

FEDERALISM IMPLICATIONS OF TREATING STATES AS STAKEHOLDERS

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

FEBRUARY 27, 2018

Serial No. 115-68

Printed for the use of the Committee on Oversight and Government Reform



Available via the World Wide Web: <http://www.fdsys.gov>
<http://oversight.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

30-397 PDF

WASHINGTON : 2018

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FEDERALISM IMPLICATIONS OF TREATING STATES AS STAKEHOLDERS

Tuesday, February 27, 2018

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The committee met, pursuant to call, at 10:04 a.m., in Room 2154, Rayburn House Office Building, Hon. Gary Palmer presiding.

Present: Representatives Palmer, Gowdy, Duncan, Jordan, Sanford, Amash, Gosar, Meadows, DeSantis, Walker, Blum, Hice, Grothman, Hurd, Mitchell, Maloney, Norton, Lynch, Connolly, Kelly, Plaskett, Krishnamoorthi, Raskin, Welch, and DeSaulnier.

Also Present: Representatives Bishop, Gonzáles-Colón, and Zeldin.

Mr. PALMER. The committee will come to order. Without objection, the chair is authorized to declare a recess at any time.

I would like to thank Governor Herbert, Governor Martinez, and Governor Otter for the time they are taking today to share important testimony with the committee and the Speaker's Task Force on Intergovernmental Affairs.

The committee and task force have been engaged in a review of federalism, identifying opportunities to improve the partnership between the Federal Government and State local counterparts. Your testimony will serve an important piece of this narrative as we look toward reform.

It is my understanding Governor Herbert must leave by noon, so I will keep my statement short to maximize time for questions, and I will encourage our members to be sensitive to the time. And if there is a question toward the end of the five minutes that would require a longer answer, I would encourage the witnesses to provide the answer in writing.

To the extent members do not need to use their full five minutes, please be mindful of the Governor's time. We will work our way through questions quickly to accommodate everyone's schedule.

We would like to welcome those members of the task force for joining us today. I ask unanimous consent to waive members of the Speaker's Task Force on Intergovernmental Affairs for today's hearing. Without objection, so ordered. I will also ask unanimous consent to insert statements from the National Governors Association and Western Governors Association into the record. Without objection, so ordered.

Mr. PALMER. I now recognize the ranking member, my friend Mr. Connolly, for five minutes for his opening statement.

Mr. CONNOLLY. I thank the chair, and I thank my friend Mr. Bishop in particular with the intergovernmental task force we both serve on, and I want to welcome our distinguished guests, the three Governors, for joining us this morning.

We are conducting this hearing in collaboration with the Speaker's Task Force on Intergovernmental Affairs. As a member of that task force, I have been glad to work with Mr. Bishop and our colleagues over the course of the past year on several meetings and events centered around the topic of improving coordination among all of the levels of government.

One thing our task force has done well is to promote an intergovernmental dialogue that incorporates all perspectives. While I would have preferred to include in on today's panel a local government perspective as well as the State perspective with equal billing, I hope we can invite in the near future American mayors and local government officials to testify to the full committee on this topic. And I was gratified that Chairman Gowdy agrees with that request. This is a dialogue best had without segregating the different levels of government in a way that promotes the very divisions we seek to address.

In the spirit of promoting intergovernmental collaboration, I intend to introduce the Restore the Partnership Act to establish the National Committee on Intergovernmental Relations, a successor to the Advisory Commission on Intergovernmental Relations that operated from 1959 through 1995. The commission will promote mechanisms for fostering better relations among the levels of government; provide technical assistance to the Federal, executive, and legislative branches in the review of proposed legislation; recommend the most desirable allocation of government functions, responsibilities, and revenues among the various levels of government; and help coordinate and simplified tax laws and administrative policies to achieve more orderly and less competitive fiscal relationship among the levels of government.

As a former local government official who served for 14 years on the Fairfax County Board of Supervisors, including five years as the chairman of the county, I have witnessed the good, the bad, and the ugly of intergovernmental relations. In our community, we led efforts to improve regional air quality enabled by strengthened Federal clean air regulations. We also dealt with the burden of unfunded mandates on localities like those imposed at the Federal level by the No Child Left Behind Act.

And in Virginia, we adhere unfortunately to the Dillon Rule, which means local governments in my State only have those powers expressly granted to them. The Dillon Rule severely constrains the ways in which local governments can raise revenue to pay for public safety, public education, and mandates placed on localities by both the Federal and State Governments, and I think that is really important. Not all of the problems emanate from Washington. Many of them from the local government perspective emanate from State capitals.

The revenue burden is why those of us from Dillon Rule States are particularly offended by the Trump budget and the administration's so-called infrastructure plan. Undergirding both is an assumption that the Federal Government defunds an activity or

shifts the funding burden down to State and local governments and that there are untapped and unlimited revenue reserves that will fill the vacuum left by the Federal Government.

The infrastructure plan, for example, would be paid for by taking money from Federal transit investments, and the plan would flip the Federal highway funding match on its head by requiring local governments to come up with an 80 percent of project costs as opposed to the current 20 percent. A Penn Wharton Budget Model team found that the plan would likely lead to an additional at best \$30 billion in State, local, and private spending, 98 percent less than the \$1.3 trillion the administration has claimed would be raised by the plan.

The President's budget would compound the infrastructure investment crisis by retreating on Federal funding for things like Metro and the types of infrastructure loans, TIFIA loans, that have helped fund transit throughout the United States. The budget also sweeps the rug out from under local affordable housing initiatives by eliminating entirely the Community Development and Community Services Block Grants, as well as the HOME Investment Partnership Program. These housing cuts alone would cost my communities in Fairfax and Prince William counties right across the river nearly \$10 million, local government, in affordable housing investments. The proposed cuts would expose the conservative panacea of block granting as potentially a more expedient method of cutting Federal investments in local communities.

I look forward to our discussion today and hope it is not bound by rigid ideology. We should be mindful that not all unfunded mandates consist of the Feds putting mandates on States. All 50 States guarantee their citizens the right to a public education, but it is often local governments that bear the majority of the financial burden for public education. In my community, for example, 80 percent of the cost of public education is borne by local taxpayers, not by the State.

Additionally, not all regulations or mandates are bad. There are Federal regulations that ensure everyone's right to a quality education. This Federal intervention was necessitated by State- and local-level intransigence in the past. This equality was hard fought for, and we should never again open the door to the abuse and discrimination that preceded it.

Finally, we cannot ignore that a lack of regulation can be a form of an unfunded mandate in itself. For example, pollution from a State that lacks strong environmental protections can and will drift into neighboring States, creating air-quality issues and health problems that impose costs on both private and public sectors. Through the work of this committee and the task force, I hope we can create bipartisan support for unfunded mandate reform and find broad agreement that the Federal Government can and should improve its coordination and collaboration with State, local governments, and tribal governments. I hope the discussion today furthers our work towards those ends.

And I thank you, Mr. Chairman, for calling us together for this hearing.

Mr. PALMER. I thank the gentleman.

I am now pleased to introduce our witnesses, the Honorable Gary Richard Herbert, Governor of the State of Utah; the Honorable Susana Martinez, Governor of the State of New Mexico; and the Honorable Clement Leroy Otter, Governor of the State of Idaho and a former Member of Congress and the old '70's TV show Welcome Back Kotter, welcome back Otter. Welcome to you all.

Pursuant to committee rules, all witnesses will be sworn in before they testify. Please rise and raise your right hand.

[Witnesses sworn.]

Mr. PALMER. The record will reflect all witnesses answered in the affirmative. Please be seated.

In order to allow time for discussion, please limit your testimony to five minutes. Your entire written statement will be made part of the record. As a reminder, the clock in front of you will show you your remaining time. The light will turn yellow when you have 30 seconds left and red when your time is up. Please also remember to press the button to turn your microphone on before speaking.

Our first witness to give testimony will be Governor Herbert from Utah.

WITNESS STATEMENTS

STATEMENT OF HON. GARY RICHARD HERBERT

Governor HERBERT. Well, thank you. And, Chairman Gowdy, Chairman Palmer, Chairman Bishop, Ranking Member Connolly, and members of the committee and the Speaker's task force, I thank you for inviting me here today. I've been speaking about this issue for many years on—about the importance of federalism, what some describe as the vertical separation of powers between the State in the Federal Government, and to me this hearing is a sign of progress.

Often when we talk about federalism, we focus on its constitutional foundation. That's important, but there's a very practical reason for federalism, to create better policy. As States, we've tried a wide variety of approaches to solving specific problems and developed expertise across the spectrum of public policy. When our political culture mistakenly presumes that the greatest expertise resides in Federal agencies, Americans miss out on the lessons already learned by the States.

Today, I'd like to suggest several Federal laws that need to change to respect the separation of the power and responsibility and facilitate better policymaking. First, I would like to point out that laws and rules are poor substitutes for cultural norms, and what we really need is a cultural change within the Federal Government. Congress and Federal agencies must stop viewing States merely as—State input as merely a box-checking exercise rather than the genuine attempt to learn from what we're doing.

Some infractions of federalism are process problems. The U.S. Code is littered with suggestions that Federal agencies consult with States as simply one among many stakeholders. For example, the Water Resources Development Act suggests that the Secretary may consult with key stakeholders, including State, county, and city governments. Similar language is found in the National Historic Preservation Act, the Energy Policy Act, and many, many more.

And even as the title of today's hearing implies, the States are—States are not stakeholders. We're sovereign governments, partners who have been involved in—should be involved at the beginning of and throughout the policymaking process. The boilerplate language of these laws should be amended to reflect that reality.

In the same vein, the National Environmental Policy Act, NEPA, requires a Federal agency to work with States to develop various alternatives and an environmental impact statement but also allows the agency to ultimately ignore input from the States. Sometimes the NEPA process feels like a little more than an exercise in generating high-quality paperwork. The law should be amended to give States not just a voice but a vote in the selection of a NEPA alternative, a change that would make Federal land management in the West far more democratic and responsive to the voters.

States should also have a more substantive role in execution. The Endangered Species Act authorizes the U.S. Fish and Wildlife Service to write management plans, designate critical habitat, and impose land-use restrictions. This doesn't make necessarily sense to me. Utah's Division of Wildlife Resources is staffed with some of the best biologists in the field, who have a profound knowledge of Utah's ecology and wildlife. There is no good reason States shouldn't take the lead in species recovery.

I don't want to leave you with a completely negative picture. We are currently enjoying a season of good relationships with many Federal agencies, many of whom are trying to push decision-making back down to the States, and that is refreshing, though it does illustrate what I said earlier about the importance of a culture of cooperation with the States. Good cooperation should not depend on a particular official or administration; it should be simply the way things are always done, regardless of who is currently in power.

Again, I think we are making progress. Yesterday, several of my colleagues and I met with Speaker Ryan and later with Minority Leader Pelosi. Representative Pelosi quoted—reminded all of us of the famous quote of Judge Brandeis who said States of the laboratories of democracy, and she said let's let States help lead in developing good policy. I couldn't agree more.

I also added another famous quote that most of you know about our Father of our Constitution James Madison who, in talking about in trying to ratify the Constitution and alleviate the fears that the States had about this new stronger Federal Government said to the States not to worry, Federalist 45, it's an interesting read and it's a short one so it won't take a long time, but he said don't worry about the Federal Government because the powers we've given the Federal Government are few and defined, article 1, section 8 of the Constitution. He went on to say the powers we've given to the States, though, are numerous and indefinite.

We need to get back to the vision of our Founding Fathers. We do need to change the culture and the thought process. We the American people are asking you the Federal Government to do more than your responsibilities would entail, more than what our Founding Fathers expected you to do. Rather, they should be—in fact, if they have problems and issues, they should first ask the States and their local governments and see if they can find a solution to the problem. We should get back to asking the States. As

I said in my initiative as chair of the National Governors Association three years ago, the States, which are closer to the people, much more responsive to the people, quicker to act, and doing it less expensively and more effectively, are where in fact we should be working. States are finding solutions and improving people's lives.

Thank you. I look forward to your questions.

[Prepared statement of Governor Herbert follows:]

Governor Gary R. Herbert
House Committee on Oversight and Government Reform
Speaker's Task Force on Intergovernmental Affairs
"Federalism Implications of Treating States as Stakeholders"
Feb. 27, 2018

Chairman Gowdy, Chairman Bishop, Ranking Member Cummings, and members of the Committee and the Speaker's Task Force, thank you for inviting me here today. I have been speaking for many years about the importance of federalism—what some describe as the vertical separation of powers between states and the federal government—and to me this hearing is a sign of progress.

Often when we talk about federalism we focus on its constitutional foundation. That's important, but there is a very practical reason for federalism: *to create better policy!* As Justice Brandeis said, states are the "laboratories of democracy." We've tried a wide variety of approaches to solving specific problems and developed expertise across the spectrum of public policy. When our political culture mistakenly presumes that the greatest expertise resides in *federal* agencies, Americans miss out on the lessons already learned by states. Today I'd like to suggest several federal laws that need to change to respect this separation of powers and facilitate better policy-making.

But first, I should point out that laws and rules are poor substitutes for cultural norms, and what we really need is a *cultural* change within the federal government. Congress and federal agencies must stop viewing state input as merely a box-checking exercise rather than a genuine attempt to learn from us.

Some infractions of federalism are process problems. The U.S. Code is littered with suggestions that federal agencies consult with states as simply one among many stakeholders. For example, the Water Resources Development Act suggests that the "Secretary may consult with key stakeholders, including State, county, and city governments . . ." Similar language is found in the National Historic

Preservation Act, the Energy Policy Act, and many more. As the title of today's hearing implies, *states are not stakeholders!* We are sovereign governments, partners who should be involved at the beginning of and throughout the policy-making process. The boiler-plate language of these laws should be amended to reflect that reality.

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I don't want to leave you with a completely negative picture. We are currently enjoying a season of good relationships with many federal agencies, many of whom are trying to push decision-making down to the states. That is refreshing, though it illustrates what I said earlier about the importance of a *culture* of cooperation with states. Good cooperation shouldn't depend on a particular official or administration; it should be simply the way things are always done, regardless of who is currently in power.

Let me end by again emphasizing that federalism is not simply an academic concept but a better way to set policy. I appreciate your interest in removing some

of these barriers to cooperation and ultimately helping us improve the lives of the people you and I serve.

Thank you, and I look forward to your questions.

Mr. PALMER. I thank Governor Herbert.
Governor Martinez, we look forward to your testimony.

STATEMENT OF HON. SUSANA MARTINEZ

Governor MARTINEZ. Chairman Gowdy, Ranking Member Connolly, Task Force Chairman Bishop, and members of the committee and the task force, I am very grateful for this opportunity to speak with you today about the balance of power between the States and our Federal Government.

As Federal legislators, you all face an incredible challenge in finding solutions that work for a nation of 320 million people in urban, rural, and frontier areas spread over 3.8 million square miles. In fact, our nation's incredible geographic and human diversity makes finding a cookie-cutter solution next to impossible. What works in South Carolina may not work in Virginia. And what works in New Mexico may not work even for our neighbors in Utah, which is precisely why it is imperative the Federal Government recognize the sovereignty of States, work with us, and allow us to lead and to innovate. When you do, great things really do happen.

The New Mexico Human Services Department implemented our State's Medicaid managed care program, Centennial Care, in 2014 under a demonstration waiver granted by the Centers for Medicare and Medicaid Services. Through this innovative program, managed care organizations administer a full array of services to New Mexicans through an integrated model. Care coordinators across the State help to ensure members receive the right services at the right time. New Mexico is a leader in providing home- and community-based services, and we are actually decreasing per-person healthcare costs. This innovation and resulting success is possible because the Federal Government allowed New Mexico to design and implement a Medicaid program that works for our State and for our people.

House Resolution 1333 sponsored by Congressman Earl "Buddy" Carter of Georgia would provide us with even more freedom to further improve program efficiencies. When we do not receive that flexibility, inefficient Federal processes tend to have dire consequences that reverberate across my State.

As another example, it takes our Energy, Minerals, and Natural Resources Department just 10 days to review new oil and gas permits, but it takes the Bureau of Land Management in New Mexico an average of 250 days. This delay has led to a BLM backlog of more than 800 applications for permits to drill in Mexico at a cost of approximately \$1.9 million to New Mexico and \$3.4 million to the Federal Government per day. Annually, this amounts to 100—excuse me, to \$710 million for New Mexico and \$1.2 billion for the Federal Government in lost and delayed revenue.

If the BLM were to delegate its oil and gas revenue process to New Mexico and to other Western States for those—for these resources on Federal lands—States like Montana and Utah—it would result in billions of dollars of additional State and Federal revenue.

During my time as New Mexico's Governor, I've seen two different sides of the State-Federal partnerships. At times, regulations and edicts from Washington have brought rigid and formulaic

programs to New Mexico that do not allow us to adapt them to our unique States. That tide seems to be turning as Federal agencies like the Department of Interior and the Department of Transportation are engaging with us to face common challenges. As elected officials, we all strive to deliver the best possible results for those that we represent as well. We do that best when we work together and—constructively and collaboratively as true partners.

And I thank you for this opportunity to speak with you.

[Prepared statement of Governor Martinez follows:]

Written Testimony Of
Susana Martinez
Governor of New Mexico

Before the
United States House of Representatives
Committee on Oversight and Government Reform and
Speaker's Task Force on Intergovernmental Affairs

"FEDERALISM IMPLICATIONS OF TREATING STATES AS STAKEHOLDERS"

February 27, 2018

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As elected officials, we all strive to deliver the best possible results for those we represent. We do that best when we work together constructively and collaboratively as true partners.

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Mr. PALMER. Thank you. Governor Otter, if you would give your testimony.

STATEMENT OF CLEMENT LEROY "BUTCH" OTTER

Governor OTTER. Well, thank you, Mr. Chairman, and I appreciate very much the opportunity to be here. Chairman Rob, good to see you again—Chairman Bishop, good to see you again, and Ranking Member Connolly. It is indeed—members, it is indeed a pleasure to be here today and have the opportunity to appear before you and talk about the relationships between the Federal Government and the Federal Government's creators, the States.

I come to you in my 12th year as Governor of the great State of Idaho. I have approximately 113 days, 13 hours, 27 minutes until I leave office, but then, who's counting? During my tenure, there's been three presidential administrations. At times, they have provided me the opportunity to see federalism at its finest. Idaho has been treated as a true partner with a meaningful voice in national policies and most—that most directly impact all our citizens.

At other times and far too often, I have experienced the kind of dysfunction and heavy handedness from our national government that make a mockery of what the Founders referred to as federalism. In fact, I've seen both interpretations of federalism come into play on a single issue not only during my six years here in Congress but also as my three terms as Governor.

The limited and narrow powers granted to the Federal Government by our Constitution have been expanded exponentially, constantly reaching far beyond those originally enumerated and the central powers relegated through the Tenth Amendment to the dustbin of history. The kind of mission creep is most apparent in Idaho and throughout the West wherever the Federal Government controls access to the enormous and vast swaths of our lands. Instead of being recognized as sovereign States with equal standing in our union and essential interest at stake, when it comes to managing our resources, we find ourselves continually having to ask the Federal Government, "Mother, may I?" And the problem increasingly extends beyond land management to issues as diverse as immigration and health care.

Nevertheless, hope abounds. I want to express my appreciation to Congress and the current administration for working to restore the standing of States as true partners in governance. After years as an afterthought, how we collaborate and develop our own solutions once again matters again.

In Idaho, this rebirth of federalism is resulting in development and application of innovative approaches to addressing shared challenges. With the encouragement of President Trump and the Congress and consistent with our role as the States as laboratories of democracy, I signed an executive order in January of this year directing my Department of Insurance to seek creative ways of improving access to affordable health care coverage in Idaho.

We have seen premiums for the Affordable Health Care Act skyrocket in Idaho over the past three years. As a result, individuals and families are forced to make unacceptable choices: paying for health care or paying for groceries. But encouragement by elimination of the individual mandate and this administration's ex-

pressed support for greater flexibility, Idaho will now have the opportunity for an off-exchange's State plan that provides essential coverage at more affordable rates.

Despite some overwrought arguments to the contrary, our plan actually will complement the ACA. That's because Idaho is requiring that insurance company carriers that offer choice in the State-based plans must also provide ACA-qualified plans. And most importantly, all ACA and State-based plans will be within the single risk pool, thereby broadening the risk and providing for the individual marketplace.

Instead of standing idly by as more and more hard-working Idahoans are priced out or left out of the ACA insurance coverage, we decided to tackle the problem head-on using a first-of-its-kind approach, and we are confident that it will work.

