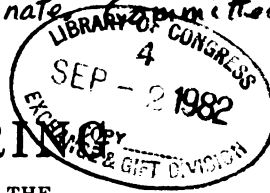


STATE IMPLEMENTATION OF FEDERAL STANDARDS

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HEARING

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INTERGOVERNMENTAL RELATIONS
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PART 1

THE CLEAN AIR ACT

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reasons of interstate competition but for other more technical and diverse reasons.

Our national automobile manufacturers quite understandably find such an outcome unworkable. So the Federal Government has again preempted a State prerogative with respect to air pollution regulation. In this series of hearings we want to examine other instances where the requirements of an open interstate market in commerce require this form of Federal preemption.

I hope these comments give our witnesses and guests an idea of where we start this new journey in intergovernmental relations. It is a relatively uncharted area and the value of this oversight work has yet to be determined. We rely on your assistance to inform and enlighten us.

We will be hearing today from State and local officials who have worked within this regulatory system and from scholars who have pondered the implications of a variety of Federal regulatory systems involving State and local governments. Unfortunately, we don't have anyone here from Idaho because I didn't see the story until this morning. However, we do have with us Dr. Alan Gitelson of Loyola University of Chicago and Dr. Melvin Dubnick of Kansas University and a variety of other people who will be introduced during the course of the afternoon.

If I may start with the two gentlemen whom I have already introduced, at least by way of their association, both of them are professors of political science. When I said there was little scholarly work done, I wanted to except these two gentlemen from that. We welcome both of you here today. Unless you have arranged otherwise, Dr. Gitelson, you may go first.

**TESTIMONY OF MELVIN J. DUBNICK, ASSOCIATE PROFESSOR OF
POLITICAL SCIENCE, UNIVERSITY OF KANSAS; AND ALAN R.
GITELSON, ASSOCIATE PROFESSOR OF POLITICAL SCIENCE,
LOYOLA UNIVERSITY OF CHICAGO**

Mr. GITELSON. Dr. Dubnick will read our statement. Then we will both respond to questions.

Senator DURENBERGER. All right.

Mr. DUBNICK. Mr. Chairman, I am Melvin Dubnick. On behalf of myself and my colleague, Dr. Gitelson, I want to thank you for the opportunity to testify on this subject. Our testimony is based on the research Dr. Gitelson and I have been conducting on intergovernmental relations. The work we will summarize in this brief statement takes up over 30 single-spaced pages. Therefore, what we present here is merely an overview of that work. We hope you and others in the room will have an opportunity to read the more detailed presentation.¹

Intergovernmental relationships have emerged and evolved slowly over the past two centuries. It is only through hindsight that we can see the forms and directions Federal relations have taken. As two analysts of intergovernmental relations, we have focused our attention on recent developments in a variety of regulatory policy arenas. We found

¹ See p. 109.

not only a significant shift in the use of intergovernmental relations, but also a strong indication that the very nature of those relationships is undergoing a potentially radical change.

Through most of the 20th century, intergovernmental relations were primarily a means of aiding or enhancing the policy capacities of State and local governments. Grants were provided as a way of transferring funds to desirable policy areas—such as highway and hospital construction, higher education, public health, and other programs. Often conditions were attached, but these typically required administrative or procedural changes—such as the consolidation of similar programs under a single agency, or the development of a civil service system for program personnel. The common theme of these efforts reflected the attitude among national officials that such conditions would help improve State and local government administration in areas where subnational units were the principal policymakers.

It is difficult to pinpoint the moment when the dominant attitude changed. It is clear that sometime during the mid-1960's there was a fundamental shift in perspective. Subnational units began to be regarded as potential "delivery mechanisms" for Federal policy in a number of areas. The intergovernmental relations system was perceived as a "tool box" from which various implements could be drawn in the National Government's efforts to carry out its policies. This development coincided with and complemented both Washington's increasing role in social and environmental policy arenas and its growing reliance on regulatory approaches to public problems.

The means for converting State and local units into delivery mechanisms for national regulatory policies varied from program to program. However, our analysis indicates that four basic forms of intergovernmental relations were used to achieve that end. Two are rooted in the more traditional types of intergovernmental relations: technical assistance and financial aid.

The transformation of these policy tools from means intended to facilitate the traditional tasks of subnational entities to techniques used to recruit State and local officials into the service of national policy implementors was simply a matter of turning "carrots" into "sticks;" or, to use another metaphor, "making them an offer they couldn't refuse." In fact, some of these offers of assistance and aid are structured in such a way that it would be administratively, fiscally, and politically impossible for subnational officials to reject them.

