



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

TESTIMONY OF

**JONI CUTLER
SOUTH DAKOTA STATE SENATE**

ON BEHALF OF THE

NATIONAL CONFERENCE OF STATE LEGISLATURES

REGARDING

UNFUNDED MANDATES AND REGULATORY OVERREACH PART II

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

**SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY,
INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM**

UNITED STATES HOUSE OF REPRESENTATIVES

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Chairman Lankford, Ranking Member Connolly and distinguished members of the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, I am Joni Cutler, a member of the National Conference of State Legislatures's (NCSL) Executive Committee and the South Dakota Senate. I appear before you today on behalf of NCSL, a bi-partisan organization representing the 50 state legislatures and the legislatures of our nation's commonwealths, territories, possessions and the District of Columbia.

Thank you for the opportunity to testify before you today about the Unfunded Mandates Reform Act of 1995 (UMRA; P.L. 104-4) and our experience with unfunded and underfunded intergovernmental mandates that are placed upon state and local governments. We'd also like to thank the chairman for raising this issue, as the financial burden the federal government imposes on state and local government is often overlooked and underappreciated.

My presentation today will highlight the effectiveness and limitations of UMRA, the impact of those limitations on state budgets and the need for substantive and technical changes to the law. As mentioned in the legislation, UMRA was adopted in an effort "...to curb the practice of imposing unfunded federal mandates on state and local governments."¹ While we would argue some of the provisions within UMRA have been effective, NCSL has identified at least \$130 billion in cost shifts from the federal government on to states between federal fiscal years 2004 to 2008 using NCSL's broader definition of what constitutes an unfunded mandate.

¹ Unfunded Mandates Reform Act of 1995.

NCSL remains an adamant supporter of UMRA. It provides us with Congressional Budget Office (CBO) analyses of the intergovernmental fiscal ramifications of pending legislation. It has a procedural hammer to call further attention to potential unfunded or underfunded mandates. And, the mere procedural threat has changed some, but not all, discussions and negotiations leading up to the advancement of legislation. CBO's annual reports to Congress have consistently shown that few pieces of legislation cross UMRA's threshold. Some of that can be attributed to the procedural threat UMRA imposes – some to the threshold itself – and some to the many exclusions and the definition of a “mandate” in the underlying law. Therefore, having just passed the 16th anniversary of UMRA's enactment, NCSL believes UMRA needs to be strengthened in order to improve federal accountability, enhance consultation and place the fiscal effects of federal legislation on state and local governments under a sharper microscope.

Our call to strengthen UMRA is even more imperative when looking at state and local government fiscal conditions. Even though states face fiscal uncertainties, they must continue to balance annual and biennial budgets. In fiscal years 2009-2011, states closed general fund budget gaps of over \$400 billion.² Those gaps represent approximately 20 percent of the state's collective general funds over these three fiscal years. NCSL information points to the need to close gaps estimated to be \$150 billion or more for fiscal years 2012-2013.³ An updated report on state fiscal conditions is due next month. I offer to share that report with this subcommittee as soon as it is available. NCSL's research also indicates that 5 to 10 percent of state general fund budgets on average are used to fill in shortfalls in federal funding for mandated activities. Combine these

² National Conference of State Legislatures. *State Budget Update: November 2010* (Denver, Colorado: NCSL, December, 2010).

³ Ibid.

shortfalls with federal maintenance of effort provisions, depressed revenues and an economic downturn and you have severe fiscal challenges – for states, and also for the federal government and localities.

State legislators view mandates more expansively than UMRA's definition. We believe there are mandates when the federal government:

- Establishes a new condition of grant in aid.
- Reduces current funds available, including a reduction in the federal match rate or a reduction in available administrative or programmatic funds, to state and local governments for existing programs without a similar reduction in requirements.
- Extends or expands existing or expiring mandates.
- Establishes goals to comply with federal statutes or regulations with the caveat that if a state fails to comply they face a loss of federal funds.
- Compels coverage of a certain population/age group/other factor under a current program without providing full or adequate funding for this coverage.
- Creates underfunded national expectations, e.g., homeland security.

