Calendar No. 12

104TH CONGRESS
1st Session

SENATE

REPORT
104–1

UNFUNDED MANDATE REFORM ACT OF 1995

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1

TO CURB THE PRACTICE OF IMPOSING UNFUNDED MANDATES ON STATES AND LOCAL GOVERNMENTS; TO STRENGTHEN THE PARTNERSHIP BETWEEN THE FEDERAL GOVERNMENT AND STATE, LOCAL AND TRIBAL GOVERNMENTS; TO END THE IMPOSITION, IN THE ABSENCE OF FULL CONSIDERATION BY CONGRESS, OF FEDERAL MANDATES ON STATE, LOCAL, AND TRIBAL GOVERNMENTS WITHOUT ADEQUATE FUNDING, IN A MANNER THAT MAY DISPLACE OTHER ESSENTIAL GOVERNMENTAL PRIORITIES; AND TO ENSURE THAT THE FEDERAL GOVERNMENT PAYS THE COSTS INCURRED BY THOSE GOVERNMENTS IN COMPLYING WITH CERTAIN REQUIREMENTS UNDER FEDERAL STATUTES AND REGULATIONS, AND FOR OTHER PURPOSES

JANUARY 11 (legislative day, JANUARY 10), 1995.—Ordered to be printed

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104D CONGRESS *1st Session* | SENATE | REPORT 104–1

UNFUNDED MANDATE REFORM ACT OF 1995

JANUARY 11 (legislative day, JANUARY 10), 1995.—Ordered to be printed

Mr. ROTH, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1]

The Committee on Governmental Affairs to which was referred the bill S. 1, the Unfunded Mandate Reform Act of 1995, to curb the practice of imposing unfunded mandates on States and local governments; to strengthen the partnership between the Federal Government and State, local and tribal governments; to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate funding, in a manner that may displace other essential priorities; and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations, and for other purposes, having considered the same, reports favorably thereon without an amendment and recommends that the bill as amended do pass.

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I. PURPOSE

The purpose of S. 1—the ''Unfunded Mandate Reform Act of 1995''—is to strengthen the partnership between Federal, State, local and tribal governments by ensuring that the impact of legislative and regulatory proposals on those governments are given full consideration in Congress and the Executive Branch before they are acted upon. S. 1 accomplishes this objective through the following major provisions: a majority point of order in the Senate to lie against Federal mandates without authorized funding to State, local and tribal governments; a requirement that the Congressional Budget Office (CBO) estimate the cost of Federal mandates to State, local and tribal governments as well as to the private sector; a requirement that Federal agencies establish a process to allow State, local and tribal governments greater input into the regulatory process; and, a requirement that agencies analyze the costs and benefits to State, local, and tribal governments of major regulations that include federal mandates.

II. BACKGROUND

On October 27, 1993, State and local officials from all over the Nation came to Washington and declared that day as ''National Unfunded Mandates Day.'' These officials conveyed a powerful message to Congress and the Clinton Administration that unfunded Federal mandates imposed unreasonable fiscal burdens on their budgets, limited their flexibility to address more pressing local problems, forced local tax increases and service cutbacks, and hampered their ability to govern effectively.

The Committee on Governmental Affairs heard that message, and on November 3rd scheduled a Full Committee hearing on the issue. Witnesses from all levels of State and local government, from big cities on down to small townships, testified at the hearing on how unfunded Federal mandates adversely effected their ability to govern and set priorities. Mayor Greg Lashutka of Columbus, Ohio summed up the problems best when he said:

> Others have called it [unfunded Federal mandates] spending without representation. Across this country, mayors and city councils and county commissioners have no vote on whether these mandated spending programs are appropriate for our cities. Yet, we are forced to cut other budget items or raise taxes or utility bills to pay for them because we must balance our budget at our level.

Mayor Ed Rendell of Philadelphia, Pennsylvania was more emphatic:

> What is happening is we are getting killed. In most instances, we can't raise taxes. Many townships are at the virtual legal cap that their State government puts on them, or in my case in Philadelphia I took over a city that had a $500 million cumulative deficit that had raised four basic taxes 19 times in the 11 years prior to my becoming mayor. We have driven out 30 percent of our tax base in

> that time. I can't raise taxes, not because I want to get re-elected or because it is politically feasible to say that, but because that would destroy what is left of our base, and our base isn't good enough.

Further, Mayor Rendell noted how Federal mandates forced undesirable tradeoffs against tackling more needy local problems:

> So when you pass a mandate down to us and we have to pay for it, the police force goes down, the firefighting force goes down. Recreation departments are in disrepair. Our rec centers are in disrepair because our capital budget is being sopped up by Federal mandates, by the need to pay for Federal mandates.