Thus, what often seems voluntary on the surface may actually involve a great deal of coercion and compulsion. For many States in the Midwest and West, the 55-mile-per-hour speed limit exemplifies this approach. However, other examples could be cited.

While we would not wish to understate the role of technical and financial assistance in this new system of intergovernmental relations, it must be noted that the other two means for making State and local officials part of a national policy delivery system may prove both more significant and controversial in the long run. We have called the first of these approaches the "assertion of preemptive capabilities"—or "partial preemption"—and the second "legal conscription."

Under "partial preemption," Congress asserts its exclusive jurisdiction of a given policy area and usually makes an explicit statement

prohibiting unsanctioned State or local activity in the field. Having formally occupied the field, the national policy extends an open invitation for subnational entities to participate in the program if they meet certain substantive, administrative, and procedural conditions. Typically these include mandating that State policies in the area be at least as stringent as Federal policies, and that an acceptable implementation plan be drawn up and approved by the appropriate Federal officials.

In exchange for that participation, State and local officials receive technical and fiscal assistance for both setting up and operating their program agencies. They retain operational jurisdiction over that policy area. Here the archetypical examples are found in the areas of occupational safety and health, pesticide regulation, and policies related to strip mining.

The final approach is, by far, the most revolutionary of the means for obtaining State and local government cooperation in implementing national policies. It minimizes both the voluntary nature of subnational unit participation and the substantive discretion provided for the State and local officials who are involved. In fact, this mechanism challenges the very essence of Federalism as a system of separate legal jurisdictions. It relies upon a unitary vision involving hierarchically related central and periphery units. It goes beyond preemption. Focusing attention on the national scope of a public problem, this approach assumes that policy solutions should determine the relationships between various levels of government.

The logic of this approach allows national officials to mobilize State and local resources on behalf of national policy programs as they see fit. These resources can be mobilized in various ways, but underlying each step in the process is the ability of national officials to formally and legally "draft" those resources into national service. Thus we call this "legal conscription."

The 1970 Clean Air Act Amendments provided the first major instances of this approach. These were followed by similar provisions in the 1972 Federal Water Pollution Control Act Amendments. The legal conscription approach is also evident in the 1978 National Energy Policy Act, particularly in portions of the National Energy Conservation Policy Act and in the Public Utilities Regulatory Policy Act. The specific citations to relevant provisions are provided in our study.

It should be stressed here, however, that while legal conscription mechanisms are "on the books," they have seen rather limited use. For various political, administrative, and economic reasons, national officials have been reluctant to assert the powers provided to them under this approach. Therefore, not only have State and local officials, thus far, been spared the "rod" that is implied in legal conscription, but there also has not been a major test of the constitutionality of the approach.

As noted in our paper, however, legal conscription is still a potentially powerful tool for national officials to use. For the moment, at least, it remains only a "high explosive" in the arsenal of intergovernmental mechanisms that can be used to nationalize regulatory policies.

These changes and developments have a number of implications. Legally and constitutionally, they represent a new challenge to the

tradition of Federalism—a challenge that the Federal concept may not be able to meet. Politically, they provide both costs and opportunities for State and local officials who must contend with this new set of intergovernmental relations. As another scholar in this area has noted, perhaps the most significant cost involved is the possible loss of legitimacy and authority that State and local units will suffer.

Fiscally, budgetary and related policy distortions which were characteristic of the growing categorical grant system of the 1960's and 1970's are likely to be magnified as financially strapped State and local officials undertake the burden of implementing Federal policies.

Administratively, there is little evidence that anything will be gained from these changes. Using the intergovernmental system to deliver national regulatory policies may, in fact, prove self-defeating. We know very little about that system. Our indiscriminate reliance on it is bound to prove frustrating unless we learn more about it and those who are involved in its operations.

Thank you.

Senator DURENBERGER. Thank you both very much.

I have had an opportunity to look at your longer statement, with its numerous attachments, which was delivered at the 1980 annual meeting of the Political Science Association. You have provided—both in this statement and in your testimony today—a very thoughtful description and analysis of the trends toward developing national policy and using a regulatory approach to achieve national goals.

At the present time, however—I just came from a meeting with representatives to the national meeting of the Urban Coalition—we at the Federal Government level are busy cutting, capping, and blocking funds for grants-in-aid, cutting back numerous regulations, and doing a variety of other things. Clearly this is part of our effort to give more careful consideration to what we should and should not be doing.