The experience of state and local governments with UMRA, coupled with our view of what constitutes a mandate, suggests future review and strengthening of UMRA. There remain gaps in the fiscal protections provided to state and local governments. The law must be refined to provide broader protections to states and localities against the imposition of costly and administratively cumbersome mandates. Specifically, NCSL encourages the federal government to enact reforms that include:

- Expansion of the definition of an unfunded mandate to include all open-ended entitlements, such as Medicaid, child support and Title 4E (foster care and adoption assistance) and proposals that would put a cap on or enforce a ceiling on the cost of federal participation in any entitlement or mandatory spending program. Furthermore, any proposal that places a cap or enforces a ceiling must be accompanied by statutory offsets that reduce state spending, administrative duties or both.
- Elimination of the existing exclusions under Section 4 of UMRA. The experience of Congress in overcoming an unfunded mandate point of order by majority vote demonstrates that the protections afforded by UMRA will not prevent Congress from exercising its will in important areas such as enforcing constitutional rights or meeting national security needs. However, excluding such legislation from the requirements of UMRA precludes an official accounting of the costs imposed under such legislation.
- Expansion of the definition of mandates to include new conditions of federal funding for existing federal grants and programs, including costs not previously identified.
- Expansion of the definition of mandates to include proposals that would reduce state revenues, especially when changes to the federal tax code are retroactive or otherwise provide states with little or no opportunity to prospectively address the impact of a change in federal law on state revenues.
- Expansion of the definition of mandates to include those that fail to exceed the statutory threshold only because they do not affect all states.

- Revision of the definitions of mandates, direct costs or other provisions of the law to capture and more accurately reflect the true costs to state governments of particular federal actions.
- Enactment of legislation which would require federal reimbursement, as long as the mandate exists, to state and local governments for costs imposed on them by any new federal mandates.
- Improvement of Title II, including enhanced requirements for federal agencies to consult with state and local governments and the creation of an office within the Office of Management and Budget that is analogous to the State and Local Government Cost Estimates Unit at CBO.

UMRA has not achieved its full and intended purpose, as exclusions and exceptions have limited the act's coverage. Therefore, NCSL has endorsed legislation in previous Congresses to correct these limitations. In the 111th Congress, North Carolina Representative Virginia Foxx and Texas Representative Henry Cuellar introduced H.R. 2255, the Unfunded Mandates Information and Transparency Act of 2009, which would have closed several of the loopholes that allow legislation to fall outside the definition of an unfunded mandate as applied by UMRA. While H.R. 2255 was unable to garner extended support in the House of Representatives, it would have amended UMRA to require CBO and the Joint Commission on Taxation (JCT) to report on indirect costs, require CBO to report on the state impact of changes to conditions of grant aid and require a written report from CBO for all regulatory actions resulting in expenditures by state and local governments exceeding \$100 million in any year. NCSL is looking

forward to supporting similar legislation in the 112th Congress that would achieve UMRA's original legislative intent by closing loopholes in the current law.

It would also be immensely helpful if the fiscal year 2012 budget resolution contained a general instruction to appropriators and committees of jurisdiction to avoid imposing new or expanding existing unfunded or underfunded mandates. To this end, I respectfully encourage you to request your leadership and budget committee members to support the inclusion of language in the budget resolution accomplishing this. With discretionary spending and entitlement programs on the table to help reduce future debt, NCSL sees this as an opportunity for Congressional leadership to affirm the federal deficit will not be exported to state and local governments. While we fully expect future cuts to state-federal programs, shifting costs to states while not providing greater program flexibility or relief from maintenance of effort requirements will be detrimental to states when they are already in precarious fiscal conditions. If the budget resolution advocated for UMRA reform, this would signal a strong statement to restore balance to the intergovernmental fiscal partnership and hopefully promote intergovernmental savings.

Finally, there are several pending reauthorizations before the 112th Congress. Three of these reauthorizations – the No Child Left Behind Act; the Temporary Assistance for Needy Families Block Grant; and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) program – contain unfunded or underfunded mandates. These reauthorizations present opportunities to either repeal or minimize provisions that shift costs to states. They present opportunities to potentially achieve savings for all levels of government while providing public services deemed essential. Throughout the course of the 112th Congress, NCSL

would like to work with you, Mr. Chairman, and members of this subcommittee to address what we hope are mutual concerns regarding these reauthorizations.

Mr. Chairman, in closing I would like to add that NCSL remains steadfast in its resolve to work with federal policymakers to reduce the federal deficit and to maintain critical programs to our most vulnerable populations. Controlling the deficit is a daunting task involving difficult choices, many of which involve our intergovernmental partnerships and some of the areas where the largest cost shift occurs—Medicaid and education. NCSL recognizes the pressure for the federal government to reduce its annual deficits and curb growth in the national debt. We are also aware mandatory federal spending and restrictions on the growth of discretionary spending promote a tendency to seek the accomplishment of national goals through federal mandates on state and local governments. However, NCSL is encouraged that many federal lawmakers have recognized the difficulties posed by the cost shifts to states and we look forward to working with you on this important issue. I thank you for this opportunity to testify and would be happy to answer any questions the committee may have.