Another good example of our improving relationship with the Federal Government relates to a program known as the Good Neighbor Authority. In 2014, during the last administration, the 2014 Farm Bill authorizes States to lead forest restoration projects on national forest lands. That collaborative, cross-jurisdictional effort is increasing the pace and scale of timber harvest projects in areas prone to insect damage, disease damage, and subsequent wildfire.

Over the next three years, we expect to treat nearly 11,000 acres of Federal Forest Service land using the Good Neighbor Authority, harvesting 70 million board feet of timber and bringing \$14.5 million in revenue. Good Neighbor Authority improves the forest health, reduces fire risk, boosts the rural economy, and pays for itself. It truly is the gold standard for cooperative federalism.

We are similarly encouraged by the Trump administration's commitment to streamlining efficient and costly environmental review process. Decisions too often are being made in anticipation of being sued rather than based on sound science and local conditions.

And finally, we are—continue to benefit from the flexibility that's being offered in Every Student Succeeds Act. Idaho now is empowered to be the architects of our own K through career education in Idaho.

While this recent renewal of classic federalism is welcome and refreshing, there still remains much work, and I appreciate this committee's attention to that work. Again, thank you for the opportunity to testify before you today. Your continuing—and thank you also for your continuing service to the United States of America. And, Mr. Chairman, I stand ready to answer questions.

[Prepared statement of Governor Otter follows:]

**Testimony of C.L. “Butch” Otter
Governor of Idaho
United States House of Representatives
Committee on Oversight and Government Reform; and
The Speaker’s Task Force on Intergovernmental Affairs**

Thank you Chairman Gowdy, Chairman Bishop, committee members and task force members. My name is Butch Otter and I’m governor of the great state of Idaho. It’s an honor to appear before you to discuss the relationship between our state and federal governments.

I come to you in my 12th and final year as governor. I have approximately 313 days, 13 hours and 50 minutes until I leave office ... but who’s counting?

During my tenure there have been three presidential administrations. At times, they have provided me the opportunity to see federalism at its finest. Idaho has been treated as a true partner, with a meaningful voice in national policies that most directly impact our citizens.

At other times – and far too often – I have experienced the kind of dysfunction and heavy-handedness from our national government that make a mockery of what the Framers meant by federalism. Idaho has been treated as if we are little more than a box to check rather than a partner with which to collaborate in the interest of the people we serve.

In fact, I’ve seen both interpretations of federalism come into play on a single issue between my six years in this body and my three terms as governor.

The limited and narrow powers granted to the federal government by our Constitution have been expanded exponentially, constantly reaching far beyond those originally enumerated and essentially relegating the Tenth Amendment to the dustbin of American history. That kind of “mission creep” is most apparent in Idaho and throughout the West – wherever the federal government controls access to and use of enormous swaths of our land.

Instead of being recognized as sovereign states with equal standing in our union and essential interests at stake, when it comes to managing our resources we find ourselves continually having to ask our federal landlords, “Mother, may I?” And the problem increasingly extends beyond land management to issues as diverse as immigration and health care.

Nevertheless, hope abounds. I want to express my appreciation to Congress and the current administration for working to restore the standing of states as true partners in governance. After years as an afterthought, how we collaborate and develop our own solutions matters again.

In Idaho, this rebirth of federalism is resulting in development and application of innovative approaches to addressing shared challenges. With the encouragement of President Trump and Congress, and consistent with the role of states as laboratories of democracy, I signed an executive order in January directing my Department of Insurance to seek creative ways of improving access to affordable healthcare coverage in Idaho.

We have seen premiums for Affordable Care Act plans skyrocket in Idaho over the past three years. As a result, individuals and families are forced to make the unacceptable choice of paying for health insurance or paying for groceries. But encouraged by elimination of the individual mandate and this administration's expressed support for greater state flexibility, Idaho now will allow off-exchange state plans that provide essential coverage at more affordable rates.

Despite some overwrought arguments to the contrary, our plans actually will complement the ACA. That's because Idaho is requiring that insurance carriers that choose to offer state-based plans also must provide ACA plans. And most importantly, all ACA and state-based plans will be within a single risk pool, reducing costs across the individual marketplace.

Instead of standing idly by as more and more hard-working Idahoans are priced out or left out of ACA insurance coverage, we decided to tackle the problem head on using a first-of-its-kind approach. And we are confident it will work.

Another good example of our improving relationship with the federal government relates to a program known as Good Neighbor Authority. The 2014 Farm Bill authorized states to lead forest restoration projects on national forest lands. That collaborative, cross-jurisdictional effort is increasing the pace and scale of timber harvest projects in areas prone to insect infestation and disease that can lead to catastrophic wildfires.

Over the next three years, we expect to treat nearly 11,000 acres of Forest Service land using Good Neighbor Authority, harvesting 70 million board feet of timber and bringing in \$14.5 million in revenue. Good Neighbor Authority improves forest health, reduces fire risk, boosts rural economies, and pays for itself. It truly is the gold standard of cooperative federalism.

We are similarly encouraged by the Trump administration's commitment to streamlining inefficient and costly environmental review processes. Decisions too often are being made in anticipation of being sued rather than being based on sound science and local conditions.

And finally, we continue to benefit from the flexibility built into the Every Student Succeeds Act. Idaho now is empowered to be the architects of our own K-12 education programs. The U.S. Department of Education has moved from punitive sanctions to enabling states to define their own strategies for supporting and lifting up under-performing schools. Instead of closing low performing schools or replacing their principals and staff, the Every Student Succeeds Act leaves those decisions up to states working collaboratively with local education agencies.

While this recent renewal of classic federalism is welcome and refreshing, there remains much room for improvement. I highlight these positive examples in the hope that a culture of treating states as partners rather than stakeholders will take root and extend to other facets of our national government. Again, thank you for the opportunity to testify before you today and for your continuing service to the United States of America.

Mr. PALMER. I thank the witnesses for their testimony. The chair now recognizes the gentleman from Utah, the chairman of the Committee on Natural Resources and chairman of the Speaker's Task Force on Intergovernmental Affairs, Mr. Bishop.

Mr. BISHOP. Thank you, Gary, and thank you, the three Governors, for joining us here today. It is extremely good to have you back here. And I am grateful to be here, especially for the task force. I noticed I think about six members of the task force have been or were here or are leaving here at the same time, whatever.

Let me tell you what I am going to ask each of you so you can be thinking about it and then preface this for just a second.

So, Governor Herbert, I want to hit you up on the consultation concept again, go into more detail on that. Ms. Martinez, I do want to talk to you about how we can make this effort on federalism a bipartisan approach, and for Governor Otter, I want to talk to you again about what you called mission creep or creeping conditionalism. You have to realize, I mean, there are about 266 former legislators who are Members of Congress. I don't know why we forget our lessons we learned in State legislature, but it seems when we come here to Congress, all of a sudden we want to solve all sorts of problems, regardless of how those problems are solved.

There is something that is very unique now as both parties, both liberals and conservatives, are now talking about federalism under different titles more than ever before. If I notice, you know, Senator Feinstein has a bill that deals with federalism dealing with drones and Representative Cohen has one that deals with drug policy and Senator Baldwin has one that deals with health partnership. And one of you mentioned a resolution by Representative Carter. People are now talking about that. This is an opportunity we have of actually trying to implement it.

So, Governor Herbert, let me start with you. You talked about collaboration, how important it is. We have long talked about consultation is important. How do we actually define consultation here to allow that State and local governments are ensured that they are consulted and that their comments are taken seriously? For example, we have had court cases in the State of Utah where commissioners' decisions have been thrown out because they said the commissioners had too much influence vis-a-vis NGOs. How do we ensure that States actually do fulfill that consultation role?

Governor HERBERT. Well, I think part of it is what I talked about, a culture change. We need to go back and review the role of the Federal Government in conjunction with the role of the States. It is often forgot that Federal Government was, as Butch Otter has said, created by the States. And we are sovereign States. We are, as Justice Brandeis said, you know, laboratories of democracy. We do have a role to play. And that is part of an attitude thing. For whatever reason, we have got to the point where we seem to ignore the role of the States and aren't listening to what the States are doing and let them perform their role as laboratories of democracy.

Mr. BISHOP. You went through a litany of laws in which it is allowed. Would it be better if we actually wrote laws so it was mandated?

Governor HERBERT. I think that, one, there ought to be a mandate to listen and respect the role of the States and, again, it's not just a matter of checking off a box and saying, well, we've got your input, now we'll ignore it.

Mr. BISHOP. Okay.

Governor HERBERT. We think that the States should have a role to make decisions, and we ought to devolve the decision-making power back to the States. We'd get a better result and less cost to the taxpayer.

Mr. BISHOP. Governor Martinez, how can we make this concept of federalism bipartisan? I mean, you represent a purple State, whereas in Utah and Idaho I think we have got zoning ordinances that keep Democrats at bay.

Mr. DESAULNIER. If only you had a little purple.

Mr. BISHOP. Well, I am not going to say anything about Californians. So how do we make this issue bipartisan?

Governor MARTINEZ. Thank you for that question. So sorry, I forget the button. Thank you very much for that question, Congressman Bishop. I think it's important that we remember that we're not politicians but we're actually leaders. I am a Republican Governor in a State where we're outnumbered three to one by Democrats and independents, and so therefore, I have a very clear understanding that I represent all the people of New Mexico and not just those who voted for me or those of the same party.

We have done this many times through, for example, when I expanded Medicaid. When I expanded Medicaid, it was not necessarily something that was a Republican thing to do. However, I went on a listening tour, private and local communities, private businesses, I did it with organizations and advocacy groups and wanted to hear why I should or should not expand Medicaid. And at the end of the day I did what was right for the people of New Mexico. I actually did expand Medicaid and I have also, through that process, costs per month—per person and per month have actually gone down, and that's why we're a leader in New Mexico because this was not a political decision.

Mr. BISHOP. I appreciate you doing that because you're talking about the attitude that Governor Herbert was talking about, and in the five seconds I have got left, I appreciate what you are talking because we are going to have an energy bill that tries to partner with the States to allow the States to do all the paperwork, keep the Federal standards but the States do the paperwork to see if we can actually work together more. I hope that comes in there.

Butch, I am out of time, but if there is a second round, I want to come back to this idea of mission creep and creeping conditionalism with you. I will yield back but—sorry.

Mr. PALMER. The chair now recognizes the gentleman from Virginia, Mr. Connolly, for five minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

And, Governor Martinez, I appreciate the decision you made on the expansion of Medicaid. I believe Governor Kasich, your Republican colleague in Ohio, made a similar decision. And we are now wrestling with it yet again in Virginia. It is costing my State billions of dollars not to do it. It is 400,000 people not getting coverage that otherwise would get it. And ironically, it is the red parts

of the State, it is rural areas that are seeing the pressure on their hospitals and clinics closing because they financially can't make it. And the expansion of Medicaid would save those hospitals and provide care to people who desperately need it. So I applaud your non-political decision, and I think that is the spirit in which Republicans and Democrats ought to approach governance, especially at the State and local level.

All three of you come from Western States, and I know that if we had the Governor of New York and the Governor of Virginia and some other Governors, we might have a different perspective about the Trump administration and how helpful it has been or not, and I guess the jury will be out. We will see. But the philosophy you all are sharing with us, I find myself largely in agreement in principle. And, Governor Herbert, I was shaking my head listening to thinking, you know, a lot of wisdom there, but doesn't that apply to local governments, too? Are any of you Dillon Rule States?

Governor HERBERT. I come from local government.

Mr. CONNOLLY. You come from local government.

Governor HERBERT. I was a local county commissioner, and I have concerns about making sure that the State and the legislature and the Governor respect the role of the counties and the cities, so certainly there's some tension there.

Mr. CONNOLLY. Yes.

Governor HERBERT. The difference is, though, the States created those local entities, so they have—they are the mother. They're the ones that created it. The Federal Government is created by the States, that miracle in 1787, so it's a matter of roles and responsibilities under the law. You're right; it should not be a partisan issue. It's the vision of our Founding Fathers embedded in our Constitution.

Mr. CONNOLLY. Yes. Certainly, there is a legal argument that local governments are the creatures of the State. They are created by the State. But practically speaking, that doesn't really get us very far. In my State, the local government I headed is the biggest in the State and one of the biggest in the United States. We were a full-service—you know, my budget is bigger than the—you know, our budget was bigger than seven States' budgets. And what we constantly were subjected to—and this is not unique to my State. You see this tension in lots of States.

But, you know, the State legislature was prejudiced against the more affluent northern part of the State, which, by the way, funds about half of the State. And so when you look at formulas for allocating resources, we always got the short end of the stick. In fact, one egregious example, there was a library fund years ago created, of course mostly funded by Northern Virginia by my taxpayers, and they actually had a formula that said no jurisdiction larger than 900,000 could qualify for benefits from the fund. So we funded the fund, and we got zero benefits because of course we were the only jurisdiction with more than 900,000 people in the State of Virginia it just so happened. It got that egregious.

And, you know, we get real nervous when people talk about block granting things because that goes to the State capital where we know we are going to get the short end of the stick. We won't get

a fair share. And so I am just curious, since none of you actually address local government in your opening remarks—understandably, you are talking about your relationship with the Feds—but what is good for the goose is good for the gander. What about your local governments? Have you ever taken a careful look at the State level about the unfunded mandates you impose, not you personally but the State does and sort of the imposition sometimes you make in laws and regulations that they then have to implement? Because the ultimate implementer of everything is local government. Governor Otter, you are shaking your head.

Governor OTTER. Yes. Well, thank you, Representative Connolly. I can tell you this, that in my 12 years as Governor and all the legislation—probably 350 pieces of legislation that I signed—am responsible for either signing or not signing or vetoing every year, in the most cases, the limitations that are put on local units of government are actually edicts from the Federal Government. And you can go right through almost every agency starting with the EPA and the Clean Water Act and those sort of things, so if a local government wants to develop in a certain area, they must certainly follow through all the —

Mr. CONNOLLY. If I can interrupt, Governor Otter, because of time. Forgive me. But, I mean, that is not true in the case of education funding formulas. That is a State formula, not a Federal formula. And it has a huge impact on local governments and the tax rates they have to charge or not charge to fund their local education. In my case 80 percent of our school funding we bear because the State has a funding formula that just so happens to discriminate against certain parts of the State and benefits other certain parts of the State. I am sure politics has nothing to do with it. That is not a Federal issue, that is a —

Governor OTTER. Well, perhaps —

Mr. CONNOLLY.—State issue.

Governor OTTER.—we are a little more fair in Idaho because we actually assign so much money for each and every classroom unit no matter whether it is in Weippe, Idaho, or Boise, Idaho, the largest school district or the smallest.

Mr. CONNOLLY. My time is up. I want to learn more about that. Maybe we could get you to Richmond and educate them a little bit about —

Governor OTTER. Be happy to.

Mr. CONNOLLY.—the funding formulas. Thank you, Mr. Chairman.

Mr. PALMER. The chair recognizes the gentleman from North Carolina, Mr. Meadows, for five minutes.

Mr. MEADOWS. Thank you, Mr. Chairman. I thank each of you for your testimony here today. The first one, the committee has reviewed a number of major Federal regulatory actions where the Federal Government actually did not adequately consult with the States. Some of those were with the EPA Army Corps of Engineers, the Department of Labor and its overtime rule, Department of Interior in terms of stream buffers are just a few examples of those.

So the executive order 13132 on federalism and unfunded mandates actually required consultation with State and local governments. Can each of you very quickly let me know how you—how

do you think that this particular executive order is working? Is the consultation actually taking place? And so, Governor, will you go ahead and—Herbert, if you will go ahead and start.

Governor HERBERT. Thank you. The fact that we are here today talking about it, I think we see progress. I'm hopeful. The fact that former Speaker Nancy Pelosi, first thing out of her mouth yesterday meeting with a few of us Governors was, hey, Judge Brandeis, laboratories of democracy, we need to let you guys take the lead on these policy issues. I think we are getting heard. I think there's been an attitudinal change that needs to continue, and so I feel good about the direction we're headed.

Mr. MEADOWS. All right. Governor Martinez?

Governor MARTINEZ. Yes, sir. Thank you. Certainly, there's been more collaboration in the last two years than I experienced in the previous six years as being Governor. I've actually been asked to sit at tables within the Department of Transportation, as well as sitting at the table with a variety—yesterday with a committee in reference to our prisons and the reforms that can take place for individuals that are moving from within the prisons and out into the communities. That never happened before. I never even received a phone call when things were taking place. And particularly when an endangered species was being listed, it was—the State wasn't given the opportunity to protect that species as it's supposed to be given in order to eliminate the Federal involvement so that we can protect it and continue to have that not on the list of endangered species.

Mr. MEADOWS. All right. Thank you, Governor. Governor Otter?

Governor OTTER. Congressman, I can think of several times when we have been consulted many times and never listen to. I've served as Governor under three presidential—under three different Presidents, three different administrations, and from time to time early on in my first two years when the Bush administration, things began to change and not for the better. They got worse for the next eight years. Now, they're starting to get better again. So simply in—simply requiring consultation doesn't always work. Sometimes, there has to be a result and whose side are we going to make the final decision on, the States or the Federal Government's side?

Mr. MEADOWS. All right. So let me real quickly in the two minutes I have remaining follow up on that because what you are saying is it is not enough to just listen but it is actually to take that input and actually put it into action. So would you say that what we are seeing is actually more efficient policy and cost savings as a result of that collaboration?

Governor HERBERT. Clearly, as we look back and just again one of the controversial issues of the Affordable Care Act, Obamacare, the Governors were never one time consulted and asked what's our opinion, yet we're going to be on the frontlines of having to implement the program.

Mr. MEADOWS. So what you are saying is is this collaboration could actually save the American taxpayer dollars —

Governor HERBERT. Dollars and —

Mr. MEADOWS.—in a real way?

Governor HERBERT.—develop better policy.

Mr. MEADOWS. Yes. Okay.

Governor HERBERT. And certainly, again, we ought to have the States weigh in, and we ought to not just be listened to but respected and considered and let us be part of the decision-making process.

Mr. MEADOWS. All right. Governor Martinez, do you agree with that?

Governor MARTINEZ. Well, I agree that certainly in the education reform that was discussed by Congressman Connolly is that we were—in collaboration with the Federal Government, the—under the Obama administration, we were in collaboration, we were in agreement on education reforms, but it was our Democrat State legislature that was not in collaboration with the States and local communities.

Mr. MEADOWS. But I can't help with that problem so —

Governor MARTINEZ. I understand, but there are opportunities that we have actually agreed.

Mr. MEADOWS. All right. Governor Otter?

Governor OTTER. I would say yes, and improving daily.

Mr. MEADOWS. All right. So if that is indeed the case, would you encourage more reforms of this type where we can actually streamline this, yes or no in my 12 seconds? Yes, Governor?

Governor HERBERT. Yes, the more you involve the States, the better it's going to be.

Mr. MEADOWS. Governor?

Governor MARTINEZ. Absolutely. There is no cookie-cutter solution that can be done for all States.

Mr. MEADOWS. Governor?

Governor OTTER. Yes.

Mr. MEADOWS. All right. Thank you. I yield back.

Mr. PALMER. The chair recognizes the gentleman from Maryland, Mr. Raskin, for five minutes.

Mr. RASKIN. Mr. Chair, thank you so much for putting together this terrific panel, and it is an honor to be in the presence of these Governors.

Everybody loves federalism in principle. Everybody loves federalism in theory, in the abstract. The question is whether you are willing to defend federalism when it cuts against your deepest-held policy preferences. And so I want to try to get beyond the level of principle, which we all embrace, to the critical issues that are facing us in this Congress.

Let's start with marijuana. Right now, this might be the greatest federalism issue in the country. We have dozens of States that have embarked upon experiments with medical marijuana, with decriminalization of marijuana, with treating it as a public health problem rather than a criminal problem, and we got the Attorney General of the United States, Attorney General Sessions, who wants to come down like a sledgehammer on the States to crush all of these experiments and to revive a war on marijuana. And I just wonder whether any of you are willing to take a position on behalf of States' rights and federalism against what the Attorney General is trying to do? Governor Otter, perhaps you could start and just quickly go down.

Governor OTTER. Of all the States that I border, four of them have legalized recreational marijuana, and it would be one thing if that stopped at the border, but it doesn't stop at the border.

Mr. RASKIN. Well, nothing ever stops at the border. That's always the argument that the nationalizers take against people who I thought you were siding with, which was the States' rights people.

Governor OTTER. But it doesn't cause harm to my State —

Mr. RASKIN. That is always the argument made it. Do you see? There is the problem.

Governor OTTER. Well, maybe that ought to give —

Mr. RASKIN. We all love federalism in theory, but are we really willing to stick to it when it comes to a specific case where we are against it? I assume you don't favor the decriminalization of marijuana?

Governor OTTER. I do not.

Mr. RASKIN. Okay. So, Governor Martinez, where do you stand on it?