Susan Ritter, County Auditor, Renville County, North Dakota, and David Worhatch, Township Trustee, Hudson, Ohio gave their perspective of how Federal mandates negatively impact the smallest of governments with a description of some specific examples. Ms. Ritter noted that the town of Sherwood, with a population of 286, will have to spend one half of its annual budget on testing its water supply. Mr. Worhatch noted how well-intentioned Federal mandates can have unintended consequences at a township-level that thwart the original purpose of the mandate. He pointed to strict regulations that could force the closure of a local landfill. That closure could lead to greater midnight dumping—an undesirable result.

The Federal-State-local relationship is a complicated one. It is a blurry line between where one level of government's responsibility ends and another begins. Local officials decry unfunded State mandates as much as they do unfunded Federal ones. State officials then tell local officials that those mandates aren't theirs, but rather that they come from the Federal government and that States are just the conduit. The Federal government officials sometimes accuse State and local governments of falling down on their share of responsibilities when using Federal aid to carry out a Federal program. Likewise, State and local governments say that the regulations that go with accepting that aid are too onerous, and getting more so. They blame Federal agencies for promulgating burdensome and inflexible regulations. The agencies say that it is not their fault and claim that they are only carrying out the will of Congress in implementing statutes. Congress asserts that agencies have the statutory authority to allow State and local governments more leeway and flexibility in regulation and that therefore the responsibility lies there. What is lost in the debate is need for all levels of government to work together in a constructive fashion to provide the best possible delivery of services to the American people in the most cost-effective fashion. Vice President Gore's National Performance Review recognizes this fundamental issue in its report—"Strengthening the Partnership in Intergovernmental Service Delivery." The report notes:

> Americans increasingly feel that public institutions and programs aren't working. In fact, serious social and economic problems seem to be getting worse. The percentage of low-birth-weight babies, the number of single teens hav-

> ing babies, and arrest rates for juveniles committing violent crimes are rising; the percentage of children graduating from high school is falling; welfare rolls and prison populations are swelling; median incomes for families with children are falling; more than half of children in female-headed households are poor; and 37 million Americans have no basic health care or not enough.
>
> Why? At least part of the answer lies in an increasingly hidebound and paralyzed intergovernmental process.

The report goes on to explain how the 140 Federal programs designed to help families and children are administered by 10 departments and 2 independent agencies. Fifteen percent of them are directly administered by the Federal government, 40 percent by States, and the remaining 40 percent by local, private or public groups.

Whether these programs, as well as many other Federal programs, work or not hinges on the ability of Federal, State and local to work together as partners in carrying the program's responsibilities. When that coordination breaks down, the whole program suffers and program's objectives, be they improved environmental protection, reduced crime, better education, etc., fall short.

State and local officials emphasized in the Committee's hearings of November 3, 1993, April 28, 1994, and January 5, 1995, that over the last decade the Federal government has not treated them as partners in the providing of effective governmental services to the American people, but rather as agents or extensions of the Federal bureaucracy. In their view, this lack of coordination and cooperation has not only affected the provision of services at a local level but also carries with it the penalty of high costs, costs that they then pass on to local citizens.

A. THE COST OF FEDERAL MANDATES TO STATE AND LOCAL GOVERNMENTS

There has been substantial debate on the actual costs of Federal mandates as well as on their indirect costs and benefits. Suffice it to say that almost all participants in the debate would conclude that there is not complete data on the aggregate cost of Federal mandates to State and local governments. So there is a need to develop a baseline of what the aggregate cost of Federal mandates is to State and local budgets.

Notwithstanding the difficulty in preparing reliable cost estimates, the Committee believes that a strengthened and more thorough analytical process applied to legislation and regulation that impacts State, local and tribal governments is not only worthwhile, but achievable. There have been good faith efforts made in the past to measure the cost impacts of Federal intergovernmental mandates.

The Advisory Commission on Intergovernmental Relations' (ACIR) 1993 report—"Federal Regulation of State and Local Governments: The Mixed Record of the 1980s" examined the procedures by which Congress measures the impact of legislation on State and local governments. Since 1981, the Congressional Budget Office (CBO) has been preparing cost estimates on major legislation

reported by Committee that is expected to have an annual cost to State and local governments in excess of $200 million. According to CBO, on average roughly 10 to 20 reported bills per year exceed the $200 million threshold. These figures translate to between 2 and 4 percent of the total number of bills reported out of Committee. CBO estimates that about 11 percent of all bills reported out of Committee each year have some cost impact on State and local governments. A breakout on a year-by-year basis between 1983 and 1988 is shown below.

