back and sorting out proposals.

The ACIR was joined by other institutions that enabled the emergence of an intergovernmental issue network in Washington. These included a separate grants division in the President's budget office, the Office of Management and Budget (OMB), as well as specific subcommittees on federalism and intergovernmental relations on both House and Senate sides of the Congress, chaired by powerful senior members of Congress such as Senator Edmund Muskie. The GAO also created a unit dedicated to assessing the intergovernmental system for the Congress in the mid-1970's. During the 1980s, state and local groups invested in the creation of an Academy for State and Local Government, which was intended to perform neutral studies on the intergovernmental system that each group could not perform on its own.

This entire edifice crumbled during the 1980s and 1990s. The ACIR was abolished by a Congress seeking short-term budget savings by eliminating smaller agencies and commissions. The OMB eliminated its grants office in the early 1980s, ironically at the time when federalism received high level attention from President

Ronald Reagan as part of his broad scale reform intended to reallocate and devolve powers from federal government to the states. The Congress abolished its federalism subcommittees. The state and local groups abandoned their Academy, as internal disagreements on priorities and interests among them caused an independent neutral group to lose support.. The GAO and CBO retain their independent analytic units devoted to unfunded mandates and intergovernmental grants, however.

What are the common denominators behind the collapse of the intergovernmental institutional edifice in Washington? Certainly, the shifting landscape of the policy process played a role. The rise of polarized parties, confrontational politics, and interest group advocacy served to erode support for institutions that sought out the vital center and promoted improvements in relationships among governments.. Yet I fear that these developments also reflect the eclipse of federalism as a fundamental rule of the game in Washington, DC. Real progress on unfunded mandates reform is critically dependent on the reinvigoration of intergovernmental institutions within both the Congress and the Executive Branch to rekindle the priority placed on our federal system in the inner councils of government. This is a heavy lift indeed and one that will require a major initiative by those in the Adminstration, the Congress and the state and local community. Hearings like the one today are a vital first step in this project.