Governor MARTINEZ. As a prosecutor for 25 years and on the border of New Mexico with the Mexican border, I do not support the legalization of marijuana. I completely support —

Mr. RASKIN. As a matter of States—you mean as a matter of exercise of your State power. The question is do you think the Federal Government should crush the experiments in the States with dealing with the marijuana problem?

Governor MARTINEZ. As the law stands today, it is my responsibility as a lawyer, as the Governor to the people of New Mexico. I have to comply with the laws of the United States Government, and that means there's no legalization of marijuana in my State. However, we do have a medical marijuana program that is very successful.

Mr. RASKIN. And they want to crush that, too. Governor Herbert?

Governor HERBERT. You've put the States in a Catch-22 problem. You have a Federal law that says it's illegal. If you don't like that, change the law.

Mr. RASKIN. Yes, so you —

Governor HERBERT. So that allows us then as States to take on the responsibility on a statewide basis. We are learning. We're next-door to Colorado. I've worked with Governor Hickenlooper. He's told us as a State and other Governors be very careful, watch we do. I —

Mr. RASKIN. So you are supporting a change in Federal laws —

Governor HERBERT. I support —

Mr. RASKIN.—to allow the States —

Governor HERBERT. Change the Federal law.

Mr. RASKIN.—to experiment —

Governor HERBERT. Yes, you can't —

Mr. RASKIN. Okay.

Governor HERBERT. You put —

Mr. RASKIN. So let's try another one, which is again something we are dealing —

Governor HERBERT. Take it off the schedule I so we can actually do the research necessary to backup —

Mr. RASKIN. Good.

Governor HERBERT.—science to back up what—at least the anecdotal stories.

Mr. RASKIN. Here is another one that is happening right now. There is an effort to wipe out medical malpractice laws across the country and to impose one Federal one-size-fits-all solution in terms of medical malpractice where the awards are set when you get a jury trial and so on. Do you favor that, or do you think each of the States should be able to decide for themselves what their medical malpractice laws are?

Governor OTTER. We already have that in Idaho.

Mr. RASKIN. You have what?

Governor OTTER. We have limitations on medical malpractice.

Mr. RASKIN. Sure, but they are set at different places in different States. You think we should have one-size-fits-all national solution or do you think the States should be able to decide for themselves?

Governor OTTER. I do not think we ought to have a national solution.

Mr. RASKIN. Governor Martinez?

Governor MARTINEZ. I agree completely.

Mr. RASKIN. Yes?

Governor HERBERT. State decision-making, no one-size-fits-all.

Mr. RASKIN. Okay. Well, so there I just want you to know you are siding with the Democrats in Congress against the legislation that is being pushed by the Republicans —

Governor HERBERT. It shouldn't be partisan.

Mr. RASKIN. And that is why I am with you. I appreciate the fact that you are standing up for the federalism principle, you know, in reality when it counts. Let me just do one more. The conceal-carry permits, there is an attempt to wipe out all of the laws of the States on concealed carry to say that if you get the right to carry a loaded weapon in Florida, which has very liberal laws on this, you should be able to come into my State, for example, which doesn't allow people who have domestic violence offenses or other violent misdemeanor convictions to get one. Do you think that should be a matter of national law or do you think it should be up to the States who gets to carry a loaded pistol in their —

Governor HERBERT. I can tell you —

Mr. RASKIN. Yes.

Governor HERBERT.—it's clearly—it's been tested all over the Supreme Court, it's a State issue. We have reciprocity. We have people that come to Utah, get a concealed weapon permit when 31 other States —

Mr. RASKIN. And you can make the reciprocity agreements and —

Governor HERBERT.—run State by State by State —

Mr. RASKIN. Yes.

Governor HERBERT.—reciprocity, there should not be a national norm.

Mr. RASKIN. Got you. Governor Martinez?

Governor MARTINEZ. Absolutely, I am—I have a conceal-carry license, and I at first was very leery, but I certainly appreciate the fact that it's something that can be decided within the State because, as a law enforcement family, my father, my husband, my son, it always worried me that citizens were carrying it. However,

with the training that we have implemented, it is a very safe thing to be able to have a concealed carry.

Mr. RASKIN. And you don't want us trampling the laws of New Mexico to say we know better than you, we are going to bring it down to the lowest common denominator?

Governor MARTINEZ. That's exactly right.

Mr. RASKIN. Governor Otter?

Governor OTTER. I believe the same. It's a State issue.

Mr. RASKIN. Well, I thank you very much for standing up for federalism in that case, and I am happy to yield back, Mr. Chairman.

Mr. PALMER. I thank the gentleman. The chair now recognizes the gentlewoman from Puerto Rico, Ms. Gonzalez-Colon, for five minutes.

Ms. GONZALEZ-COLON. Thank you, Mr. Chairman. And thank you, all Governors, for being here today and for your testimony.

Coming from Puerto Rico, we also have got the same problem in the States, and when these executive orders may not apply to the island as we do not have that sovereign power, I may say that all those regulations did apply and do apply to Puerto Rico. And each agency it says the executive order shall have accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications within 90 days. Of course, that 90 days never occurred, and that designation that comes with that mandate always put a burden on some of the States to comply with those regulations. So what kind of burden in terms of the expenses all of your States are incurring to comply with all those regulations in your States? Governor Otter?

Governor OTTER. Well, I haven't got—I haven't added up the list of the costs that we've had, but I can tell you this: Nearly every public policy that we deal with in Idaho we have to factor in what the Federal Government wants us to do, as well as how much of the cost they want us to suffer. So I would tell you when we establish public policy, we really need to see who it helps and who it harms. And sometimes there's very little attention or care paid, especially from the Federal level.

Ms. GONZALEZ-COLON. Governor Martinez?

Governor MARTINEZ. Yes, thank you so much. And certainly our prayers continue to be with your people —

Ms. GONZALEZ-COLON. Thank you.

Governor MARTINEZ.—in Puerto Rico. Regulations, for example, with BLM and the duplication of work that takes place with the Federal Government and the State Government, the types of testing that is done, environmental testing, that's a duplication of costs not only to State Government but also to the Federal Government and the people who are conducting business within our State. You know, time is money, and when something can take 10 days within a State regulation, what takes 250 days in a Federal regulation, you can see where time is money and that business people will end up going someplace else to conduct business where it is easier and better to do it because they don't have the Federal land that they're having to deal with with BLM but actually having to deal with just State land.

Ms. GONZALEZ-COLON. Are we talking about NEPA?

Governor MARTINEZ. NEPA is one of those that is required, yes, and then sometimes it's not required but they're making us do it anyway, which ends up being more expensive. There are regulations that actually have exclusions, but we're made to comply nonetheless.

Ms. GONZALEZ-COLON. And how much will that cost your State?

Governor MARTINEZ. Oh, cost—the costs that I was quoting you just a while ago, it costs the Federal Government in actual dollars. It is \$1.9 million to New Mexico per day and \$3.4 million to the Federal Government per day in revenues. That is what is being lost right now because of these regulations.

Governor HERBERT. Let me just speak about Utah, and again, it kind of goes to what Representative Connolly was talking about, local government. When we put together our budget, we have local government comes to us and said we'll trade you one dollar of Federal money that comes to the local government for 85 cents of a State dollar, and that's because the red tape, the regulations are so expensive they'll give a discount of 15 percent just to get a State dollar.

Why does it take so long for the Federal Government to make decisions? We had a question with Interior here on a road, whether it should be opened or closed on some of our public lands. It took us 7-1/2 years, 7-1/2 years to get a decision, and the only reason we got a decision was because we eventually decided to sue to make them make a decision. That is time is money, and when you have local governments say we'll give you the Federal dollar, give us back just 85 cents, we know that the cost of the Federal oversight is really getting too expensive and too time-consuming.

Ms. GONZALEZ-COLON. So you know that with President Trump's infrastructure plan we also are looking for a streamlined process in NEPA. Are you in favor of that?

Governor MARTINEZ. Yes.

Governor OTTER. Yes.

Governor HERBERT. Absolutely.

Ms. GONZALEZ-COLON. Can you provide some examples of specifically what can we be looking at that process directly for the States?

Governor OTTER. Well, I can tell you that we find most of the standards for our highway systems in Idaho if there's any Federal participation in those—in some cases if it's our State highways paid for by our State-only money leading to a Federal connection—intersection, those are required to meet the same standards, and those are standards that may work very well in Virginia or New York or someplace else, but in Idaho it's a little different.

Governor MARTINEZ. I agree. Certainly, I think NEPA has its place, but to have it overly expansive on a State that not necessarily—like, we're very rural, and to have similar type of testing. I believe in the facts and the evidence and the data that shows that—whether or not NEPA is something that should be applied to a particular project. If it doesn't support it, then we shouldn't be doing it just for the sake of that's how we've always done it.

Governor HERBERT. I think it speaks to the lack of trust. Again, the Federal Government doesn't believe that our own environmental scientists can make the assessment and the evaluation. We're doing a reconstruction of our interstate along the Wasatch

front. It's the same right-of-way and roads that we've had for 50 years. Why are we having to go—because we're expanding capacity—a complete revival of an environmental assessment costs time and it's a waste of time and money.

Ms. GONZALEZ-COLON. Thank you, Mr. Chairman.

Mr. PALMER. The chair now recognizes the gentlelady from the District of Columbia, Mrs. Holmes Norton, for five minutes.

Ms. NORTON. Thank you very much, Mr. Chairman.

Much of the discussion both from those of us in Congress as we question you and from you have, it is assumed, an adversarial relationship. Of course, there is a built-in adversarial relationship when you are part of a whole and yet we are very different. We are exquisitely different from coast to coast.

On the other hand, the deep pockets of the Federal Government does allow it, along with the Constitution and Federalist notions, to fund important benefits that the States want.

I want to ask about Medicaid expansion because of the way you all have approached it. There are States that apparently prefer to leave a considerable amount of money, indeed most of the money the Federal Government would pay for—most of it on the table, which is to leave the health care of their own residents on the table. Governor Martinez, you did not make that decision. An article was provided from the Albuquerque Journal where you stated, "Access to health care has the potential to improve the well-being of our families so our kids can learn better in school and so Mom and Dad can be better parents and more productive employees." You did accept Medicaid expansion.

Governor MARTINEZ. I did.

Ms. NORTON. And would you discuss the remarkable results there? The figures I have show that your uninsured rate was 25 percent and that it is down now to 10.2 percent. Are those figures correct?

Governor MARTINEZ. Yes, ma'am.

Ms. NORTON. Governor Herbert, so you found that rather than assuming the Federal Government was an adversary, working with the Federal Government, particularly when there was money on the table and the health and lives of your own residents was at stake, that that is not always an adversarial relationship. It can be a very beneficial relationship, perhaps the way the Founders saw it.

Governor Herbert, you of course tried to expand Medicaid in Utah, and I commend you for the several compromises that you tried to achieve so that Medicaid could be—or so that health care could be available for more in Utah. And you were not able to do that. You said, "The poorest among us will continue to struggle until Utah leaders can find agreement on this difficult issue." What was difficult with the Federal Government funding the lion's share of health care and your compromising approach so as to try to bring together people who might otherwise be adversaries?

Governor HERBERT. Well, one, I respectfully reject the attitude that it ought to be adversarial. I think it ought to be collaborative. We have difference of opinion. There may be some tension there, but it shouldn't be adversarial. We should try to solve the people's problems.

Ms. NORTON. Exactly.

Governor HERBERT. All the money that the Federal Government gets comes from State taxpayers. You take the money from us, you come back, you come up with programs. Sometimes we like them, sometimes we don't. We learn from the States. We learn from Susana Martinez, New Mexico, and how it works in there and we'll learn maybe that will—we'll want to adopt in the State of Utah.

Ms. NORTON. Well, why were you unable, since you were willing to compromise, to get Medicaid expansion?

Governor HERBERT. Because we could not convince members of the legislature, particularly in our House side, that it would be the fiscally responsible thing to do in the long term. It's not just a matter of what can we get today, get some of our taxpayers' money back, but what's going to be the ongoing obligation in the long term? Can we afford to buy today and not afford to buy tomorrow?

Ms. NORTON. Yes, that was the reason that that was given even though there was a huge amount of money on the table and no indication that Congress was going to pull it back.

Governor Otter, did you mention that you had tried some sort of compromise in this regard as well?

Governor OTTER. I have and I continue to. In fact, I have one before the Legislature this year.

Ms. NORTON. I just want to say that what this does indicate is that the Governors are closest to the people, and while we see some States that would rather leave that health care—leave where, for example, Governor Martinez was unwilling to leave the health care of her residents, increasingly we do see more States. Even though the affordable health care has been under such assault in Congress, we now see more States wanting to be a part of the program, and I think that has everything to do with who is closest to the people. We can debate the matter here. You have got to live with the matter in the States. Thank you for your testimony.

Mr. PALMER. I thank the gentlelady. The chair now recognizes the gentleman from Iowa, Mr. Blum, for five minutes.

Mr. BLUM. Thank you, Mr. Chairman, and thank you to our panelists today for being here. I must say, first of all, I am a huge, huge supporter of the Tenth Amendment. In addition to it being in the Constitution, I also know that Governors and their State legislators can do most everything less expensive than this Federal Government and produce better results. You see here in Washington—this is not news to you all—there is no penalty for failure. Typically, when a program here doesn't produce results, we just spend more money on it. It is always we haven't spent enough money. But you all are CEOs of your States and you have to live with the results, so thank you for being here and thank you for what you do.

I don't have an agenda here but I would like to chat about sanctuary cities, sanctuary counties. I am from eastern Iowa, and when I am out there talking to people, they just don't understand how cities, counties—it is not States per se, but how they can choose to ignore the law. And we have had Presidents who, if they didn't like a law, let's just not enforce it. You know, I think you would all agree one of the reasons we are the greatest nation on the face of this earth is because of the rule of law, and we are a nation of

laws. And I am going to listen. I would like to have your opinions about sanctuary cities, how you deal with that in your State. I don't know if you have any in your States, but what your thoughts on that are.

Governor HERBERT. Well, us going first, it's a challenge because we do respect our local governments in Utah, so our cities, our mayors and council people, our county commissioners. We don't support anything other than the rule of law. We think if anybody goes contrary to that, that's a mistake. If you don't like the law, change the law, whether it's a Federal law or a State law. So I think we're asking for chaos and division in our country if we don't adhere to the rule of law.

Mr. BLUM. Do you have sanctuary cities in Utah?

Governor HERBERT. We—maybe Salt Lake City. I think the mayor there was—indicate we—we're not going to round up people and violate their peace and tranquility to be upholding the law of the Federal Government, so they don't feel like it's their responsibility. So I don't know if I'd say we're a sanctuary city there, but that would probably be the only place it would be considered at all. I don't think they claim to be a sanctuary city.

Mr. BLUM. Recently, I saw on TV—you probably all did as well—the Oakland, California, mayor saying that she felt it was her—ethically, she needed to forewarn potentially illegal immigrants that ICE was going to conduct operations in their area, in their neighborhood. Governor, can you give me your thoughts on that?

Governor HERBERT. Well, my thoughts really are it's a Federal issue. We actually tried to find a State solution. We went to the—we were challenged in court by the Obama administration. We lost where the court said this is a Federal issue. I later met with President Obama and he talked about his executive order, and I said, well, you're trying to do the same thing I did. We tried to do it by law and a State-right position. You're trying to do it by executive order, and you're going to lose in court, too, because it's a congressional responsibility.

It's disappointing I think to many people across the country that we can't come together on that. Maybe there are different aspects we have disagreement, but we all agree we should secure the borders. Why don't we just do that? We—is not just the gate—or, excuse me, not just the fence, the wall, again talking to President Obama about this. The gate doesn't work. We ought to work on the gate so the people come and go as we think would be appropriate, and he agrees. He says, why can't we get Congress to act? That was President Obama to me. Well, that's the frustration I think of many people across the country.

Mr. BLUM. Well said. Governor Martinez?

Governor MARTINEZ. Yes. As Governor, I took an oath to enforce the rule of law, whether that be the Federal Government and the implementation of their Federal laws and the State laws. However, I also understand that the enforcement of immigration laws is that of the Federal Government and not of the State. I do not support sanctuary cities. I think it is something that is—can be very chaotic. We are releasing individuals from jails, et cetera, that are violent offenders and not notifying the Federal Government that someone is within our community who is a violent offender, wheth-

er be released from prison or from the State or from local jails that now are amongst the population of the people.

And I have a responsibility to protect the people of the State of New Mexico, the citizens of New Mexico from anyone who is violent and being released from a jail. So I signed an executive order just shortly after becoming Governor and doing away with sanctuary State policies. That doesn't mean cities have not declared themselves as a sanctuary city. However, I am very much not in favor of that.

If the law needs to be changed, the Federal law, then change it, but the confusion that is taking place is going to end up in some very terrible outcomes, and so that is why I don't support it. I support making sure that we're enforcing the rule of law.

Mr. BLUM. With the indulgence of the chair, could Governor Otter answer my question?

Mr. PALMER. I yield additional time to Governor Otter.

Mr. BLUM. Governor Otter?

Governor OTTER. Well, thank you very much, Congressman. You know, it really is a pretty simple—28 words. “Those powers not delegated to the United States by the Constitution nor denied to the States by it are reserved to the States respectively or to the people.” And if you want to view the scope and the jurisdiction of supremacy, look to article 1, section 8—or, pardon me, section 8 of article 1 because those enumerated powers are exactly what the Tenth Amendment was talking about. That is where the government—Federal Government is supposed to exercise supremacy. Those are the limited and delegated powers.

Mr. BLUM. Thank you. I have gone past my time, but thank you for your service to your States. Thank you very much.

Governor OTTER. Thank you.

Mr. CONNOLLY. Mr. Chairman?

Mr. BLUM. Thank you, Mr. Chairman.

Mr. PALMER. Yes?

Mr. CONNOLLY. Mr. Chairman, if you would just allow me real quickly, picking up I think on a distinction made by Governor Herbert. There is a distinction between declaring oneself a sanctuary city or county and a local police force or sheriff's office saying it is a Federal responsibility for enforcement, not ours, and we are not going to take that on ourselves. Those are two different things, and I think I heard Governor Herbert make that distinction. Certainly, in my community that is our position, one that we don't declare it sanctuary but we don't feel that it is our responsibility locally to enforce Federal immigration laws as such. That is a Federal responsibility. Thank you, Mr. Chairman.

Mr. PALMER. The chair recognizes the gentlewoman from New York, Mrs. Maloney, for five minutes.

Mrs. MALONEY. Thank you, Mr. Chairman, and I thank all the Governors for your service and for your testimony today.

I would like to ask you about President Trump's infrastructure proposal and how it is going to affect your States. When the President released his proposed budget for 2019, he announced the vague outlines of a plan that he claims will boost investment in infrastructure in our nation. We need it. His plan includes \$40 billion through a rural block grant program, as well as \$130 billion in var-

ious funding pots for which States will compete. But even if they win this competition, States would receive only 20 percent of the amount needed to fund an infrastructure project, and States and localities would have to contribute the remaining 80 percent of the cost.

And he further went forward with his idea to allow States to impose tolls on all interstate highways, and he says this would allow them to raise the revenue for the infrastructure investment.

So I would like to ask all of you, would you raise tolls on interstate highways to generate revenues for the infrastructure funding under this plan for your State? Are you planning to raise tolls which—if you want to go down just starting with Governor Herbert and Martinez, Otter.

Governor HERBERT. There may be some appropriate use of toll roads. We see them around the country. Certainly, the Pennsylvania Turnpike and others have been worked out very successfully. I'm not really in favor of toll roads. I think that we need to address our infrastructure needs that has been neglected. I think President Trump is right about that since the Eisenhower days. But probably an adjustment of the gasoline tax, which has not been done for, what, 25 years or so —

Mrs. MALONEY. I agree.

Governor HERBERT. So if you're going to do that, at least to recapture what we've lost from inflation, it would probably be a good thing.

That being said, you know, States aren't waiting for the Federal Government. Again, we appreciate the partnership when it's appropriate. You're taking money from us, and we'd like to get some of it back. But we just completed one of the larger construction projects in America, \$1.7 billion of our interstate, did it all with State dollars.

Mrs. MALONEY. Governor Martinez, would you support a gas tax for infrastructure?

Governor MARTINEZ. No, ma'am, I would not.

Mrs. MALONEY. Okay.

Governor MARTINEZ. We've actually done something very different in New Mexico. Having had continuing resolutions with the budget, we had to become very creative in how we were going to widen roads, make roads more accessible. We do not have any toll-booths in New Mexico, and so what we've done is made sure that there was skin in the game for local communities, counties, the legislators that represent those counties and municipalities in the State legislature, that their port dollars are going towards true infrastructure. The State would—and then the port—the part of the infrastructure dollars that were given to me were part of that, and then Federal dollars were.