TABLE 5–5.—STATE AND LOCAL COST ESTIMATES PREPARED BY CBO, 1983–88

Estimates prepared	1983	1984	1985	1986	1987	1988	Total	Average
For bills approved by committee	483	554	367	465	393	559	2,821	470
Other	90	87	166	125	138	127	733	122
Total	573	641	533	590	531	686	3,554	592
Estimates with no state/local cost	496	584	488	543	448	598	3,157	526
Percent	87	91	92	92	84	87	89	89
Estimates with some cost	77	57	45	47	83	73	382	64
Percent	13	9	8	8	16	11	11	11
Estimates with impact above $200 million	24	6	14	8	22	15	89	15
Percent of total	4	1	3	1	4	2	3	3
Percent of bills with some cost	31	11	31	17	26	21	23	23

Source: Congressional Budget Office Bill Estimates Tracking System, in Theresa A. Gullo, ''Estimating the Impact of Federal Legislation on State and Local Governments,'' in Michael Fix and Daphne A. Kenyon, eds. ''Coping with Mandates: What Are the Alternatives?'' (Washington, DC: Urban Institute Press, 1990). p. 43.

The Committee also asked CBO to provide it with more recent cost estimates and to examine the number of bills that cross a $100 million annual threshold. In 1991, CBO scored 5 bills to cost State and local governments in excess of $100 million apiece. Another 8 bills had significant costs to State and local governments, but fell under the $100 million threshold. Further, CBO determined that for another 6 pieces of legislation for which they were unable to come up with specific estimates—5 bills would probably fall under the $100 million mark, one would probably exceed that total.

In testimony before the Committee on April 28, 1994, Dr. Robert Reischauer, Director of CBO, noted that preparing thorough and reliable State and local cost estimates is not easy. He presented the following reasons for the difficulty CBO sometimes has in preparing the estimates:

Preparing the estimates requires the use of many different methodologies;

The estimating process does not always yield firm estimates. Further, completing the estimates does take time—time that may not be readily available in the normal legislative process; and,

Legislative language may lack the detail necessary to estimate the costs.

Dr. Reischauer further stated that these constraints apply even more so to the preparation of cost estimates on private sector mandates. The Committee does believe that part of CBO's difficulty in performing these estimates lies in CBO not having adequate resources to conduct the estimates. Therefore, S. 1 authorizes an increased in funding for CBO of $4.5 million for each of Fiscal Years

1996 through 2002. CBO's budget currently stands at just over $23 million.

Federal environmental mandates head the list of areas that State and local officials have claimed to be most burdensome. A closer look at two of the studies done on the cost to State and local governments of compliance with environmental statutes does indicate these costs appear to be rising. A 1990 EPA study (prepared in conjunction with the Environmental Law Institute) ''Environmental Investments: The Cost of a Clean Environment,'' estimates that total costs of environmental mandates (from all levels of government) to State and local governments will rise levels of government) to State and local governments will rise (in constant 1986 dollars) from $22.2 billion in 1987 to $37.1 billion by the year 2000—a real increase of 67 percent. According to the Vice President's National Performance Review report on the EPA, this figure when adjusted for inflation reaches close to $44 billion on an annual basis by the year 2000. EPA estimates that costs to local government will increase the most (70 percent) while the impact on State governments is less (48 percent), but still significant. Over the 13 year span, the average real increase in costs to State and local governments translates to 5.2 percent on an annual basis. A table is included as follows:

TABLE 1–2.—TOTAL ANNUALIZED COSTS OF ENVIRONMENTAL MANDATES BY FUNDING SOURCES, 1972–2000

[In millions of 1986 dollars]

Funding source	1972	1980	1987	1995	2000
Environmental Protection Agency	$978	$4,574	$6,758	$9,161	$10,409
Other Federal Agencies	87	1,932	2,649	7,970	11,670
State Government	1,542	2,230	3,025	3,911	4,476
Local Government	7,673	12,857	19,162	27,913	32,577
Private	16,201	36,376	53,696	76,101	88,772
Total	26,481	57,969	85,290	125,056	147,904

Source: U.S. Environmental Protection Agency, ''Environmental Investments: The Cost of a Clean Environment'' (Washington, DC: U.S. Environmental Protection Agency. 1990) selected data from pp. 8–49 through 8–51. These estimates use a mid-range discount rate of 7 percent and include funding to meet EPA's air, water, land, chemicals, and multi-media regulations.