In this climate of redefining the Federal role, could you expand a little bit on your statement? Under what circumstances is it appropriate for the Federal Government to regulate through the intergovernmental system? Maybe this comes sort of like some little set of criteria, or definitions or whatever?

Mr. GITELSON. Senator, the topic of intergovernmental regulations is a very difficult one to define or discuss in the abstract. In our initial research we have found that under certain circumstances it may be very appropriate to use the intergovernmental mechanism. Under other circumstances it may be less appropriate.

Senator DURENBERGER. Any specific clues, or anything that sort of stands out, as to where it is most appropriate to look at the intergovernmental aspect?

Mr. GITELSON. We can distinguish between two issues in intergovernmental relations: political and technical. I will briefly speak to the political question. Mel might want to discuss the question of technical attributes.

Politically we know that intergovernmental relations represents a rather complex issue: one that is difficult to summarize in a brief period of time. We know, for example, that there are many political questions involved in any intergovernmental program—particularly when

it involves Federal regulations. Local communities desire to subsidize certain programs through an intergovernmental program; yet, at the same time, that desire is tempered once that Federal program has been canceled and the municipality must maintain its own financing for the program. The problems that a local government gets into are enormous, particularly political and fiscal problems.

Mayor Koch, of New York, recently wrote an article outlining the difficulties that occur for a municipality that is initially happy to get involved in regulated intergovernmental programs which provide Federal aid; but then tremendous burdens, fiscal and otherwise, exist for the city once that aid has been cut. Intergovernmental regulations often require financial commitments that State and local governments are often pressed to meet.

Politically, a local unit will, at times, have to choose between funding a necessary local project not funded by the Federal Government and one partially funded by the Federal Government. The strong temptation is for the local unit to get as much outside fiscal aid as possible. The matching of that aid with local funds is often at the cost of financing local programs which will not attract outside aid. This is not to argue, obviously, against Federal aid on a variety of problems, but simply to suggest that the Federal Government, through its regulatory programs and via preemption and legal conscription, can strongly influence local spending patterns. On the question of technical differences, we can suggest a number of things.

Mr. DUBNICK. Right. We have been looking at various alternatives to intergovernmental relations as a delivery mechanism. We are finding that it really is not a matter of alternatives to it but different variations of using intergovernmental systems.

We have been finding, for instance, that there are certain areas where there is a high degree of consensus, at least among those involved, about the desirability for regulation and for a high degree of technical expertise in the area where everyone is pretty certain about cause-effect relationships between regulating and the result.

An interesting but mundane example is weights and measures, which is constitutionally a function of the National Government. It is one of the ancient regulatory systems of the Federal Government. It is so successful that few really realize that there is regulation going on. If you look into the weights and measures system which the National Bureau of Standards heads, what you find is an intergovernmental system—a very highly developed intergovernmental system. It is based not only on legal legitimacy where local enforcers of weights and measures believe that the Federal Government has a right to set standards, but also on a strong technical legitimacy—an expertise basis for the legitimacy. So the National Bureau of Standards probably doesn't even look at itself as a regulatory agency, and it is extremely successful in that regard.

There are also areas where there is a low degree of consensus and a high degree of certainty, such as the 55-mile-per-hour speed limit, for which the intergovernmental system has been designed differently in order to deliver the regulation.

Senator DURENBERGER. Can you also share with us some clues on where it is most appropriate to use what you call assertion of preemptive capabilities versus your prescriptive legal conscription example? You were describing the system, I know, as it exists now.

Mr. DUBNICK. Right.

Senator DURENBERGER. I am going beyond that and saying, are there some specific clues as to whether one or the other approach might be most appropriate?

Mr. DUBNICK. I think one way in which it has been used, which is probably beneficial to the system, is in the area of environmental protection—not necessarily with the Clean Air Act—by getting States to start their own programs. This is done by the Federal Government preempting the system and then turning around and making it very desirable for States to adopt their own programs which are efficient and effective. That may be the best place for it.

What happens, however, or what seems to happen, is that it doesn't stop there. Once the States do have a program in place, as I think we will hear in later testimony, they generally find that the Federal Government doesn't stop imposing new requirements and new standards. It continually tries to make the State be sure it is being honest, or at least living up to the standards which the Federal Government is continually placing on it.