Also private sector, they were laying, for example—Facebook, when we brought them in, they were going to lay down cable for the internet, and what we did through the Department of Transportation is actually dig the trenches for them to be able to then lay down the cable that was necessary for the web. And so these are public-private community local projects for very big projects of road infrastructure that were not only funded but completed and completed on time and on budget.

Mrs. MALONEY. And, Governor Otter, would you support a gas tax or would you support tolls on your interstate highways?

Governor OTTER. As recently as two years ago, I increased the gas tax in Idaho and also the licensure of automobiles. One of the problems with just looking at the gas tax is that we have so many automobiles that are either 50 miles to the gallon but still want the same amount of safety, still want the same amount of space on the highway but are getting 50 miles to the gallon or a run-off of electricity.

In Idaho—in fact a lot of places in the West—it would be very difficult to put in toll roads because of the access to the freeway—to the State freeways. So that's something we'd have to—we might be able to find some isolated places where we could do that, but I can tell you this, the infrastructure in all the West and especially Idaho—because we are a value-added manufacturing State and there's only one way to get our products to market, and that's down that highway.

Mrs. MALONEY. Okay. And also, his budget would cut \$122 billion from the existing Highway Trust Fund over 10 years, and this means States would receive less money from Federal highway and transit formula programs, which currently match at a rate of 80 percent Federal to 20 percent local. So let me ask all of you. Would your States like to receive less money from the Highway Trust Fund?

Governor HERBERT. You know, we would take less money if you'll take away the red tape and redundancy. I've met with our contractors in Utah, seven major road builders, and say if we could get the money block granted to the States without all the Federal red tape, we'll build the same number of roads for 50 percent less money. You don't have to have more money, you just cut and save.

Mrs. MALONEY. Well, my time is expired. Thank you.

Mr. PALMER. I thank the gentlelady.

Mr. CONNOLLY. Mr. Chairman, I ask unanimous consent to enter into the record statements from the National Association of Counties on this subject and from the NewDEAL Coalition, Debbie Cox Bultan, the executive director —

Mr. PALMER. Without objection, so ordered.

Mr. CONNOLLY. I thank the chair.

Mr. BISHOP. Mr. Chairman?

Mr. PALMER. Mr. Bishop.

Mr. BISHOP. I have one request if I could from the task force at the end of this. All of you have spoken very well about how, if everyone has good intentions, we can always get along. The problem that Congress has to try and come up with rules to make sure that if people are jerks, we can still get along. So what the task force needs from you three, if you would be kind enough, are some specific recommendations of what we can do not just to ensure that you are consulted but you are remembered for it. But we can talk about—I didn't get a chance to ask you about the mission creep, how we can deal with those issues, the mission creep. Should States have not just standing, which they have, but special standing in order to sue on issues that are imposed upon you? Some specific ideas that can be very helpful to ensure that, regardless of

what happens, States are recognized, States are understood, and States have the right to have that statement.

So I am asking that for the task force, not for the subcommittee purposes but for the purpose of the task force as we try and come up with recommendations. So anything you could give me that is specific as to what we can do statutorily to help on all these issues, as the gentlelady from the District said, you know, what you do with the money that is laying on the table.

Governor OTTER. Representative Bishop, I can tell you this, consult us at the beginning. Generally, what we find is we come—we are invited late to the party. Public policy has already started to see its first or second or third draft by the time—if they ever do ask the States—by the time the States are asked. And make it a requirement for the agencies that are going to put in new rules, new—which become laws and which become those laws that we have to operate by, but ask us at the beginning. Is this something you folks need? Are we solving a problem here or are we looking for—just to create another law?

Mr. BISHOP. Perfect. Help me find a place that we can statutorily mandate that.

Governor HERBERT. Can I add, Congressman Bishop, that it would be nice if the Congress would say—when issues come before them and say is this best handled at the State level? That'll be the first question. Maybe it's their responsibility. Maybe they can address this better rather than just taking on anything and everything. I think, again, we the people of America are asking you to do more than was ever envisioned by our Constitution or our Founding Fathers. And the States are adept. As Congresswoman Pelosi said yesterday, laboratories of democracy. You guys should be leading in on policy. We have a lot of responsibility. You have a few. Article 1, section 8, as Governor Otter mentioned. So ask yourself, is this really something we should do or should we let this be handled by the States?

Governor MARTINEZ. I just have one last statement if I may. I am certainly hopeful that federalism is not just a principal or a theory but that it is actually a practice as a United States citizen. And with that I think we will actually become a better country every single day, understanding that the States have the solutions for their people that may be very different from our neighbors, allowing us to take lead in many of the projects, many of the things in which the Federal Government cannot make a single solution that satisfies us all.

Mr. CONNOLLY. Would my friend from Utah yield for a minute?

Mr. PALMER. I don't know. Would I? It depends. What are you going to say?

[Laughter.]

Mr. CONNOLLY. I would certainly support his request, but I would remind ourselves respectfully we have three Governors from Western States in front of us. We don't have the Northeast perspective, we don't have the West Coast perspective, and this is big country and there could be other points of view. And I just hope that in inviting feedback to inform us in considering a statute that we make sure we have broad feedback from other experiences, including, well, other States just so that we are well-informed at that

we are getting all balanced points of view, with no disrespect at all because I found the testimony quite convincing this morning in many respects, but I just ask that of my friend from Utah.

Governor HERBERT. Can I just respond? Because I'm the one here who's been the chairman here three years ago of the National Governors Association, a bipartisan organization. We get along actually very well, very congenial, and we respect each other's difference of opinions on things. So I would welcome all 50 States and the five territories for that matter to weigh in on this issue. But I can tell you, having experienced my involvement for eight years with the National Governors Association, most all of us would say give us more flexibility. Let us take on the challenges. We don't need the one-size-fits-all mentality that comes too often out of Washington, D.C. Democrats and Republicans alike would agree with that. So I think get everybody. I think you'll find that we have a lot of consensus on this issue amongst the States.

Mr. CONNOLLY. I had dinner last night with your colleague John Carney of Delaware, and he said very nice things about you.

Governor HERBERT. Well, and I'll say nice things about him. We were Lieutenant Governors together, so we've been around for a long time.

Mr. PALMER. Just for the record, we gave every opportunity for a Democratic Governor to join the panel and would really like to have heard from them. In that regard, what I would recommend is that if there are other Governors, Republican or Democrat, who would like to submit a statement for the record, the record will be held open for two weeks. I will remind you of that at the conclusion of the hearing.

At this time I will recognize the gentleman from California, Mr. DeSaulnier, for his questions for five minutes.

Mr. DESAULNIER. Thank you, Mr. Chairman. And being from California, I wish our Governor was here. It would be even more entertaining; he always is.

Let me just say this challenge of course has been with this country forever, how this relationship works. When I was on the executive board of the National Conference of State Legislatures, to your comments, Governor, I found that environment to be very collegial, bipartisan, being a Democrat from the bay area and the State Senate. So there are examples where this works. And I think when you are involved in that, as you are, you realize that 50 States are very different and there are lots of communities within that.

But there are compelling places, and I want to talk specifically about addiction and opioid addiction in my questions and the results of the bipartisan commission that the administration put together that was chaired by former Governor Christie and what the relationship is in terms of best practices to this epidemic and the Federal Government's role.

So one of the key quotes from that report from Governor Christie is "One of the most important recommendations in the final report is getting Federal funding support more quickly and effectively to State governments who are on the frontlines of fighting this addiction battle every day." And my district, very different from other places, it is a more upscale part of the bay area, or much of my district, and it is upper middle income. I have lots of meetings and

put a good deal of my time in my former job working with the Attorney General's Office, now U.S. Senator Kamala Harris to deal with that. So knowing that it is very different in different communities, what you need from the Federal Government, and could you express the urgency you need it when it comes to addiction and opioid addiction in your States? Can you start?

Governor HERBERT. We're not asking for much from the Federal Government. Again, I am cognizant of your budget challenges. The fact that you're \$20–21 trillion in debt is not lost on a State that has a AAA bond rating. We try to live within our means and not spend more than we take in and we have rational debt.

So, that being said, I'm not looking to the Federal Government. We're trying to do this—this has been an issue that's been raised by the National Governors Association four years ago. We're on the cutting edge of this in the States. We're doing things in our respective States to address this issue. We're putting warning labels, we're—there's talk about litigation, lawsuits against the pharmaceuticals that have evidently withheld information about the addictive nature of these drugs. That's probably something that's going to be in our future. I think tobacco litigation.

We are training our doctors better. We have now put a database in the State of Utah so that doctors can know if you're doctor-shopping and what your issues have been, if you've been in the emergency room, if you've been to a doctor, and your general practitioner, they can all access this on the internet without violation of HIPAA laws. We've got that wired in so there's permission given.

So, again, we're doing things at the States. We're learning from each other. And again, we'll homogenize together as we find the successes that are taking place in the States. So I'm not asking for anything from the Federal Government.

Mr. DESAULNIER. Either of you?

Governor MARTINEZ. No, actually, we've done the very same thing in making sure that we can prevent that kind of doctor-shopping. You know, you go in for a root canal and you get 30 days' worth of opioids, which is really completely unnecessary. However, that person can become addicted, and therefore, the database is very helpful for us to make sure that there isn't that doctor-shopping because from the opioids and we're not able to continue to have access, then you turn over to heroin, and heroin is very accessible because we're on the border. It may be very different from Montana, may be very different from the middle of the country, but right there in New Mexico it is very accessible and very cheap.

Governor OTTER. During our meetings this week, we had a very good roundtable on—and we had a report from the task force to which you referred that Governor Christie held. And there was one thing that almost all the States need, and that was a review of all Federal rules and regulations that inhibit us from defending ourselves from that epidemic.

Mr. DESAULNIER. And that one thing I would ask for your help with, Representative Carter, a Republican from Georgia, a pharmacist, he and I have worked closely together. In California, we spent \$5 million, which was not significant in our budget, to make sure that the Department of Justice and the medical board has real-time information for people who are doctor-shopping. So one of

the things that Representative Carter and I have been working on is interoperability as all States try to bring this system up.

And then, just lastly, until I came to Congress, I never was a States' rights advocate, but being from California, I am becoming more and more of one. When you see things that work well in one State that is very different from another State, just if we could have more of a conversation that I would see as more bipartisan, more evidence-based, that what works in the bay area is not going to work in many of your jurisdictions and vice versa. Some of that is politically driven obviously, but when we really look at the evidence and what works, including on immigration, I wish we had more of those discussions, and I hope you have them when you meet with your colleagues.

Governor OTTER. Thank you.

Mr. DESAULNIER. Thank you, Mr. Chairman.

Governor MARTINEZ. Thank you.

Mr. PALMER. I thank the gentleman.

The chair now recognizes the gentleman from Wisconsin, Mr. Grothman, for five minutes.

Mr. GROTHMAN. Thank you very much. It is an honor we have three Governors at one shot.

The committee has heard from State and local governments, and I certainly hear from them at home all the time that the compliance of Federal regulations is very, very expensive. And lawmakers have shared compliance with Federal—some lawmakers have shared compliance with Federal regulators, forcing local governments to create funding by increasing sales and property taxes on citizens. Do you know how much money, say, your States spend to comply with Federal mandates and regulations?

Governor HERBERT. As I mentioned earlier—and I don't—we could probably reduce it to a number, but it's—our local governments tell us we'll give you a dollar—a Federal Government dollar to spend in exchange for 85 cents, so it's about a 15 percent margin as a minimum.

Mr. GROTHMAN. Okay. I will give you another question. I used to be a State legislator in Wisconsin, and one of the things that bothered me is sometimes Federal funds come with a maintenance-of-effort requirement in which you are really forced to spend money just to keep the Federal funds coming, money that you don't want to spend. Have you guys had any experience like that?

Governor HERBERT. We have. Remember years ago the cops grant where you're trying to get public safety and so you would get money from the Federal Government to hire policemen, but then you had to maintain those. You could not diminish your law enforcement, so it was built into your baseline. You took the grant and then you had to continue to spend money.

Again, as far as the concern we talked about with Medicaid expansion, for our legislators, the concern is what is going to be the ongoing cost? And the match just stays the same, so you still get—have to come up with your portion of the match, and that's an ongoing—I mean, with the rising cost of health care has caused some of the legislators to say we can afford it today, but we're not—we don't think we can afford our match tomorrow.

Mr. GROTHMAN. How about TANF? Do you guys have any problem spending all your TANF dollars, or when things are going well, do you find that you have to look around to spend things on that you really wouldn't spend them on otherwise?

Governor HERBERT. You know, we've taken a little different approach in Utah. Again, we appreciate the programs that are out there to help people get out of poverty. We're probably the State leading the Nation in getting people out of poverty. The average length of time when people come to us, say, on Medicaid is only nine months because we emphasize we're going to help you in the short term. We're going to give you education, training, and skills so you can start helping yourself. It's the old adage of we're not just going to give you —

Mr. GROTHMAN. Right.

Governor HERBERT.—a fish, we're going to teach you to fish. And that's something that I think is a good program that we're doing in Utah that I think other States, work efforts are —

Mr. GROTHMAN. It is, but I am going to tell you the problem that I think we bumped into in Wisconsin, and that is when you are successful, you have to keep spending the same amount of money or more, right, which is a problem. You are kind of penalized for being successful because the Federal Government says if you want to keep this money coming, find something to spend it on. And in that way you kind of penalize the successful States.

Governor HERBERT. Well, that's an adverse incentive, and so that's probably not a good policy.

Mr. GROTHMAN. Okay. But you guys never have a problem spending all your TANF money. Okay.

Governor HERBERT. Yes, I don't know—for example, CHIP, we don't spend all the CHIP money. Again, we're working on trying to get people off government assistance, and most people don't want to have government assistance. They want to have a job; they want to be able to be self-sustaining. That's the American way. So we don't spend it just to spend it and find ways to spend it. We're trying to actually solve problems.

Mr. GROTHMAN. You can always find a way, though, to spend it that might be good. I mean, the question is—I should put it this way: Because of maintenance effort, are you spending dollars that you feel you would never spend on your own if you had to tax yourself for it? I guess I should put it that way.

Governor OTTER. I think there's many areas, Congressman, where we could cut down on the amount of Federal dollars that we need if we're allowed to implement those things that the Federal Government or those programs want us to achieve. And I think Governor Herbert has spoken to it very well, and that is we know that there's going to be a time when people are going to hit an economic or a financial speedbump in their life, and yes, it's important that they have a government which can respond to that but only on a temporary basis. And if we had the rules and regulations that we could enforce that say, okay, while you're laid up, while you're doing this, you're going to get an education. We're going to send you back to school. And we would spend some of that money then on getting you a retrofitted for the economy of the State of Idaho in a new profession if we were allowed to.

Mr. GROTHMAN. I think one final question here in the final 30 seconds, obviously, everybody is thinking about what went on in Florida, and you get so much stuff on the internet and so many articles on there, you don't know what is true and what is not true, but it appears as though there have been Federal grants in which you are encouraged to report less crimes or less arrests or that sort of thing. So, in other words, maybe people do things different to pretend that they have better outcomes than they are having. In other words, they are in this case apparently arresting fewer people than they should arrest or I would say they should arrest to get more Federal money. Do you find that there are any programs like that in which you are incentivized to hit targets that you might not want to hit?

Governor HERBERT. You know, I can't think of anything. If in fact that's the case, again, we can see the incentive is in the wrong place. It ought to be for—the incentive ought to be have better outcomes, and we ought to be full and transparent in how we collect the data and not try to game the system.

Governor MARTINEZ. I think at times there's—there are Federal dollars, for example, in law enforcement and the maintenance of efforts that takes place. However, the paperwork, the amount of documentation that is required to be submitted, the limitations that come with those dollars when they may be better used different than having to come to the Federal Government for permission, to change the shift a little bit but still under the umbrella of law enforcement, that becomes a challenge for us.

Governor OTTER. If I understand your question, Congressman, probably the most egregious that I've seen is the introduction of a new species under the Endangered Species Act that then the State is required to maintain.

Mr. GROTHMAN. Okay. I would like to thank the chair for giving me an additional minute.

Governor OTTER. So would I.

Mr. PALMER. At this time I will recognize myself for five minutes. And the first thing I want to do, Governor Martinez, is your testimony talked about the fact that there are more than 800 applications for permits to drill in New Mexico at a cost of approximately \$1.9 million to New Mexico and \$3.4 million to the Federal Government per day. And I think you went on to say that it takes an average of 250 days. That is \$850 million just on the Federal side.

And the reason I bring that up is that I have been here—what is today, the 27th? I have been here three years, one month, and 21 days, and one of the first things I pushed was opening up Federal lands for energy. We are an energy superpower. There is no question about it. The Federal Government has tremendous resources.

And I bring this up in the context of infrastructure because I think a gas tax is the revenue source of diminishing returns. Governor Otter made this point about the fuel efficiency that we are achieving and we continue to want to do that. Everybody wants more fuel-efficient vehicles. So when you attach a gas tax, you know that that is a revenue source of diminishing return.

What I think might be more helpful is if we take your testimony and this whole permitting thing, expedite this, get it down so that

we not only can shorten the amount of time it takes to take advantage of a lease but increase the royalties—we haven't increased the royalties on Federal energy resources since the 1920s—and direct a portion of that into the Highway Trust Fund for infrastructure. We could set it up on a system where there could be matching money for the States and let the States manage it. Would you like to comment on that?

Governor MARTINEZ. Yes. Thank you very much for that question and comment. I think it's very important to understand that New Mexico is really a gem within the country not only for energy independence for the country but also the revenues that it generates. There's—for petroleum, there are so many products. It's not just for vehicles and —

Mr. PALMER. That is right.

Governor MARTINEZ.—gas is not just for vehicles. I mean, what goes—what products use the petroleum? And if we took that out of every product that we see and touch every day, we would be shocked to know how much of that is used in a variety of products.

The—under the previous administration, it was better to say nothing to the private industry, not to give permission or to deny it. Under my previous administration as a Governor, the same thing. It was easier to say nothing, which costs people money to have something sitting there. We had some of these permits sitting there three years when I entered into office, so it was a quick move of going forward and backwards for every permit coming in the door and everything that was sitting there. To be able to have the revenues that allow us for education, allow for special projects, infrastructure projects that we have, and our permanent fund. We have a permanent fund, is one of the healthiest ones in the country because of oil and gas just in case when it was developed we ran out of oil and gas. But because technology is so great now, we're able to actually produce more and make it more available so that we're not reliant on countries that are in such turmoil.

Mr. PALMER. Well, it has been reported that there is a formation out West in western Colorado, southwestern Wyoming, and northern Utah, the Green River Formation, that holds three trillion barrels of recoverable oil. That is three times what the entire world has used in the last 100 years. I don't want to stay focused on that. I want to talk about some of these other issues and a more collaborative effort between State and local government.

I think that is a legitimate discussion, particularly since my brother is a county engineer—on how we can work on infrastructure together on the permitting. What we have seen over the last few years is just an enormous drag on infrastructure and really on the economy because of permitting. The infrastructure is so important to the economy.

I would like to get some feedback from each of you on how you see we could improve that process, maybe let the State and local governments do more of the work in a collaborative way, as you talk about, Governor Herbert.

Governor HERBERT. Well, thank you. Again, I come from local government. I was a county commissioner for 14 years. I participated with NACo on many things. We railed against the Federal Government when I was there about the unfunded or underfunded

mandates would come to local government, so the issue is still here. It's always probably going to be here, but at least we ought to be cognizant of it.

In Utah, we in fact invite—they have an association for the cities called the League of Cities and Towns. They come. We have 245 of them that they represent, the cities of the State, 29 counties, part of our Utah Association of Counties. They are probably the most active people on the Hill during the legislative session to make sure that what we do, they get input and they're invited.

We equalize our educational funding in the State of Utah so that if you're in a rural part on the Navajo Nation that you get as much education funding as you do if you're in the middle of the urban heartland of the State of Utah. So we try to respect, you know, all the local government and their subdivisions and make sure that they're part of the decision-making process in the State of Utah.

Again, a lot of it's just an attitude. We're saying we're not going to make decisions at the State level until we've got input from the local levels, and some of that we devolve down and let them say, you know what, that's a county issue. In your county, you take care of it. That's a city issue. You're a city, you take care of it and the State will stay out of it.

Mr. PALMER. Okay. In that regard—and this is my last question—we have talked a good bit about shrinking the State and local consultation requirements of reforming the Unfunded Mandates Reform Act to help restore the States' partnership with the Federal Government. What I want to know is how important are these types of reforms, and are there other possible areas for reform that Congress could be, should be looking at to improve the relationship or communication between the Federal Government and the States? And each of you can answer that, and we will be done.

Governor OTTER. Mr. Chairman, let me begin by saying we learned a lot about ourselves during the recession between '08 and '10. And what we did is what almost every Idaho family did is they sat around the breakfast table when the work ran out for Dad and said, you know, what things do we—what are—what is necessary and what is nice? To find out what is necessary, we look to the Constitution, and the Constitution was pretty specific about an education system for the State of Idaho and other areas. And then we said, well, what is nice? If we haven't got the money for nice, we're not going to do those things anymore.

And so I think at every level of government, especially when you run into a time like the Great Recession—like the recession was, that's the process that you have to go through. And even further than that, after the recession we didn't go back to the old ways of doing things because we learned there were a lot of things that were simply not the proper role of government.

Mr. PALMER. Thank you. Governor Martinez?

Governor MARTINEZ. I completely support that. You know, having inherited the largest structural deficit in the history of our State. I have not raised a tax once. And they can call it whatever they want, revenue enhancements, whatever it may be. We've not raised a single tax but we've actually become competitive with our surrounding States, which didn't exist for a very, very long time. It was believed doing the same thing over and over again we were

going to get different results, and we didn't. We became competitive and we've actually recruited companies and businesses to New Mexico because we're doing it different.

However, now, we're turning over an amazing budget. We have a surplus. We have great royalties. We have a permanent fund that's outstanding. But I hope that the next Governor doesn't see it as a way to start a spending frenzy and then growing government back to where it used to be, which was absolutely unnecessary, way too many employees to actually complete the mission of the State. And so that's what we've done is reduce our actual government size to fit what was necessary for us to deliver the services that are required.

Mr. PALMER. Thank you. Governor Herbert?

Governor HERBERT. I'll just finish by saying this. You've heard me say this already. But all 435 Members of the House, all 100 Members of the Senate, the President should always ask the question, "Is this an issue, something that should be better addressed at the State level?" That should be the beginning of every discussion. And it'll be differences of opinion, but many times you're going to say, you know what, that probably is going to be better and more effectively addressed at the State level. Let them take on that responsibility. We will welcome that. And I think that's a bipartisan approach, by the way, that feeling. Thanks for hearing us today.

Mr. PALMER. Well, I thank our witnesses again for appearing before us today. I think this has been an excellent hearing and very constructive.

The hearing record will remain open for two weeks for any member to submit a written opening statement or questions for the record.

If there is no further business, without objection, the committee stands adjourned.

Governor MARTINEZ. Thank you. Thank you for the opportunity. [Whereupon, at 11:48 a.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD



Brian Sandoval
Governor of Nevada
Chair

Steve Bullock
Governor of Montana
Vice Chair

Scott D. Pattison
Executive Director and CEO

Written Statement of the
National Governors Association

On

Federalism Implications of Treating States as Stakeholders

To The

House Committee on Oversight and Government Reform

February 27, 2018

The National Governors Association (“NGA”) appreciates the opportunity to submit written comments for the record in today’s hearing of the House Oversight and Investigations Committee about the implications to federalism of treating States as stakeholders.

Established more than 100 years ago, the NGA is the bipartisan organization for the nation’s governors. NGA assists governors on domestic policy and state management issues, and provides a forum for governors to speak with a unified voice to our federal partners in the Executive, Legislative, and Judicial branches.

We begin with several main points:

- Governors believe that a strong, cooperative relationship between the states and federal government is vital to best serve the interests of all.
- Governors believe that federal action should be limited to those duties and powers delegated to the federal government under the Constitution. We favor the preservation of state sovereignty when our federal partners legislate or regulate activity in the states.
- Governors believe that federal preemption should be the exception, not the rule because it often poisons the well for healthy intergovernmental collaboration.

Principles for State-Federal Relations

To ensure the proper balance between state and federal action and to promote a strong and cooperative state-federal relationship, governors encourage federal forbearance. Forbearance involves limiting federal action to situations where constitutional authority for such action is clear. It curbs federal action to challenges that are truly national in scope. It also carefully balances federal action with each state’s ability to deliver resources and approaches to common challenges. Unless constitutionally prohibited, federal action should not set preemptive ceilings but rather provide a floor for additional state action.

Regarding federal preemption, governors recognize the need for federal intervention should states fail to act collectively on issues of legitimate concern. Preemption of state laws, however, should be the exception rather than the rule. This is especially true in areas of primary state responsibility, including, but not limited to: education, insurance regulation, criminal justice, preservation of the dual banking system, preservation of state securities regulation, and the management of state personnel programs.

NGA also urges its federal colleagues to reconsider federal-state program design, which has run the gamut from prescriptive to devolution. NGA encourages middle-ground

partnerships, not these two extremes. We believe that there are opportunities to improve collaboration and cooperation in program design to provide maximum flexibility and opportunity for innovation, as well as foster administrative efficiency and cross-program coordination.¹

The “Federalization” of Federalism?

Governors believe that a strong, cooperative relationship between the states and federal government is vital to best serve the interests of all.

Federalism is a dynamic, not static doctrine. It recognizes that, while dual sovereignty governs our nation, federal and state power derives from the people. In practice, however, the ebb and flow of power among those sovereigns during federalism’s modern historical arc triggers the need for regular adjustments, where appropriate, to maintain optimum balance.

Today’s hearing invites a candid conversation about whether, and to what extent, federalism has, in practice, become “federalized,” shifting our dual sovereign relationship away from States-as-Partner, to one of States-as-Stakeholder. The federal agency rulemaking process offers a window into this question.

¹ NGA Permanent Policy at Section 2.3 (2016) outlines specific principles to help design federal-state programs including:

- States should be actively involved in a cooperative effort to develop policy and administrative procedures.
- The federal government should respect the authority of states to determine the allocation of administrative and financial responsibilities within states in accordance with state constitutions and statutes. Federal legislation should not encroach on this authority.
- Legislation should authorize and appropriate sufficient funds to meet identified program objectives.
- Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures.
- States should be given flexibility to transfer a limited amount of funds from one grant program to another, or to administer related grants in a coordinated manner.
- Federal funds should provide maximum state flexibility without specific set-asides.
- States should be given broad flexibility in establishing federally mandated advisory groups, including the ability to combine advisory groups for related programs.
- Governors should be given the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass-through of funds.
- Federal government monitoring should be outcome-oriented.
- Federal reporting requirements should be minimized.
- The federal government should not dictate state or local government organization.

Executive Order 13132 (“EO 13323”), first issued in 1999 and renewed on a bipartisan basis by successive administrations, directs all non-independent federal agencies and departments to evaluate proposed rulemakings for their effects on federalism.² EO 13132 calls for federal consultations with state and local governments, and requires federal agencies to provide a federalism impact statement whenever proposed regulations would have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”³ In practice, however, the application of EO 13132 has been uneven, with only some, but not all federal agencies and departments maintaining internal guidance to evaluate the effect of proposed agency actions and rulemakings on federalism.⁴

The Administrative Conference of the United States (“ACUS”), a federal advisory body, released recommendations in 2011 for federal agencies and departments to help guide the federal-state relationship on regulatory preemption.⁵ The recommendations, which were aspirational, not obligatory, included one calling for federal agencies to “reach out to appropriate State and local officials early in the [rulemaking] process when they are considering preemptive rules.”⁶

For States and local governments, this recommendation raises the question, “to what end?” When a federal agency proposes a draft regulation that would have a preemptive effect on state and local governments, the affected parties often file comments with the intent to modify the draft rule and mitigate the preemption. Instead of providing state and local officials with new equipment to improve the odds of mitigating, let alone overcoming a federal preemptive rulemaking, optimally at the conceptual stage, the ACUS recommendation simply reminds sub-federal stakeholders to be alert to the pending preemption.

ACUS also explained that their goal with these recommendations was “not to favor or disfavor preemption.”⁷ Unfortunately, the ACUS recommendations may have been an opportunity missed to help move the intergovernmental relationship closer to partnership because by remaining neutral on preemption, ACUS endorsed the status quo.

Federal officials may desire partnership with States and local governments, but, in practice, statutory and administrative rules limit it. States are often petitioners in rulemakings, offering formal comments to proposed rules based on self-interest, governed by filing deadlines and *ex parte* procedures. The federal “notice-and-comment”

² Exec. Order No. 13132, 64 Fed. Reg. 153 (Aug. 10, 1999).

³ Id. at §6(c)(2) and §1(a).

⁴ Sharkey, C., Federal Agency Preemption of State Law (Executive Summary), https://www.acus.gov/sites/default/files/documents/Executive-Summary_Dec_20.pdf (Last visited Feb. 22, 2018).

⁵ Recommendation 2010 – Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81 (Jan. 3, 2011).

⁶ Id. at 83 (Recommendation 5.d.)

⁷ Id. at 82.

rulemaking process itself can invite procedural challenges that may thwart the desired collaborative intergovernmental relationship.

Governors support a vibrant and strong partnership with Congress and the Administration to maintain and promote a balanced federal system. But, until a pragmatic strategy developed through intergovernmental collaboration among committed champions from across the levels of government emerges that roadmaps revisions, for instance, to long-standing administrative procedures that guide federal rulemakings, the federal call for “partnership” risks a less-than-satisfying answer.

We encourage this Committee specifically, and the Congress generally, not to pass on important opportunities to go bold and help promote the intergovernmental partnership.

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**Testimony of James D. Ogsbury
Executive Director, Western Governors' Association**

**Before the
United States House of Representatives
Committee on Oversight and Government Reform
and the
Speaker's Task Force on Intergovernmental Affairs**

Oversight Hearing on Federalism Implications of Treating States as Stakeholders

February 27, 2018

Chairman Gowdy, Ranking Member Cummings, Task Force Chairman Bishop, and members of the Committee and Task Force, Western Governors appreciate the opportunity to provide written testimony on matters involving the relationship between states and the federal government. These remarks are presented by the Western Governors' Association (WGA), an independent, bipartisan organization representing the Governors of 19 western states and three U.S. territories in the Pacific.

We are encouraged that the Committee and the Task Force are focusing on the critical issue of the state-federal relationship. This is a high priority for Western Governors, as reflected by their adoption of WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*. This resolution articulates the Governors' vision for a more efficient and effective partnership between the federal government and the states. It is appended to this testimony for inclusion in the hearing record.

States Are NOT Stakeholders

"States, tribes, local governments, groups and organizations, and *other stakeholders* ..." This phrase (and multiple variants thereof) often appears in legislation and throughout federal proclamations: notices of rulemakings, requests for comments, departmental orders, and all types of policy statements. The idea that it communicates (i.e. that states stand in the same relation to the federal government as any other organized group) has taken firm hold in various theaters of the federal executive and legislative branches of government. This widespread notion, however, is legally incorrect and contrary to our fundamental principles of governance.

States are not stakeholders. Rather, they are a sovereign level of United States government. States not only created the federal government, but they reserved to themselves the greater measure of authority over public affairs. This reservation of power is memorialized in the Tenth Amendment of the U.S. Constitution, which reads in its entirety: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Under the American construct of federalism, the powers of the federal government are narrow and defined, while those of the states are vast and innumerable. Nevertheless, the balance of power envisioned by the Founding Fathers has, over generations, been turned on its head. The outsized role of the federal government is reflected in the enormity of its budget, the scale of its workforce and the scope of its regulatory reach.

As the chief elected officials of sovereignties, Western Governors expect to engage with federal officials as co-regulators. They are fiercely committed to working with federal offices as authentic partners in the formulation and execution of public policy. They understand that Governors – who exercise authority closer to the governed – have specialized knowledge of their states' environments, legal frameworks, culture, and economies that is essential to informed national decision-making. A *bona fide* partnership between state and federal authorities will result in more efficient, cost-effective, and legally defensible decision-making. It will result in better public policy.

A Complex Relationship

The relationship between state and federal governments manifests itself in various, legally distinct contexts. Thoughtful consideration of improvements to the relationship must account for its various incarnations.

Certain areas of responsibility (e.g. national defense, production of currency) are exclusively within the federal purview. Other areas (e.g. groundwater and wildlife management) are the province of state government. There are instances of shared authority (e.g. the adjudication of federal water rights under state law), and cases where federal authority is delegated to the states (e.g. Clean Water Act and Clean Air Act implementation). There are other situations where the relationship is predicated on historical obligations (e.g. Payments-in-Lieu-of-Taxes) or wholly voluntary collaborations (e.g. Memoranda of Understanding, conservation joint ventures). These different "flavors" of the state-federal relationship are explained more fully in the attached resolution.

Congress has, through various statutes, expressly recognized states' unique status as sovereignties with their own inherent authority. In other instances, Congress has specifically designated states as co-regulators with federally-delegated authority, and has directed federal agencies to consult with states accordingly.

The intersection of federal and state authority is especially complex with respect to the management of natural resources. On the one hand, such managerial authority is mostly vested in the states. States are the principal authority for the allocation and management of natural resources within their borders. They exercise inherent police power in the management of wildlife resources and possess plenary authority over groundwater resources.

On the other hand, the federal government is by far the largest single landowner in the West. In fact, 47 percent of the 11 westernmost continental states is federally owned, as is 61 percent of the State of Alaska. In contrast, the federal government owns only four percent of lands in the other states. It is incumbent upon federal land managers to administer their holdings according to the laws of the states in which they reside. Accordingly, it is especially important that federal and state officials work collaboratively and constructively in resource management to deliver the best possible results for their common constituents.

Strengthening the State-Federal Relationship and Consultation

WGA commends the attention of the Committee and Task Force to the attached resolution for specific recommendations to improve the state-federal relationship. For example, the resolution addresses the issue of federal preemption and notes that, in the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign.

With respect to the delegation of authority to states for the administration of federal programs, the resolution provides that when a state (which should be respected and regarded as a co-regulator) is meeting the minimum requirements of a delegated program, the role of a federal department or agency should be limited to the provision of funding, technical assistance and research support. Federal agencies should grant states the maximum administrative discretion possible, and federal oversight of states should not unnecessarily intrude on that discretion.

The resolution further identifies opportunities for positive engagement between Governors and federal officials. It calls for robust application of a revised and enforceable executive order on federalism. Moreover, it offers specific suggestions for the involvement of states in the development and implementation of federal land use plans.

An improved state-federal relationship depends on improved communication. Accordingly, the resolution's provisions on consultation are especially salient to the subject of this hearing, and they are presented here for consideration by the Committee and Task Force.

Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets, and strategic planning.

Federal agencies should rely on state data and expertise in development and analysis of underlying science serving as the legal basis for federal regulatory action. States merit greater representation on all relevant committees and panels (such as the Science Advisory Board of the Environmental Protection Agency and related issue panels) advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes.

Federal agencies must engage in early (pre-rulemaking) consultation with Governors and state regulators. This should include substantive consultation with states during development of rules or decisions and a review by states of the proposal before a formal rulemaking is launched (i.e., before such proposals are sent to the White House Office of Management and Budget). As they receive additional information from state agencies and non-governmental entities, Governors and designated state officials should have the opportunity to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to finalization.

Western Governors can conceive of no legitimate reason they could not or should not be consulted at the earliest stages of policy ideation. An interactive, relational model of cooperative policy development would yield great dividends for our shared constituents. Adoption of such a model, however, is only possible upon embrace of states as partners and rejection of the notion that states are stakeholders.

The Promise of Restored Partnership

Governors are eager to work with the federal government as authentic partners. They hope to engage with federal agencies at the earliest stages of federal decision-making and program development. A decision-making paradigm that applies local knowledge, expertise, resources, and competencies will result in efficiencies, cost-savings, and legally sound (and defensible) policy.

Western Governors are not the only group to recognize the importance of strengthening the relationship between federal, state, and local governments. In coordination with other state and local groups, they have developed a common set of Principles to Clarify and Strengthen the State-Federal Relationship. In addition to WGA, adopters of these principles include the Conference of Western Attorneys General, Council of State Governments – West, Western Interstate Region of the National Association of Counties, Pacific NorthWest Economic Region, Western States Air Resources Council, and Western States Water Council.

As Governors pursue efforts to realign the state-federal relationship, they would appreciate the opportunity to consult with Congress on the development and use of precise legislative language that recognizes the sovereignty of states and helps restore their status as a co-equal level of government. They also request your vigilance to protect against the undue transfer of financial burdens to states and localities. A common goal should be to maximize the return that Americans receive on the investment of their limited tax dollars.

Western Governors appreciate the interest of the Committee and the Task Force in improving the state-federal relationship. They are interested in working with you to effect meaningful and enduring improvements and assisting you in creating a legacy of which you can jointly be proud. Western Governors look forward to helping you realize a historic opportunity to develop a more functional policy-making paradigm that promises untold benefits for generations to come.



**WESTERN
GOVERNORS'
ASSOCIATION**

**Western Governors' Association
Policy Resolution 2017-01**

Building a Stronger State-Federal Relationship

A. PREAMBLE

The Governors of the West are proud of their unique role in governing and serving the citizens of this great nation. They recognize that the position they occupy – the chief elected official of a sovereign state – imposes upon them enormous responsibility and confers upon them tremendous opportunity. Moreover, the faithful discharge of their obligations is central to the success of the Great American Experiment.

It was, after all, the states that confederated to form a more perfect union by creating a national government of limited and defined powers. The grant of specific responsibilities for irreducibly common interests – such as national defense and interstate commerce – was brilliantly designed to make the whole stronger than the sum of its parts.

The genius of American democracy is predicated on the separation of powers among branches of government (*viz.* the legislative, executive and judiciary) and the division of power between the federal and state governments (federalism). Under the American version of federalism, the powers of the federal government are narrow, enumerated and defined. The powers of the states, on the other hand, are vast and indefinite. States are responsible for executing all powers of governance not specifically bestowed to the federal government by the U.S. Constitution. This principle is memorialized in the Tenth Amendment, which states in its entirety, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

This reservation of power to the states respects the differences between regions and peoples. It recognizes a right to self-determination at a local level. It rejects the notion that one size fits all, and it provides for a rich tapestry of local cultures, economies and environments.

Because of the Constitutional recognition of state sovereignty, the states have been appropriately regarded as laboratories of democracy. States regularly engage in a kind of cooperative competition in the marketplace of ideas. Western Governors are leaders in innovative governance who employ their influence and executive authority to promote initiatives for improvement of their states’ economies, environments and quality of life.

Despite the foregoing, the balance of power has, over the years, shifted toward the federal government and away from the states. The growth in the size, cost and scope of the federal government attests to this new reality. Increasingly prescriptive regulations infringe on state authority, tie the hands of states and local governments, dampen innovation and impair on-the-ground problem-solving. Failures of the federal government to consult with states reflect a lesser appreciation for local knowledge, preferences and competencies.

The inauguration of a new Administration presents a historic opportunity to realign the state-federal relationship. Western Governors are excited to work in true partnership with the federal government. By operating as authentic collaborators on the development and execution of policy, the states and federal government can demonstrably improve their service to the public. Western Governors are optimistic that the new Administration will be eager to unleash the power and creativity of states for the common advantage of our country. By working cooperatively with the states, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united. Such an outcome will redound to the credit of the Administration and inure to the benefit of the American people.

B. BACKGROUND

1. The relationship between state government authority and federal government authority is complex and multi-dimensional. There are various contexts in which the authorities of these respective levels of U.S. government manifest and intersect. For example:
 - a) **Exclusive Federal Authority** – There are powers that are specifically enumerated by the U.S. Constitution as exclusively within the purview of the federal government.¹
 - b) **State Primacy** – States derive independent rights and responsibilities under the U.S. Constitution. All powers not specifically delegated to the federal government are reserved for the states; in this instance, the legal authority of states overrides that of that federal government.²

¹ The structure of the government established under the U.S. Constitution is premised upon a system of checks and balances: Article VI (Supremacy Clause); Article I, Section 8 (Congressional); Article II, Section 1 (Executive Branch); Article III, Section 2 (Judicial Branch). State law can be preempted two ways. If Congress evidences an intent to fully occupy a given “field,” then state law falling within the field is preempted. If Congress has not fully displaced state regulation over the matter, then state law is preempted to the extent it *actually* conflicts with federal law.

² Amendment 10 of the U.S. Constitution: “*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.*”

Governors have responsibilities for the condition of land, air, forest, wildlife and water resources, as well as energy and minerals development, within their state's borders.

- c) **Shared State-Federal Authority** – In some cases, state and/or federal authority can apply, given a particular fact pattern.³ Federal preemption of state law is a concern under this scenario. According to the Council on State Governments, the federal government enacted only 29 statutes that pre-empted state law before 1900. Since 1900, however, there have been more than 500 instances of federal preemption of state law.
- d) **State Authority “Delegated” from Federal Agencies by Federal Statute** – The U.S. Congress has, by statute, provided for the delegation to states of authority over certain federal program responsibilities. Many statutory regimes – federal environmental programs, for example – contemplate establishment of federal standards, with delegated authority (permissive) available to states that wish to implement those standards.