Senator DURENBERGER. Where do we justify preemption? If you can recall, in my opening statement I talked about interstate competition to attract business and the impact of this on interstate commerce. We also have such things as interstate transportation. I am trying to see if you can give us some guidance on what principles, in your mind, might justify preemption by the National Government.

Mr. DUBNICK. It is difficult to come up with a specific answer. Each area really has its own unique history and its own unique circumstances. Again, how the system is designed to handle that would depend on those circumstances.

Senator DURENBERGER. Also in my opening remarks I made a distinction between mandates, crosscutting requirements, and State implementation—which around here is a very familiar typology. Could you relate your own typology to the one I have used? In your view, is the National Environmental Policy Act, which is a crosscutting requirement, really very different from the Clean Air Act where we are requiring State implementation as a form of intergovernmental relations? Don't they both sort of come out about the same way, whether you use the crosscutting requirement of NEPA or the State implementation which is inherent in the Clean Air Act? Aren't they about the same thing?

Mr. GITELSON. I think we can suggest that there are similarities. One of the points we wanted to suggest within the context of our paper, particularly at the close of it—and this may be somewhat off your question, but it is relevant to the general issue—is that the Clean Air Act and other acts in some ways encompass all of the characteristics of our particular model.

We are suggesting that within those characteristics we can see signs of technical assistance and fiscal assistance in terms of grants-in-aid. Under certain circumstances we see what we call partial preemption and legal conscription. To talk strictly in terms of our model of the Clean Air Act as being simply one of exemplifying legal conscription is misleading. Developmentally and within the context of the way policies are carried out, the Clean Air Act really cuts across a variety of different models in terms of best describing how it func-

tions, how it mandates State policy, what its impact or effect is on State acts regarding environmental protection, and a variety of other areas.

Mr. DUBNICK. If I could just add something. There is something we tried to stress in our statement and I want to stress it again. There is a process cost and an authority cost to the choice of mechanism which is used. Yes, I think there is a relationship between the way NEPA affects State and local governments and the effects of other kinds of acts in the way in which they get State and local governments to do things. Trying to compare them on the basis of their ultimate effects, I think, is losing sight of the fact that there is a process effect which goes on.

The State and local governments which voluntarily do something in light of technical or financial assistance, with no strings attached, are probably not going to suffer the costs in legitimacy and authority that they would suffer, let's say, if they were sued in order to carry out certain action. So the end result may be the same; but the process cost—the authority cost, as Professor Hanus of American University puts it—can be significant.

I think that cost oftentimes is ignored when we indiscriminately just say let the State and local governments do it and it is well for them to do it. There has to be some consideration of those differences.

Senator DURENBERGER. In your view, is the legal conscription approach to clean air necessary to achieve State and local participation in the pollution control effort?

Mr. GITELSON. Again I think we have to suggest that under some circumstances it is appropriate and under other circumstances less appropriate. We obviously need more research in this field.

Legal conscription is a useful mechanism and has been a useful mechanism in any one of a number of States. We feel that it probably has to be somewhat modified. One has to take into account regional and statewide differences. There has to be some form of appeal system within these particular regions and/or States. For the most part the Clean Air Act—and I think the testimony from the witness from Minnesota will support this—has been very useful in the context of cleaning up a variety of pollution problems. But, on the other hand, there is still a need for more State input.

However, we are suggesting in our own research that local municipalities and States are not exactly handcuffed under these regulations. Under any one of a number of circumstances, local municipalities and State commissions can and do have different weapons or tools that they can use to delay or counter Federal regulations across a broad spectrum of issues.

For example, EPA regulations as well as regulations emanating from the National Historic Preservation Act of 1966 have been used by local communities to successfully delay or halt interstate highway programs mandated by the State and Federal governments. In this case, as in others, local communities have been able to use Federal regulations to counter other Federal regulations. Intentionally or unintentionally, we have built into the system tools for local and State governments to use against the Federal Government. Professor Dubnick and I would like to emphasize, however, the need for strong national direction and regulation, through an intergovernmental mechanism, in a variety of

areas including air and water pollution control where problems often cross over municipal and State boundaries and where State and local governments are reluctant to act for fiscal, technical or political reasons. We don't want to suggest that within the context of the legal conscription we have totally tied the hands of local municipalities.

Mr. DUBNICK. If I can carry the conscription label a little bit further, to the military conscription of a decade ago. The draft, in that sense, opened up all sorts of alternatives. Legal conscription, even though it has never been enforced, has been put there as a potential high explosive; it is there. I don't think it has been used. I can't find a case in which it has actually been used. It has not been tested in the courts. It may prove to be unconstitutional.