According to the Environmental Council of the States (ECOS), states have chosen to accept responsibility for 96 percent of the primary federal environmental programs that are available for delegation to states. States currently execute the vast majority of natural resource regulatory tasks, including 96 percent of the enforcement and compliance actions and collection of more than 94 percent of the environmental quality data currently held by the U.S. Environmental Protection Agency (EPA).

- e) **Other** – Where the federal government has a statutory, historical or “moral” obligation to states.⁴

³ The federal government has authority to regulate federal property under Article IV of the Constitution. That authority, however, is limited. General regulatory authority (including regulation of wildlife and land use) is held by the states, unless Congress passes a specific law that conflicts with a state's exercise of authority. This is discussed in detail in U.S. Supreme Court case, *Kleppe v. New Mexico*.

⁴ These historic agreements include, but are not limited to: Payments in Lieu of Taxes; shared revenues authorized by the Secure Rural Schools Act; Oregon and California Railroad Revested Lands payments; shared mineral royalties at the historic level of 50% and renewable energy leasing revenues from development on U.S. Forest Service lands, Bureau of Land Management lands and waters off the coasts of the western states; Abandoned Mine Lands grants to states consistent with 2006 Amendments to the Surface Mining Control and Reclamation Act; legally binding agreements and timetables with states to clean up radioactive waste that was generated in connection with nuclear weapons production and that remains on lands managed by the Department of Energy in the West.

2. Over time, the strength of the federal-state partnership in resource management has diminished. Federal agencies are increasingly challenging state decisions, imposing additional federal regulation or oversight and requiring documentation that can be unnecessary and duplicative. In many cases, these federal actions encroach on state legal prerogatives, especially in natural resource management. In addition, these federal actions neglect state expertise and diminish the statutorily-defined role of states in exercising their authority to manage delegated environmental protection programs.
3. The current fiscal environment exacerbates tensions between states and federal agencies. For example, states have a particular interest in improving the active management of federal forest lands. The so-called “fire borrowing” practice employed by the U.S. Forest Service and the Department of the Interior to fund wildfire suppression activities is negatively affecting restoration and wildfire mitigation work in western forests. Changes are needed, as the current funding situation has allowed severe wildfires to burn through crippling amounts of the very funds that should instead be used to prevent and reduce wildfire impacts, costs, and safety risks to firefighters and the public. This also has impacts on local fire protection districts, which often bear the brunt of costs associated with first response to wildfire, and state budgets that are also burdened by the costs of wildfire response. Fire borrowing represents an unacceptable set of outcomes for taxpayers and at-risk communities, and does not reflect responsible stewardship of federal land. In addition, states increasingly are required to expend their limited resources to operate regulatory programs over which they have less and less control. A 2015 report by the White House Office of Management and Budget on the costs of federal regulation and the impact of unfunded mandates notes that federal mandates cost states, cities and the general public between \$57 and \$85 billion every year.
4. States are willing and prepared to more effectively partner with the federal government on the management of natural resources within their borders.
5. The U.S. Advisory Commission on Intergovernmental Relations – established in 1959 and dissolved in 1996 – was the federal government’s major platform for addressing broad intergovernmental issues beyond narrow considerations of individual programs and activities.
6. The current Executive Order on Federalism (E.O. 13132) was issued by then-President William Clinton in 1999. That E.O. has not been revisited since and it may be time to consider a new E.O.

C. GOVERNORS' POLICY STATEMENT

1. Review of the Federal-State-Local Relationship

- a) It is time for thoughtful federal-state-local government review of the federal Executive Order on Federalism to identify areas in the policy that can be clarified and improved to increase cooperation and efficiency.
- b) Governors support reestablishment of the U.S. Advisory Commission on Intergovernmental Relations. It is imperative that the President show his commitment to the Constitutional separation of powers by establishing a platform at the highest level to address federalism concerns.

2. Avoiding Preemption of States

- a) In the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign. Accordingly, federal departments and agencies should, to the extent permitted by law, construe, in regulations and otherwise, a federal statute to preempt state law only when the statute contains an express preemption provision or there is some other firm evidence compelling the conclusion that Congress intended preemption of state law, consistent with established judicial precedent.
- b) When Congress, acting under authority granted to it by the Constitution, does preempt state environmental laws, federal legislation should:
 - i. Accommodate state actions taken before its enactment;
 - ii. Permit states that have developed stricter standards to continue to enforce them;
 - iii. Permit states that have developed substantially similar standards to continue to adhere to them without change and, where applicable, without consideration to land ownership.

3. Defining Meaningful State-Federal Consultation

- a) Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with *early, meaningful and substantive*

input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets and strategic planning.

- b) Consistent with C(2) and C(3)(a), federal agencies should consult with states in a meaningful way, and on a timely basis.
 - i. **Predicate Involvement:** Federal agencies should take into account state data and expertise in development and analysis of underlying science serving as the legal basis for federal regulatory action. States merit greater representation on all relevant committees and panels (such as the EPA Science Advisory Board and related issue panels) advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes.
 - ii. **Pre-Publication / Federal Decision-making Stage:** Federal agencies should engage in early (pre-rulemaking) consultation with Governors and state regulators. This should include substantive consultation with states during development of rules or decisions and a review by states of the proposal before a formal rulemaking is launched (i.e., before such proposals are sent to the White House Office of Management and Budget).
 - iii. **Post-Publication / Pre-Finalization Stage:** As they receive additional information from state agencies and non-governmental entities, Governors and designated state officials should have the opportunity to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to finalization.

4. State Authority "Delegated" from Federal Agencies Pursuant to Federal Statute

Where states are delegated authority by federal agencies pursuant to legislation:

- a) Federal agencies should treat states as co-regulators, taking into account state views, expertise and science in the development of any federal action impacting state authority.

- b) Federal agencies should grant states the maximum administrative discretion possible. Any federal oversight of such state should not unnecessarily intrude on state and local discretion. Where states take proactive actions, those efforts should be recognized and credited in the federal regulatory process.
- c) When a state is meeting the minimum requirements of a delegated program, the role of a federal department or agency should be limited to the provision of funding, technical assistance and research support. States should be free to develop implementation and enforcement approaches within their respective jurisdictions without intervention by the federal government.
- d) New federal rules and regulations should, to the extent possible, be consistent with existing rules and regulations. The issuing agency should identify elements and requirements common to both the proposed and existing regulations and provide states an opportunity to develop plans addressing the requirements of both in a coordinated fashion. This will achieve economies of scale, saving both time and money.
- e) When a federal department or agency proposes to take adjudicatory actions that impact authority delegated to states, notice should be provided to affected Governors' offices, and co-regulating states should have the opportunity to participate in the proceedings. Where legally permissible, that right should extend to federal agencies' settlement negotiations impacting state environmental and natural resource management prerogatives. Where their roles and responsibilities are impacted, states should be meaningfully consulted during settlement negotiations, including negotiations aimed at avoiding, rather than resolving, litigation (such as negotiations following a notice of intent to sue under the Endangered Species Act, but prior to a formal complaint being filed to initiate legal action).
- f) States' expertise should be recognized by federal agencies and robustly represented on boards and in other mechanisms upon which agencies rely for development of science to support regulatory action.

5. Other Opportunities for Positive Engagement by the Federal Government with Western States

- a) **Federalism Reviews** – Federal agencies are required by federal Executive Order 13132 to consider and quantify consequences of federal actions on states. In practice, the current process falls short of its stated goals. Governors call on the President to revisit the executive order to, among other things:

- i. Specifically involve Western Governors on issues (e.g., public lands, water and species issues) that disproportionately impact the West;
 - ii. Work with Governors to develop specific criteria and consultation processes: 1) for the initiation of federalism assessments and 2) that guide the performance of every federal Department and agency federalism assessment;
 - iii. Require federal Departments and agencies to meet the criteria developed under C(5)(a)(ii), rather than simply require the consideration of federalism implications;
 - iv. Provide states, through Governors, an opportunity to comment on federalism assessments before any covered federal action is submitted to the Office of Management and Budget for approval.
- b) **Federal and State Land-Use Planning** – Governors possess primary decision-making authority for management of state resources. Accordingly, it is essential that they have an opportunity to review new, revised and amended federal land management plans for consistency with existing state plans. Governors and their staffs have specific knowledge and experience that can help federal agencies craft effective and beneficial plans. A substantive role in federal agencies' planning processes is vital for Western Governors:
- i. Federal landscape-level planning presents new issues for Governors to consider as they attempt to ensure consistency between state and federal requirements. Agencies should provide Governors sufficient time to ensure a full and complete state review. This is particularly true when agency plans affect multiple planning areas or resources;
 - ii. Agencies should seek to align the review of multiple plans affecting the same resource. This is particularly true for threatened or endangered species that have vast western ranges;
 - iii. When reviewing proposed federal land management plans for consistency with state plans, Governors should be afforded the discretion to determine which state plans are pertinent to the review, including state-endorsed land use plans such as State Wildlife Action Plans, conservation district plans, county plans and multi-state agreements;
 - iv. Governors must retain a right to appeal any rejection of recommendations resulting from a Governor's consistency review.

- c) **Honoring Historic Agreements** – The federal government should honor its historic agreements with states and counties in the West to compensate them for state and local impacts associated with federal land use and nontaxable lands within their borders that are federally-owned.
- d) **Responsible Federal Land Management** – The federal government should be a responsible landowner and neighbor and should work diligently to improve the health of federally-owned lands in the West. Lack of funding and conflicting policies have resulted in large wildfires and the spread of invasive species from federally owned forests and grasslands, negatively impacting adjacent state and privately-owned lands, as well as state-managed natural resources (soils, air and water).
- e) **Recognizing State Contributions to Federal Land Management** – The U.S. Congress and appropriate federal departments and agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states' borders through the contribution of state expertise, manpower and financial resources.
- f) **Avoiding Unfunded Mandates** – The U.S. Congress and federal departments and agencies should avoid the imposition of unfunded federal mandates on states. The federal government increasingly requires states to carry out policy initiatives without providing the funding necessary to pay for implementation. State governments cannot function as full partners if the federal government requires them to devote their limited resources to compliance with unfunded federal mandates.
- g) **Other Considerations in Designing an Effective State-Federal Relationship** – Other important considerations in the design of a stronger state-federal relationship include:
 - i. The U.S. Congress and federal departments and agencies should respect the authority of states to determine the allocation of administrative and financial responsibilities within states in accordance with state constitutions and statutes. Federal action should not encroach on this authority.
 - ii. Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures.

- iii. States should be given flexibility to transfer a limited amount of funds from one grant program to another, and to administer related grants in a coordinated manner.
- iv. Federal funds should provide maximum state flexibility without specific set-asides.
- v. States should be given broad flexibility in establishing federally-mandated advisory groups, including the ability to combine advisory groups for related programs.
- vi. Governors should be given the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass-through of funds.
- vii. Federal government monitoring should be outcome-oriented.
- viii. Federal reporting requirements should be minimized.
- ix. The federal government should not dictate state or local government organization.

D. GOVERNORS' MANAGEMENT DIRECTIVE

- 1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.
- 2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult www.westgov.org/policies for the most current copy of a resolution and a list of all current WGA policy resolutions.

SIGNATORIES

Principles to Clarify and Strengthen the State-Federal Relationship

Western Governors' Association (*December 2016*)
Conference of Western Attorneys General (*December 2016*)
Council of State Governments – West (*December 2016*)
National Association of Counties – Western Interstate Region (*December 2016*)
Pacific NorthWest Economic Region (*December 2016*)
Western States Air Resources Council (*August 2017*)
Western States Water Council (*August 2017*)

Principles to Clarify and Strengthen the State-Federal Relationship

A. Fundamental Federalism Principles

1. The structure of government established by the United States Constitution is premised upon a system of checks and balances.
2. The Constitution created a federal government of supreme, but limited and enumerated, powers. The sovereign powers not granted to the federal government are reserved to the people or to the states, unless prohibited to the states by the Constitution. The constitutional relationship among sovereign governments, state and federal, is memorialized in the Tenth Amendment to the Constitution. Under this Constitutional framework, states also confer governmental powers to counties and local governments.
3. Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires.
4. Effective public policy is achieved when there is competition among the several states in the fashioning of different approaches to public policy issues. The search for enlightened public policy is advanced when individual states and local governments are free to experiment with a variety of approaches to public issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems.
5. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state and local authority and regulation.
6. To the extent permitted by law, federal executive departments and agencies should not construe, in regulations and otherwise, a federal statute to preempt state or local authority unless the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of state or local authority, or when the exercise of state or local authority directly conflicts with the exercise of federal authority under the relevant federal statute or U.S. Constitution.
7. When an executive department or agency proposes to act through adjudication or regulatory action to preempt state or local authority, the department or agency must provide all affected states and local governments notice and an opportunity for

appropriate participation in the proceedings [as outlined in B(2)].

8. With respect to federal statutes and regulations administered by states and local governments, the federal government should grant states and local governments the maximum administrative discretion possible. Any federal oversight of such state and local administration should not unnecessarily intrude on state and local discretion or create undue burdens on state and local resources.

B. Actions by Federal Agencies That Should Be Covered by Federalism Executive Order / Consultation

1. Actions having federalism implications include federal regulations, proposed federal legislation, policies, rules, guidances, directives, programs, reviews, budget proposals, budget processes and strategic planning efforts that have substantial direct effects on the states and/or local governments or on their relationship with the federal government, or the distribution of power and responsibilities, between the federal government and the states and local governments.
2. "Consultation" – Each federal executive department / agency should be required to have a clear, consistent and accountable process (see Section C below) to provide states and localities with early, meaningful and substantive input in the development of regulatory policies that have federalism implications.
3. Independent regulatory agencies should be required to comply with the same federalism-related requirements that other executive departments and agencies are required to follow.

C. Federalism Review Process

1. The head of each federal executive department and agency should be required to designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely.
 - a. Regulatory actions [see B(1)] with federalism implications should trigger preparation of a federalism assessment. Such assessments should be considered in all decisions involved in promulgating and implementing the policy.
 - b. Each federalism assessment should accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A19, and:

- i. contain the designated official's certification that the policy has been assessed in light of the principles, criteria and requirements contained in this document;
 - ii. identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in this document;
 - iii. specifically identify the extent to which the policy imposes additional costs or burdens on state or local governments, including the likely source of funding for the state and local governments and the ability of the states and impacted local governments to fulfill the purposes of the policy; and
 - iv. specifically identify the extent to which the policy would affect impacted governments' abilities to discharge traditional state and local governmental functions, or other aspects of state sovereignty and local government authority.
- 2. No executive department or agency should promulgate any regulation that is not authorized by federal statute. Where regulations are appropriate, authorized and Constitutional, but have federalism implications or impose substantial direct compliance costs on states or localities, the executive department or agency must:
 - a. Ensure that new funds sufficient to pay the direct costs incurred by the state or local government in complying with the regulation are provided by the federal government to the impacted state and local governments for the duration of the impact; and
 - b. Prior to the formal promulgation of the regulation:
 - i. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provide to the Director of the Office of Management and Budget a description of the extent of the executive department / agency's prior consultation with representatives of affected states and local governments, a summary of the nature of their concerns, and the executive department / agency's position supporting the need to issue the regulation; and
 - ii. makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by states or local governments.

D. Increasing Flexibility for State and Local Waivers

1. Agencies should review the processes under which states and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
2. Each agency should, to the extent practicable and permitted by law, favorably consider any application by a state or local government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency. In general, federal agencies should operate with a general view toward increasing opportunities for utilizing flexible policy approaches at the state or local level in cases in which the proposed waiver is consistent with applicable federal policy objectives and is otherwise appropriate.
3. Each agency should, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency should provide the applicant with timely written notice of the decision and the reasons for the application's rejection.
4. This process would apply only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.



States Are Not Stakeholders – Legal Primer

Some truths are so basic that, like the air around us, they are easily overlooked.

- Justice O'Connor (on State sovereignty in *New York v. U.S.*, 505 U.S. 144, 187 (1992)).

States are sovereigns.

- U.S.C.A. Const. Amend. 10.
- The U.S. Supreme Court has recognized that the States entered the federal system with their sovereignty intact. *Blatchford v. Native Vill. Of Noatak*, 501 U.S. 775, 779 (1991).

The U.S. Supreme Court and Congress recognize that States are entitled to the degree of respect due a co-equal governmental institution.

- See, e.g. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Alden v. Maine*, 527 U.S. 706, 750 (1999); *Printz v. U.S.*, 521 U.S. 898, 928 (1997); *New York v. U.S.*, 505 U.S. 144, 156-57 (1992); federal agency enabling acts; Unfunded Mandates Reform Act, 2 U.S.C. § 1501 *et. seq.* (Guidelines and Instructions for Implementing Section 204, *State, Local, and Tribal Government Input*); *Federalism*, E.O. 13132.

Congress has, through various statutes, expressly recognized States' unique status as sovereignties with their own inherent authority – as well as instances in which States serve as co-regulators with federally-delegated authority – and has directed federal agencies to consult with States accordingly.

- As recognized by the U.S. Supreme Court, Congress directs federal agencies to defer to State authority in areas such as: land and water use and zoning, education, domestic relations, criminal law, property law, local government, taxation, and fish and game.
- Congress directs federal agencies to co-regulate with the States under statutes such as: Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, and Comprehensive Environmental Response, Compensation, and Liability Act.

Because States are sovereign, the U.S. Supreme Court provides the States with unique consideration for the purposes of invoking federal court jurisdiction. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (finding states are not "normal litigants.").

Federal agencies are directed by Executive Order 13132, *Federalism* to adhere to fundamental federalism principles and develop an accountable process to ensure meaningful and timely input from States when formulating policies that have federalism implications.

Will litigation be the ultimate form of State involvement over federal regulatory policies?

Proper agency consultation with states produces more informed, effective, and durable administrative rules, regulations, and policies.



FEDERAL-STATE RELATIONSHIP: AUTHORITY FRAMEWORK¹

SCENARIO I	Federal Authority Exclusively
Explanation	There are powers that are specifically enumerated by the U.S. Constitution as exclusively the purview of the federal government. ²
Some Examples	National defense, interstate commerce, border control.
SCENARIO II	State Primacy Rules
Explanation	All powers not specifically delegated to the federal government by the U.S. Constitution are reserved for the states, allowing state legal authority to overrule federal intrusion.
Some Examples	Groundwater, ³ water allocations/management, wildlife management (outside ESA context) ⁴ and natural resource management under state "trust" authorities. ⁵

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² U.S. Constitution Article VI (Supremacy Clause), Article I (Congressional) Section 8; Article II, Section 1 (Executive Branch), Article III, Section 2 (Judicial Branch). State law can be preempted two ways: Congress evidences an intent to fully occupy a given "field," then state law falling within the field is preempted. If Congress has not fully displaced state regulation over the matter, state law is preempted to the extent it actually conflicts with federal law.

³ Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. The U.S. Supreme Court has repeatedly emphasized the exclusive nature of state authority over water management, including in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

⁴ See AFWA's 2014 report: "[Wildlife Management Authority, the State Agencies' Perspective](#)."

⁵ Amendment 10 of the U.S. Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." Public trust doctrine is a common-law concept concerning public rights to lands and water to be held "in trust" by states for certain public uses. This is the basis of states' so-called "trust" authority over natural resources and wildlife. The manner in which states hold title to such lands and water is described in the U.S. Supreme Court case *Illinois Central Railroad vs. Illinois*. In the wildlife context, this is further articulated through the [North American Model of Wildlife Conservation](#).

⁶ Per the 10th Amendment, state authority dominates in the pre-listing conservation context.

⁷ Ibid.

SCENARIO III	Shared State-Federal Authority
Explanation	Where state and/or federal authority can apply, given a particular fact pattern. ⁶ Risk of federal preemption of state law is a concern with this scenario.
Some Examples	Water (e.g. federal water rights adjudicated through state water courts), wildlife (ESA-triggered and in wilderness and National Wildlife Refuges), land management (especially under landscape-based planning models), planning and siting of linear facilities.
SCENARIO IV	State Authority “Delegated” from Federal Agencies via Federal Statute
Explanation	Where a statutory regime contemplates establishment of federal standards, with delegated authority (permissive) available to states that wish to implement those standards. ⁷
Some Examples	CAA, CWA, EPCRA, FIFRA, OPCA, RCRA, SDWA, SMCRA, TSCA. ⁸
SCENARIO V	Other Opportunities for State Engagement / State Rights Afforded by Statute / EO
Explanation	Where the federal government has a statutory, historical or “moral” obligation to states.

⁶ The federal government has authority to regulate federal property under Article IV of the Constitution. However, that authority is limited. General regulatory authority (including regulation of wildlife and land use) is held by the states, unless Congress passes a specific law that conflicts with state policy. This is discussed in detail in U.S. Supreme Court case, *Kleppe v. New Mexico*. On the other hand, federal authority can extend to state public trust lands adjacent to so called “special use” federal property (e.g. designated wilderness areas) when state uses interfere with the federal property. This concept is discussed in U.S. Supreme Court cases, *Camfield v. United States* and *United States v. Alford*.

⁷ There are requirements that federal facilities and activities comply with state environmental laws, The CWA, CAA, RCRA, SDWA, TSCA and CERCLA all include provisions that require implementation activities involved to be subject to, and comply with, all federal, state, interstate and local requirements.

⁸ See ECOS, “[State Delegation of Environmental Acts](#),” (Feb. 2016) for lists of states accepting delegation under various federal environmental statutes. According to ECOS, states implement 96.5% of federal programs that can be delegated to states. States conduct over 90% of environmental inspections, enforcement, environmental data collection.

Some Examples	PILT/SRS, mineral royalties, unfunded mandates, required regulatory review, cost-benefit and economic impacts analyses, federalism reviews, NEPA cooperating agency status, ESA cooperating agency (Section 7) and Section 6 cooperative agreements and "maximum extent practicable" clause (Section 6).
SCENARIO VI	Voluntary Federal-State Collaboration Models
Explanation	Where state(s) and federal governments enter wholly voluntary collaborative relationships.
Some Examples	WGA Chair initiatives, conservation joint ventures ⁹ , collaboratives.

⁹ AFWA 2014 report: "[Wildlife Management Authority, the State Agencies' Perspective](#)," pages 26-27



Asked and Answered: Issues Raised Regarding State-Federal Consultation

This document identifies issues which have, in the past, frequently arisen in the context of state consultation during the federal administrative rulemaking process, as well as analyses of the legal foundations and legitimacy of each such issue.

Description of Issue:	Legal Analysis:	Relevant Legal Authorities:
Non-Legislative Rulemaking: Federal agencies often categorize their proposed rules and regulations as “non-legislative,” which are not subject to the requirements of the Administrative Procedure Act (APA) for notice-and-comment rulemaking. This practice precludes transparency in the rulemaking process, as well as the opportunity for the “public” (in which agencies include state governments) to provide input to the agency in the development and adoption of rules.	1) All agency rules intended to be legally binding (on the agency and/or the public) must be promulgated through procedures for notice-and-comment rulemaking. 2) “Rules which do not merely interpret existing law or announce tentative policy positions, but which establish new policy positions that the agency treats as binding must comply with the APA’s notice-and-comment requirements, regardless of how they initially are labeled.” (OMB Good Guidance Bulletin). For detailed analysis, see WGA Memorandum: <i>Non-Legislative Rulemaking to Circumvent Basic Procedural Requirements</i>.	<u>Administrative Procedure Act, Section 553 (5 U.S.C. § 553)</u> <u>Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000)</u> <u>OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007)</u> <u>E.O. 12866, Regulatory Planning and Review (58 Fed. Reg. 51735; Oct. 4, 1993)</u>
Ex Parte Communications: Agencies have expressed that general agency policy restricting “ <i>ex parte</i> ” communications with non-agency officials prohibits	1) There is no statutory authority, including the APA, which prohibits federal agencies from communicating	<u>Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981)</u>

communications with state officials ("and other stakeholders") during an agency's rulemaking process. Several federal agencies have adopted their own policies which restrict communications with non-agency personnel during the rulemaking process. These policies are non-legislative rules, which are highly immune from legal or administrative challenge.	with non-agency officials at any point during the rulemaking process 2) Many of the federal policies on <i>ex parte</i> communication were hastily adopted in response to overly-restrictive federal case law which has been subsequently overturned. 3) Agency policies addressing <i>ex parte</i> communications have been adopted as non-legislative rules and, thus, cannot have any binding effect. For detailed analysis, see WGA Memorandum: <i>Ex Parte Communications Between State and Federal Officials in the Federal Administrative Rulemaking Process.</i>	<u><i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council</i>, 435 U.S. 519 (1978).</u>
Application of FACA to Communications with State Officials (and Representative Organizations): Federal agency officials have expressed reluctance to consult with state interests and associations of elected state government officials due to concern that such communications would trigger the procedural requirements of the Federal Advisory Committee Act (FACA).	1) FACA's application to meetings between federal and non-federal officials is limited in scope and only applies to committees that are established by federal officials to obtain collective advice. 2) The Unfunded Mandates Reform Act (UMRA) provides an exemption from FACA for consultations held exclusively between federal personnel and non-federal elected officials (or their designees) "relating to the management or implementation of federal programs established pursuant to statute that explicitly or inherently share intergovernmental responsibilities or administration."	<u>Federal Advisory Committee Act, 5 U.S.C. App. II §§ 1-15</u> <u>Unfunded Mandates Reform Act, P.L. 104-4 (1995)</u> <u>Alice M. Rivlin Memorandum (Sep. 21, 1995)</u>

	For detailed analysis, see WGA Memorandum: <i>FACA Application to WGA Intergovernmental Meetings with Federal Officials</i> .	
FOIA – Deliberative Process Exemption's Application to State Consultation: Federal agency officials have expressed concern about sharing – or even discussing the details of – pre-decisional agency documents with state officials due to the possibility the such shared information would be subject to public disclosure under the Freedom of Information Act (FOIA).	1) FOIA's "Deliberative Process" exemption applies to communications that are: (i) inter-agency or intra-agency; (ii) pre-decisional and not a final policy adopted by an agency; and (iii) part of a process by which governmental decisions and policies are formulated. 2) Some federal courts have applied the "consultant corollary," which extends FOIA's Deliberative Process exemption to documents produced or communications between non-federal entities in certain circumstances, to communications between federal and state officials when such communications are made exclusively in the context of a federal agency's deliberative process. The U.S. Supreme Court has declined to apply the consultant corollary to federal-tribal communications and documents created by the tribe in the context of a long-term operations plan. For detailed analysis, see WGA Memorandum: <i>FOIA and the Application of its Deliberative Process Exemption to Communications Between State and Federal Officials</i>.	<u>Freedom of Information Act, 5 U.S.C. § 552, et seq.</u> <u><i>Dep't of the Interior v. Klamath Water Users Protective Ass'n</i>, 532 U.S. 1 (2001)</u> <u>Compare, <i>Judicial Watch, Inc. v. Department of Transportation</i>, 950 F. Supp. 2d 214 (D.D.C. 2013) with <i>People for the American Way v. U.S. Dept. of Education</i>, 516 F. Supp. 2d 28 (D.D.C. 2007).</u>

Tribal Consultation Model: Most federal agencies have developed and adopted comprehensive policies and rules which prescribe procedures for consulting with federally-recognized Indian tribes throughout the course of an agency's rulemaking process. Although similarly directed to do so by effective Executive Orders, federal agencies have largely failed to adopt similar policies for consulting with state officials.	1) Comprehensive federal agency procedures for tribal consultation have developed over multiple presidential administrations. 2) Federal agencies should afford at least comparable "government-to-government" consultation opportunities to elected state officials in their rulemaking processes. Such consultation should involve early, meaningful, substantive, and ongoing back-and-forth communications between state and federal officials with decision-making authority. For detailed analysis, see WGA Memorandum: <i>Federal Policies Regarding Tribal Consultation as a Model for State Consultation Regulatory Reform</i>.	<u>E.O. 13175, <i>Consultation and Coordination with Indian Tribal Governments</i>, 65 Fed. Reg. 67249 (Nov. 6, 2000)</u> <u>Presidential Memorandum on Tribal Consultation (Nov. 5, 2009)</u>
Consultation through Notice-and-Comment Rulemaking: In many instances, federal agencies are required (by statute, rule, or executive order) to consult with states when developing and adopting agency rules and regulations. However, several agencies have demonstrated that their "consultation" requirements can be satisfied by typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful "consultation" with states.	1) Federal courts have held that, when required by statute to promulgate rules "in consultation with states," agencies cannot satisfy this mandate by merely conducting notice-and-comment rulemaking, as otherwise directed by the APA. 2) Federal agencies should afford states with opportunities for "government-to-government" consultation in their rulemaking processes. Consultation should involve early, meaningful, substantive, and ongoing back-and-forth communications between state and federal officials with decision-making authority.	<u><i>California Wilderness Coalition v. Dept. of Energy</i>, 631 F.3d 1072 (9th Cir. 2011)</u>

	3) Federal agencies should designate agency officials with decision-making authority to conduct consultations with states.	
Federalism Consultation with States (Executive Order 13132): Federal agencies have largely ignored the mandates expressed in E.O. 13132, <i>Federalism</i> , which requires agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” Agencies must consult with state and local officials early in the process of developing any proposed regulation which has federalism implications or imposes substantial direct compliance costs on state or local governments. Agencies’ failure to adhere to the procedural requirements of E.O. 13132 (or with the mandates of E.O.’s, generally) does not give rise to legal challenge or administrative appeal.	1) E.O. 13132 applies to all agency “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” 2) OMB guidance expresses that agencies “must include elected State and local government officials or their representative national organizations in the consultation process.”	<u>Executive Order 13132, <i>Federalism</i>, 64 Fed. Reg. 43255 (Aug. 4, 1999)</u> <u>OMB Guidance for Implementing E.O. 13132, “Federalism” (Oct. 28, 1999)</u>

STATES ARE NOT "STAKEHOLDERS"	WGA POLICY RESO 2017-01	SHARED FEDERALISM PRINCIPLES
States' Status as Sovereign Entities	Sec. (A): "...Constitutional recognition of state sovereignty..." Sec. (B)(1)(b): "...are reserved for the states..."	Sec. (A)(2): "The sovereign powers not granted to the federal government are reserved to the people or to the states..."
States' Status as Co-Regulators and Partners with Federal Agencies	Sec. (B)(1)(d): "...with delegated authority (permissive) available to states that wish to implement those standards." Sec. (C)(4)(a): "Federal agencies should treat states as co-regulators..." Sec. (C)(5)(e): "...opportunities for expanded cooperation, particularly where states are working to help federal partners to improve land management..."	Sec. (A)(8): "With respect to statutes and regulations administered by states and local governments, the federal government should grant states and local governments the maximum administrative discretion possible."
Federalism Impacts (E.O. 13132)	Sec. (C)(5)(a): "Federal agencies are required by [E.O.] 13132 to consider and quantify consequences of federal actions on states. In practice, the current process falls short of its stated goals. Governors call on the President to revisit the [E.O.]..."	Sec. (B)(1): "Actions having federalism implications include..." Sec. (B)(2): "...early, meaningful, and substantive input in the development of regulatory policies that have federalism implications." Sec. (C)(1): "...ensuring that the federalism consultation process is executed appropriately and completely."
Unfunded Mandates (E.O. 12866)	Sec. (C)(5)(f): "The U.S. Congress and federal departments and agencies should avoid the imposition of unfunded federal mandates on states."	Sec. (C)(1)(b): "...pursuant to [E.O.] 12291 or OMB Circular No. A19..."

		Sec. (C)(2)(a): "Ensure that new funds sufficient to pay the direct costs incurred by the state or local government..."
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WHAT CONSTITUTES EFFECTIVE CONSULTATION?	WGA POLICY RESO 2017-01	SHARED FEDERALISM PRINCIPLES
Early, Meaningful, Substantive, Ongoing	Sec. (C)(3)(a): "Each executive department and agency should be required to have a clear and accountable process to provide each state...with early, meaningful and substantive input..." Sec. (C)(3)(b)(iii): "...Governors and designated state officials should have the opportunity to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to their finalization."	Sec. (B)(2): "...early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."
Clear, Consistent, and Accountable Process	Sec. (C)(3)(a): "...clear and accountable process..."	Sec. (B)(2): "...a clear, consistent, and accountable process..."
Encompasses a Broad Range of Federal Actions and Occurs in Various Contexts	Sec. (C)(3)(a): "This includes the development, prioritization, and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets, and strategic planning."	Sec. (B)(1): "Actions having federalism implications include federal regulations, proposed federal legislation, policies, rules, guidances, directives, programs, reviews, budget proposals, budget processes and strategic planning efforts..."

Predicate Involvement / State Data and Expertise	Sec. (C)(3)(b)(i): "Federal agencies should take into account state data and expertise in development and analysis of underlying science serving as the legal basis for federal regulatory action."	None
Supplemental to, but not Satisfied by, Notice-and-Comment Rulemaking	Sec. (C)(3)(a): "Each Executive department and agency should be required to have a clear and accountable process to provide each state - through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate - with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications." Sec. (C)(3)(b): "...federal agencies should consult with states in a meaningful way, and on a timely basis."	Sec. (B)(2): "Each federal executive department/agency should be required to have a clear, consistent, and accountable process to provide states and localities with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."

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WHO MUST PARTICIPATE IN THE CONSULTATION PROCESS?	WGA POLICY RESO 2017-01	SHARED FEDERALISM PRINCIPLES
Governors (or Their Designees) From all Potentially-Affected States	Sec. (C)(3)(a): "Each Executive department and agency should be required to have a clear and accountable process to provide each state - through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate..."	Sec. (A)(7): "...provide all affected states and local governments notice and an opportunity for appropriate participation in the proceedings."

Designated Federal Official with Adequate Decisionmaking Authority	Sec. (C)(3)(a): "...clear and accountable process..."	Sec. (C)(1): "...designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely."
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AGENCY ACCOUNTABILITY / PROCESS ENFORCEABILITY	WGA POLICY RESO 2017-01	SHARED FEDERALISM PRINCIPLES
Clear and Accountable Process for Agency Determinations of Whether State Consultation is Required	Sec. (C)(5)(a)(ii): "Work with Governors to develop specific criteria and consultation processes: 1) for the initiation of federalism assessments; and 2) that guide the performance of every federal Department and agency federalism assessment;"	Sec. (C)(1): "...designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely."
Avenues for Administrative Appeal and/or Judicial Review	Sec. (C)(3)(a): "...accountable process..."	Sec. (B)(2): "...accountable process..."
Review of Agency Consultation Procedures, Implementation, and Effectiveness	Sec. (C)(5)(a): "Governors call on the President to revisit [E.O. 13132]..." Sec. (C)(5)(a)(iv): "Provide states, through Governors, an opportunity to comment on federalism assessments before any covered federal action is submitted to the Office of Management and Budget for approval."	Sec. (C)(1): "...designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely."



Recommended Principles for Regulatory Reform

- Avoid pre-emption of state and local laws.
- Require early analysis and consultation with state and local leaders during the rulemaking process.
- Ensure federal agencies recognize the differences in geography and resources among state and local governments to make certain none are disproportionately affected.
- Communicate proposed rules and regulations clearly and consistently to state and local governments.
- Avoid unfunded mandates—federal programs must not impose unreimbursed costs on state and local governments.
- Provide state and local governments with sufficient time to implement new guidelines or regulations and take into consideration legislative calendars.
- Provide maximum flexibility in the administration and maintenance of federal programs, to ensure that programs do not impose new burdens on state and local budgets.
- Make certain federally mandated administrative requirements are uniform across federal agencies.
- Harmonize federal regulations with current actions at the state and local levels.



Written statement submitted for the record by the

National Association of Counties

Statement for the
U.S. House Oversight and Government Reform Committee

Hearing on
Federalism Implications of Treating States as Stakeholders
February 27, 2018

Chairman Gowdy, Ranking Member Cummings, and members of the committee, thank you for holding this hearing on the important topic of federalism and the implications for all levels of government. We know the Oversight and Government Reform Committee continues to look for ways to best strengthen intergovernmental coordination as we serve our shared constituencies.

We are also grateful to U.S. House Speaker Paul Ryan for convening the Speaker's Task Force on Intergovernmental Affairs, and to Rep. Rob Bishop for his leadership of the task force. As a member of the Advisory Committee to the Task Force, NACo will continue working to enhance the intergovernmental partnership between all levels of government.

Examining our current system of federalism provides an opportunity for increased intergovernmental collaboration on major legislative and regulatory efforts. America's counties stand ready and willing as able partners, and often as co-regulators, to enact policies and solutions to best serve our local communities.

While counties originated during the colonial era, today's counties are primarily an extension of states. Typically states govern their counties by one of two principles: the Dillon Rule (county authority is derived directly from state legislatures) or Home Rule (governing authority is granted within their boundaries). However, even under Home Rule, counties can remain beholden to the state's legislature for a variety of functions through mandates and other laws, including those from the federal government.

Of course, no two counties are the same. The organization and structure of today's 3,069 counties are charted under state constitutions or laws and are tailored to fit the needs and characteristics of each state and local area. However, nearly all counties are governed by locally elected officials, including more than 19,000 county elected executives and commissioners and another 18,000 independently elected constitutional officers, including sheriffs, coroners, district attorneys, public defenders, treasurers, clerks, auditors and assessors.

No matter their structure, all county governments are on the front lines of building healthy and safe communities. County leaders stand ready to help build vibrant and diverse economic opportunities for all our residents.

Additionally, while counties provide front line support for the health, safety and prosperity of our communities and residents, many counties struggle to fulfill state and federal mandates and deliver essential services to constituents, as these mandates are often imposed without providing adequate funding. At the same time, states increasingly limit counties' capacity to raise revenue to fund our activities. In many cases counties have adopted creative fiscal solutions, but these are not always sufficient to cover our needs and citizen demands.

According to NACo and state associations of counties, the current state of county finances shows four critical factors this task force should consider:

1. **States are limiting counties' revenue authority to fund essential services.** Property taxes and sales taxes are the primary revenue sources for most counties. While counties in 45 states collect property taxes, all forty-five (45) states place limitations on county property tax authority, and the number of restrictions has expanded significantly since 1990s (nearly half of current state caps on county property taxing authority have been enacted or modified since 1990). Only 29 states authorize counties to collect sales taxes, but almost always under various restrictions: twenty-six (26) impose a sales tax limit and nineteen (19) require voter approval.
2. **Counties are struggling with more state and federal mandates not fully covered by state and federal aid.** Many county services are mandated by the states or the federal government, from activities in criminal justice and public safety, health and human services, transportation and infrastructure, to administration of elections and property assessments. NACo interviews reveal nearly three-quarters (73 percent) of states have escalated the number and/or cost of mandates for counties over the past decade,

decreased state funding to counties over the past decade, or imposed a combination of both.

3. **Counties are adjusting to new fiscal challenges on the horizon.** Marijuana legalization provided a new revenue stream for counties in only five of the 25 states that legalized its use prior to the November 2016 elections, but costs associated with potential substance abuse problems, public health issues and law enforcement and public safety considerations may prevent counties from receiving a net financial benefit. In 14 states, plummeting prices for oil and natural gas over the past two years have erased much of the annual severance tax revenue received by counties. Declining Secure Rural Schools payments from the federal government, due to a lack of reauthorization for the program as well as reduced timber receipts from federal lands, have impacted western and rural counties' budgets. The "sharing economy," a technological development best exemplified by Airbnb and Uber, is challenging county revenue structures.
4. **Counties are pursuing innovative solutions to ensure quality service delivery despite fiscal constraints.** Counties throughout the country partner with cities, other counties, nonprofit organizations and the private sector to deliver high-quality services to their residents in a cost-efficient manner. Further, 37 states grant counties the authority to create and/or manage special-purpose tax districts to fund specific services, though in 22 of the 37 states, counties must first obtain voter approval.

Despite these constraints, counties are often responsible for implementing and helping fund policies and programs established by states and the federal government. In many instances, we even function as co-regulators with state and federal agencies. Given these important intergovernmental roles and responsibilities, counties are more than mere stakeholders, or interested members of the community – counties are intergovernmental partners. All too often, our opportunity to engage in the regulatory and rulemaking processes is limited to the comment period offered to the public.

We appreciate the continued efforts of this committee and Congress take state and local governments into account when passing major legislation. However, to ensure the best use of federal resources and generate the most effective outcomes, our current regulatory and rule-making system could be improved by strengthening the federal consultation process to include early and frequent feedback from states and local governments. While Title II of the Unfunded Mandates Reform Act (UMRA) established a framework for federal agencies to consult with state and local governments, this process has been applied unevenly and remains ineffective. The framework established under UMRA leaves the responsibility to each agency to develop its own consultation process. Unfortunately, this flexibility has resulted in a system that is inconsistently developed and applied across all federal agencies.

Meaningful consultation with counties and local governments early in the rulemaking process will not only reduce the risk of unfunded mandates but will also result in more pragmatic and successful strategies for implementing federal policies. For intergovernmental consultation to be truly meaningful, Congress should direct federal agencies to engage state and local governments as partners, actively participating in the planning, development and implementation of rules. Counties are often the level of government closest to the people and directly accountable to them.