I think the fact that conscription is there and that there are alternatives where State and local governments, seeing that they will have to participate anyway, might as well take the grant money and do it, might as well take the opportunities offered by the legislation—the Clean Air Act and other laws—and work through those mechanisms rather than wait for EPA or another unit to force them to do something. In one act the Attorney General has the power to sue a State without getting any OK from anybody. Again, I cannot find an instance where it was used; but like the military draft, it is there. Knowing it is there will itself have an impact.

Senator DURENBERGER. One last question. I don't know much about the case, but I read in the Washington Post this morning about Idaho giving up EPA control. The thought occurred to me that, in the context of legal conscription, the case proves one of the shortcomings in the conscription sort of a situation. Unless the State, or the subnational unit—as you were calling it—has some particular self-interest involved, or has some substantial financial support from the Federal Government, it seems to be relatively easy for them to just avoid the draft and go to Canada—whatever the case may be—even though they are going to have to face some kind of legal sanction.

Mr. DUBNICK. That depends on the change in political environment. EPA may not want to take issue with Idaho's stance right now. Here is where the political factors have to be taken into account. Legal conscription is like having one alternative, and that is to shoot the person you are dealing with. There aren't any other alternatives to that tool that the Federal Government has at its disposal. That probably accounts for the fact that a lot of agencies which do have legal conscription capabilities are very reluctant to even think about it, let alone implement it.

Mr. GITELSON. I gathered from this morning's paper that EPA is moving slowly on this process. This does not mean EPA has ruled out more extensive action through the use of legal conscription. It does not suggest that it may not reach the point where EPA may take more fundamental action against Idaho. I think things will move slowly, but the potential is clearly there on the part of the Federal Government, to implement Federal EPA regulations. The Idaho case also reminds us, indirectly, that in our intergovernmental system, Federal and State laws and regulations can, and often do, conflict with one another. We must begin to study these conflicts and the means by which they can be resolved, for they often cause untold delays in the State implementation process.

Senator DURENBERGER. Thank you.

Senator Danforth?

Senator DANFORTH. No questions.

Senator DURENBERGER. Thank you both very much for your prepared statement, for your responses to the questions, and for your interest in this exotic subject.

Mr. GITELSON. Thank you.

Mr. DUBNICK. Thank you.

Senator DURENBERGER. Our next witness is Mr. David Walker. David is the Assistant Director of the Advisory Commission on Intergovernmental Relations, and a familiar face to this subcommittee.

TESTIMONY OF DAVID WALKER, ASSISTANT DIRECTOR, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Mr. WALKER. Mr. Chairman, members of the subcommittee, let me begin by expressing my appreciation for being invited to testify today. Your topic, intergovernmental regulation, is one of extreme current interest to the ACIR. As you know, we are in the process of embarking on a study of our own in this very difficult area. Thus, while we are more than happy to be able to aid you in your investigation of it, we are, in turn, being aided by these hearings, especially with the testimony being given this afternoon.

In the initial phase of our study of intergovernmental regulation, we have identified, as you have, four fairly new techniques by which the Federal Government regulates the activities of State and local governments. Most of these techniques have emerged in full form over the past decade.

First, there are direct orders, usually judicial and usually grounded in the 14th amendment.

Second, there are crosscutting requirements, on which we have done some fairly extensive research. There are national policy requirements which adhere to the receipt of all or most grants-in-aid, whether or not the purpose of that aid is furthered thereby.

Third, there are crossover fiscal sanctions, which have emerged wholly in the seventies. That is, grant-related "threats" which jeopardize the funding of one or more other programs in the same functional area if the requirements of the principal program are not met. I might say the Clean Air Act of 1970 illustrates this as well as it does the partial preemption issue.

Finally, there is partial preemption, the technique exemplified by the program I have been asked to testify on today. Through the partial preemption technique, the Federal Government, after identifying a national problem, pinpoints a constitutional "hook" on which it can hang its right to control or regulate that problem. That hook can usually be found in the interstate commerce clause. Of course, regulating through the commerce clause is as old as the Constitution itself.

What makes the partial preemption approach new and different is that the Federal Government, in effect, forces the States to administer a national policy—an act, which under other circumstances, would probably constitute a violation of the 10th amendment—by asserting that if the States don't enforce certain standards, then the Federal Government will. The Clean Air Act of 1970 is probably the best example of partial preemption, although there are earlier case