We hope this committee's focus on federalism will help federal lawmakers better understand the role counties play in implementing federal laws and regulations and increase awareness of the variability in counties across the country. A sustained, strong partnership with the federal and state governments is essential to counties' ability to effectively and successfully support thriving communities across the country, which often vary widely in size, fiscal capacity and economic strength.

Ultimately, there are few federal and state programs that do not interact with counties in some manner, and we hope this federalism discussion encourages members of Congress to proactively consult state and local partners as you develop policy going forward. We are also

attaching a set of regulatory reform principles agreed to by other organizations representing state and local governments, and a letter NACo sent to the committee last year regarding unfunded mandates and the importance of the federal consultation process. Counties stand ready and willing to work side-by-side with our federal and state partners to ensure the health, well-being and safety of our citizens.



January 20, 2017

Chairman Jason Chaffetz
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Chaffetz,

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we thank you for your efforts to study and minimize the effects of unfunded mandates on state, local and tribal governments and private entities. As an integral part of the federal-state-local intergovernmental process, counties are directly impacted by federal unfunded mandates and look forward to working with you on this effort.

Counties are highly diverse across our nation and vary significantly in size, population, natural resources, political systems and cultural, economic and structural circumstances. Yet, as an arm of the state, counties are mandated through federal and state law to fulfill many responsibilities at the local level. Additionally, county governments directly affect the economic vitality and quality of life in our communities. This role encompasses a range of services, from maintaining 45 percent of America's roads to supporting nearly 1,000 hospitals to keeping communities safe through law enforcement. These services require massive resources including more than \$106 billion annually in building infrastructure and maintaining and operating public works, more than \$53 billion annually in construction of public facilities and nearly \$70 billion annually for community health and hospitals.

County governments exist to deliver public services at the local level, with accountability to our constituents and communities as well as to state and federal authorities. In fulfilling this mission, counties are not only subject to state and federal regulations, but also help to implement them at the local level. Therefore, as both regulated entities and regulators, it is critical that counties be fully engaged as intergovernmental partners through the entire federal regulatory process—from initial development through implementation.

While responsibilities are shared among all levels of government, the primary oversight for these programs occurs at the local level. In recent years, under both federal and state rules, county responsibilities have expanded, often without additional funding to meet these new requirements, creating unfunded mandates for our counties. This leaves counties in a precarious position. On one

hand, we are obligated under law to implement these new requirements; on the other hand, counties are limited by the states in our ability to adequately raise revenue. This dynamic often forces counties to prioritize spending set in a manner that is often at odds with community needs.

Counties are further challenged because states are limiting counties' revenue authority to fund these essential services. The main general revenue source for most counties is property and sales taxes. However, while counties in 45 states collect property taxes, under state law, we only can keep about a quarter (23.7 percent) of the taxes collected. **Additionally, 42 states limit the authority of counties to raise or change property taxes.** This limits a county's ability to effectively raise additional revenue to pay for unfunded mandates. Attached is a 2016 NACo report, "Doing More with Less: State Revenue Limitations and Mandates on County Finances," which further explains county fiscal restraints.

In addition to implementing state and federal programs, local governments are also expected by our constituency to provide local services, like public safety and after school programs. **When the cost of unfunded mandates outweighs available funds, counties often have to make difficult budget choices on these services—for example, do we cut hours at local libraries, delay road and bridge maintenance projects or even cut back on emergency response services?** Ultimately, when counties are faced with these difficult choices, it is our residents and local communities that are negatively impacted.

To aid your efforts of studying unfunded mandates, we have listed below several examples of existing and proposed federal regulations that create unfunded mandates on our counties. Additionally, attached to this letter is a more comprehensive list of unfunded mandates that impact local governments.

Uncompensated Health Care

Nationally, counties invest \$83 billion annually in community health for more than 300 million residents nationwide. Through 961 county-supported hospitals, 883 county-owned and supported long-term care facilities and 1,943 county public health departments, counties deliver health services to millions of Americans, including many Medicaid beneficiaries. Additionally, through 750 county behavioral health authorities and community providers, county governments plan and operate community-based services for persons with mental illnesses and substance abuse conditions which represent 75 percent of the U.S. population.

The majority of states require counties to provide some level of health care for low-income, uninsured, or underinsured residents—but this care is often not reimbursed. The Urban Institute estimates that states and localities spent \$20 billion for uncompensated care in 2013. In Harris

County, Texas, for example, resident pays more than \$500 million per year in property taxes to cover the cost of uncompensated care in the county's public hospitals.

Providing Costly Health Services for Individuals in Jail

At a cost of \$176 billion annually, criminal justice and health systems are a huge budget item for counties. As owners and operators of 87 percent of the nation's jails, we are required to provide adequate health care for individuals entering the criminal justice system, even for those individuals who are awaiting trial and presumed innocent. Under federal law, once a person is booked into jail, even though still presumed innocent until adjudicated, they are unable to access their federal Medicaid and veterans' health benefits. The jail assumes all medical and/or mental health care service costs for that individual until they leave the jail. This is a significant expense for counties since it is estimated that 68 percent of inmates have a history of substance abuse, 64 percent of inmates struggle with mental illness and 40 percent have a chronic health condition. Ultimately, these extra expenses are borne by county tax-payers.

For example, in 2014, in State of Washington, King County Public Health paid \$29 million in health care services for incarcerated people in the custody of the King County jail, which accounted for 20 percent of total jail costs for the county. According to the 2011 Indiana State Healthcare Spending Report, the average national healthcare cost for inmates is \$3,025 per month. However, the cost could be significantly higher depending on the health of the individual in jail.

"Waters of the U.S.": Costly Maintenance and Permitting Requirements

While NACo has numerous examples of the impact of environmental mandates on counties, the most significant examples come from the current Clean Water Act's (CWA) definition on "waters of the U.S." (WOTUS) or Clean Air Act (CAA) regulations.

Under CWA, many of the basic functions of county government, including ownership and maintenance of roads and roadside ditches, bridges, stormwater systems and flood control channels, are regulated under federal and state water policies. Ditches, in particular, are pervasive across the nation and, until recently, were never considered to be jurisdictional under WOTUS. However, in the last decade, certain Army Corps of Engineers (Corps) districts have inconsistently found public safety ditches jurisdictional. Once a ditch falls under federal jurisdiction, the CWA Section 404 permit is triggered, often leading to extremely cumbersome, time-consuming and expensive processes.

One Midwest county recently studied five road projects that were delayed over a period of two years as the county awaited federal permits. Conservatively, the cost to the county for the delays

was \$500,000. Some counties have missed building seasons waiting for federal CWA Section 404 permits.

Further, while the CWA Section 404 permit contains provisions to exempt ditch maintenance activities, these provisions are unevenly applied. For example, a county in Florida applied for 18 specific maintenance exemptions on the county's network of drainage ditches and canals. Due to the complicated federal permitting process, the county had to hire a consultant to compile the data and surveying materials that were required for the exemptions. Within three months, the county had spent \$600,000 and was still waiting for 16 of the exemptions to be determined. Due to the time-consuming maintenance process, the county was unable to maintain upkeep of the ditches, resulting in extreme flooding in residential areas.

Tighter Air Quality Standards: EPA's Clean Air Act Rules

As both regulated and regulating entities, counties are uniquely positioned to play a key role in the development and implementation of CAA regulations. Counties fulfill both of these roles and are responsible for ensuring that CAA goals are achieved. This is demonstrated under the CAA National Ambient Air Quality Standards (NAAQS) program. NAAQS establishes national air pollution limits for ozone, particulate matter, carbon monoxide, lead, sulfur dioxide and nitrogen dioxide.

New NAAQS rules have a significant impact for counties who are required to implement and enforce new air pollution rules and regulations at the local level, such as implementing rules governing open-air burning or limiting vehicle emissions. Implementing these new rules and regulations can be costly for local governments and may have an unintended impact on local economic development efforts. Many of our counties have watched businesses and industry find alternative locations for their plants outside of NAAQS nonattainment areas to avoid new requirements. This impacts the ability of counties to attract and retain businesses within their borders.

For example, in the last several years, Berks County, Pennsylvania, was placed on a maintenance plan for the 2008 NAAQS for lead, which led to tighter air quality requirements in the county. This, in turn, led to a major coal-fired power plant closing. As a result, 75 employees lost their jobs and the county lost \$44,403 in annual tax revenue.

DOL's Overtime Pay Rule: Requiring County Employers to Make Difficult Decisions

In May of 2016, the U.S. Department of Labor (DOL) released a final rule that would increase the salary threshold for "white collar" employees who are eligible for overtime pay from \$23,660 to \$47,476. Since counties employ over 3.6 million people, the rule could have the unintended effect of placing additional strain on already limited county budgets throughout the country, hindering our ability to provide crucial services to our local communities.

For example, in Sebastian County, Arkansas, which has a population of 127,342, under DOL's new rules, 35 of the county's current 382 full-time employees are eligible for overtime pay. This will result in an additional unexpected financial burden of almost \$228,000 in the first year alone, which may reduce incentive compensation opportunities and require county employers to make difficult employee decisions.

After the DOL rule was finalized, Mineral County, a small rural county of 4,478 in western Nevada, determined that at least ten percent of their workforce would be impacted by the new rule. This would be significant for a county of this size and it led the county to make several difficult decisions on cutting non-essential but popular community programs. For example, the county assessed whether to close the county's sole library, which was a key source for Internet access to the residents, or severely limit access to its library resources. These examples highlight the challenges our counties faced with the new DOL overtime rule.

Preemption of Local Tax Authorities: Internet Tax Freedom Act

Most counties are limited in our abilities to collect additional revenue to pay for mandated and un-mandated public services and find themselves depending heavily on property and sales taxes. This dependence was put to the test in 1998, after Congress passed the Internet Tax Freedom Act (ITFA) which limited state and county ability to collect Internet sales tax and has resulted in a loss of hundreds of millions of dollars. Since counties own and maintain the roads, bridges and other public infrastructure and public safety used to deliver and safeguard goods purchased online, it is reasonable that a portion of the Internet sales should be dedicated to supporting this infrastructure.

The scale of lost revenue that local governments are facing is evident in the fact that the seven states (Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Texas and Wisconsin) who are grandfathered under ITFA—and thus allowed to collect Internet tax revenue—are collecting over \$500 million a year in taxes. Counties in non-grandfathered states doubtlessly feel the impact of this loss of revenue on their already strained budgets.

For example, in Georgia alone, local governments lost \$737 million in revenue in 2013. And in the State of Washington, local governments lost \$663.8 million in uncollected sales tax revenue during the same year.

These examples demonstrate the heavy burden that unfunded mandates continue to place on counties. Reforms to the Unfunded Mandates Reform Act of 1995 (UMRA) are needed to remedy this situation and enable counties to provide needed services to local communities. NACo's suggestions for such reforms are respectfully listed below.

Strengthen the Federal-State-Local Rulemaking Partnership

Over two decades ago, Congress passed UMRA. While UMRA resulted in progress on unfunded mandates, further improvements are needed to strengthen the federal-state-local government partnership.

Over the last few decades, UMRA's Title I has helped to identify and reduce the number of mandates in the legislative process. Specifically, it established a procedural framework to shape how Congress considers proposed legislation that could place unfunded mandates on state and local governments. According to the Congressional Research Service (CRS), since UMRA's enactment, unfunded mandates in proposed legislation were found in only one percent of over ten thousand cost estimates prepared by the Congressional Budget Office (CBO).

However, UMRA's Title II consultation process with federal agencies has not been as effective as Title I. Under UMRA's Title II, each federal agency is required to consult with state and local governments to assess the effects of federal regulatory actions containing intergovernmental mandates. However, UMRA leaves the responsibility up to each agency to develop its own consultation process and provides no uniform standards for agencies to follow. As a result, the requirement has been inconsistent and each agency's internal process is different.

Many of the issues could be prevented if counties were regularly consulted in the rulemaking process. Meaningful consultation early in the process not only reduces the risk of unfunded mandates, but also results in more pragmatic and successful strategies for implementing federal policies. If the federal government works with counties, we can strengthen legislative and regulatory processes and craft rules that relieve the pressure of unfunded mandates on local governments.

For example, while EPA has an internal guidance document that governs the agency's interactions with state and local governments on pending rules, it is inconsistently applied at the agency. Under *"EPA's Action Development Process: Guidance on Executive Order 13132: Federalism,"* it states that states and local governments must be consulted on rules if they impose substantial compliance costs of \$25 million or more, preempt state or local laws and/or have substantial direct effects on state and local governments. For rules that trigger this requirement, EPA is required to consult in a "meaningful and timely" manner with a specific set of state and local elected officials or their organizations. In theory, EPA's guidance is a good first step in strengthening the consultation process, however, if the policy is haphazardly applied, the agency loses valuable insight into how proposed rules and regulations impact state and local governments.

The bottom line is that Congress should require federal agencies to engage with state and local governments often, and as early as possible, when considering proposed and pending rules that have a direct impact on state and local governments. Meaningful consultation with

counties and local governments early in the rulemaking process would not only reduce the risk of unfunded mandates, but would result in more pragmatic and successful strategies for implementing federal policies.

We thank you for your time and stand ready to work with you to strengthen the regulatory process between federal, state and local governments that we hope will result in successful strategies for implementing federal policies.

Sincerely,

A handwritten signature in black ink that reads "Matthew D. Chase". The signature is written in a cursive, flowing style with a large, prominent "M" and "C".

Matthew D. Chase
Executive Director
National Association of Counties

**Testimony of Debbie Cox Bultan, Executive Director of the NewDEAL
House Oversight and Government Reform Committee
Hearing on Federalism Implications for Treating States as Stakeholders
February 27, 2018**

Chairman Gowdy, Ranking Member Connolly, and members of the Committee on Oversight and Government Reform, thank you for the opportunity to provide these comments and for convening a hearing on this critical topic. The effectiveness of government at all levels – federal, state, and local – depends significantly on the way issues related to federalism are handled and whether leaders at each level fulfill the roles for which they are best suited.

As a network of 150 innovative state and local leaders pursuing policies on a wide range of issues in 46 states, the NewDEAL has gained an important perspective on the impact that the approach to federalism in Washington is having on governments throughout the country. The NewDEAL brings together these leaders to develop and share ideas at numerous in-person and virtual forums during which they have provided valuable insights on the ways in which the federal government has supported, and hindered, efforts to improve the quality of life of their constituents.

As NewDEAL Honorary Co-Chair and former Delaware Governor Jack Markell has noted, the ability of states, as well as their local government counterparts, to serve as laboratories of democracy remains as clear as ever. The best approach for the federal government to realize this potential is to first set goals for states to meet and then provide flexibility for states to reach those goals, whether it is improving student performance in public schools, reducing dirty air emissions, cutting health care costs, or many other policy objectives. Second, even while granting flexibility in how funding is spent, the federal government must ensure accountability for results. Third, Washington must avoid unnecessary regulations that restrict state's opportunities to experiment so long as states are not disadvantaging portions of their populations.

The following testimony will provide more detail about what those three principles mean in practice.

One area in which the federal government has taken positive strides and should continue to incentivize state innovation is workforce development. The Workforce Innovation and Opportunity Act (WIOA), signed into law in 2014, reduces federal red tape to allow states to do what makes sense on the ground by better tailoring workforce efforts to local employers, while also giving states the ability to streamline youth through adult workforce efforts, including through better integration with K-12 systems.

NewDEAL Leaders are on the front lines of preparing workers for new and growing industries and must adapt to the employment opportunities in the areas they represent. They recognize that no effort is more important for attracting business activity, giving their people access to good jobs, and growing the economy in their communities.

In Cook County, Illinois, Commissioner Bridget Gainer has demonstrated an effective way to tap into federal funding by starting the first earned credit for employers who create and run a Department of Labor registered apprenticeship program. This initiative includes opportunities for employers to build apprenticeships in non-traditional areas, like services and technology fields, where there is projected growth in the coming decades.

Louisville Mayor Greg Fischer's Code Louisville program involves a series of 12-week software development tracks for adults who want to pursue a career in the software development industry at no cost to the student. More than 100 companies have already hired Code Louisville graduates.

Moreover, Arkansas Representative Warwick Sabin founded the Arkansas Regional Innovation Hub, a model for communities to provide the space, equipment, and employer to worker/student connections that are critical to a well-trained workforce. Partnerships with high schools and community colleges give students access to programs in high-tech areas like robotics and 3D-printing, while employers can create programs to train current employees or potential recruits in welding, coding, and more.

Workforce preparation is essential to the prosperity of the nation, yet the responsibility to carry it out falls to leaders who are closest to the people who need help. Congress and federal agencies should continue to look to the leadership of these officials and others like them, and to encourage communities across the country to replicate their successes.

NewDEAL applauds the legislation recently introduced by Representative Connolly – H.R.534, Restoring the Partnership Act – as embodying the right approach to the federal - state relationship. Americans prosper when federal, state, and local governments work together to advance their interests and refuse to let bureaucracy, regulatory roadblocks, and power struggles dominate the dynamic. The federal government must recognize that while flexibility for state and local governments is necessary, new unfunded mandates or cuts to federal funding, including those that come disguised as streamlined programs with more flexibility, like "block grants," threaten the ability of state and local officials to deliver on essential support for their constituents.

President Trump's infrastructure proposal embodies the wrong approach. Although the White House claims to have put forward a \$1.5 billion infrastructure plan, the President has provided for only about one-sixth of that in federal funding, while placing the rest of the financial burden on local and state governments. He appears to want the federal government to take the credit, while state and local governments foot the bill. That is heavy-handed federalism at its worst. In addition, Congress should heed the comments of NewDEAL Leader Columbia, SC Mayor Steve Benjamin, who has expressed concern that most of the funding in the President's plan comes

from budget cuts to transit, community development block grants, and other programs upon which cities like Columbia rely.

Initiative like the West Coast Infrastructure Exchange, which creates a regional public-private partnership to streamline infrastructure investments, show that repairing our nation's infrastructure does not need to be the responsibility of a single government entity, or even the public sector alone. However, the federal government needs to fulfill its responsibilities. State and local governments often need federal flexibility and policy structures, but also the resources that only the federal government can offer, to maximize progress.

While state and local leaders value the recognition of their key priorities and flexibility in using federal resources to address them, NewDEAL also appreciates the importance of accountability for the use of those resources. The latest reauthorization of the Elementary and Secondary Education Act, known as the Every Student Succeeds Act and signed into law in 2015, took positive steps in restoring authority in education policy to states while also retaining some notable accountability provisions of the previous version of the major federal education law, No Child Left Behind. ESSA kept the requirement to not only test nearly all students to measure school, district, and state progress, but also to break out results by sub-groups, such as minority populations and students with disabilities, to ensure schools are supporting all of their students.

NewDEAL Leader Massachusetts Senator Eric Lesser is pursuing expansion of the successful Education Empowerment Zones initiative, which frees struggling schools from many district directives, giving them more control over hiring and curriculum. Initiatives like this are more possible because of the federal government's requirements to intervene when groups of students are persistently struggling, as well as the flexibility that the federal law gives states to allow innovation in school turnaround at the local level. This balance is the key: federal requirements to hold states accountable for advancing the interests of all of their people equitably, while maintaining flexibility for identifying new solutions.

Many positive models exist for the federal government working cooperatively with state and local leaders to solve major policy challenges, including WIOA and ESSA.

NewDEAL urges Congress and the Trump Administration to learn from those models and avoid unnecessarily limiting state and local leaders' opportunities to find innovative solutions to America's challenges. One example of these solutions, pursued by State Treasurers Tobias Read (Oregon) and Mike Frerichs (Illinois), addresses the extraordinary lack of retirement savings among Americans by giving employers the choice to either provide qualified retirement savings options, or facilitate employees' enrollment into a state program. While employees can

voluntarily opt out, automatic enrollment significantly increases the likelihood of a worker's long-term participation. The savings accounts are individually owned by the respective workers and are portable from job to job.

As Treasurers Read and Frerichs have pointed out, "Congress recently chose to create more red tape for states by rolling back U.S. Department of Labor rules that had supported these state efforts, apparently acting at the behest of financial industry firms wary of competing with states that could establish savings options that are 'relatively low-cost for workers.'"

When states and municipalities develop new ways to tackle major problems that impact large proportions of Americans, the federal government's first reaction should be to follow those efforts to see if they should inform national policy, rather than trying to restrict them before their results are known.

Thank you again for the chance to participate in this important discussion and to highlight a perspective gleaned from working with forward-looking, innovative state and local leaders who regularly navigate the challenges and opportunities created by how the federal government interacts with states. I look forward to any opportunities to follow up on this testimony.