The City of Columbus, Ohio also noted a trend in rising costs for city compliance with Federal environmental mandates in its study ''Environmental Legislation: The Increasing Costs of Regulatory Compliance to the City of Columbus.'' The City examined its cost of compliance with 13 Federal environmental and health statutes and concluded that its cost of compliance with those statutes would rise from $62.1 million in 1991 to $107.4 million in 1995 (in 1991 constant dollars), a 73 percent increase. The City estimates that its share of the total city budget going to pay for these mandates will increase from 10.6 percent to 18.3 percent over the timeframe. these calculations were based on an unchanging total city budget between 1991 and 1995; assuming a 3 percent annual real growth rate in the budget reveals a lesser increase from 10.6 percent to 16.1 percent.

In addition to environmental requirements, State and local officials cite other Federal requirements as burdensome and costly; compliance with the Americans with Disabilities Act and the Motor Voter Registration Act; complying with the administrative require-

ments that go with implementing many Federal programs; meeting Federal criminal justice and educational program requirements. While all these programs clearly carry with them costs to State and local governments, they can have benefits both to society as a whole—a fact that State and local officials concede. It is the aggregate impact of all Federal mandates that has spurred the calls for mandate reform and relief. However, to truly reach a better understanding of the Federal mandates debate, it is necessary to look at the Federal funding picture.

B. FEDERAL AID TO STATE AND LOCAL GOVERNMENTS

It is readily apparent that Federal discretionary aid to State and local governments both to implement Federal policies and directives as well as to comply with them saw a sharp drop in the 1980s before rising again in the early 1990s—although in real terms Federal aid is still significantly below its earlier levels.

An examination of Census Bureau data on sources of State and local government revenue shows a decreasing Federal role in funding to State and local governments. In 1979, the Federal government's contribution to State and local government revenues reached 18.6 percent. By 1989, the Federal share of the State and local revenue pie had steadily shrunk to 13.2 percent before edging up to 14.3 percent in 1991—the latest year that data is available (see accompanying chart).

The Federal Government's contribution to State and local government revenues (1970–1991)[1]

Year:	*Percent of State and local government revenue*
1970	14.6
1971	15.8
1972	16.4
1973	18.0
1974	17.6
1975	17.8
1976	18.3
1977	18.5
1978	18.7
1979	18.6
1980	18.4
1981	17.8
1982	15.9
1983	15.2
1984	14.9
1985	14.7
1986	14.4
1987	13.6
1988	13.3
1989	13.2
1990	13.3
1991	14.3

[1] U.S. Census Bureau—Government Finances Series, 1970–1991. Chart tabulated by Staff of Senate Committee on Governmental Affairs.

A closer look at patterns in Federal discretionary grants-in-aid programs during the 1980s confirms the finding that the Federal government lessened its financial support of State and local governments. According to the Federal Funds Information Service

(FFIS), between 1981 and 1990 Federal discretionary funding to State and local governments rose from $47.5 billion to $51.6 billion, a nominal increase of 8.6 percent. However, this figure when adjusted for inflation (using the GDP Price Deflator) tells a much different story: Federal aid dropped 28 percent over the decade—a 3.1 percent real decline on an annual average basis.

A number of significant Federal aid programs to State and local governments experienced sharp cuts and, in some cases, outright elimination during the decade. In 1986, the Administration and Congress agreed to terminate the general revenue sharing program—a program that provided approximately $4.5 billion annually to local governments and allowed them broad discretion on how to spend the funds. Since its inception in 1972, general revenue sharing had provided approximately $83 billion to State and local governments. Funding for Urban Development Action Grants, another significant program, was also terminated within this timeframe.

Between 1981 and 1990, funding for numerous Federal-State-local government grant programs was substantially trimmed, among them: Economic Development Assistance (47.5 percent—decrease is in nominal dollars), Community Development Block Grants (21.1 percent), Mass Transit (30.2 percent), Refuge Assistance (38.4 percent), and Low-Income Home Energy Assistance (17.6 percent). These cuts were partially offset by increases in funding in other areas—primarily in housing and health and human services programs.

The early 1990s saw a resurgence in funding for Federal-State-local discretionary aid programs. Funding rose from $51.6 billion in 1990 to $67.4 billion in 1993, a nominal increase of 30.6 percent and an inflation-adjusted average annual gain of 5.6 percent. This growth was driven primarily by expansions in funding for Head Start, Highway Funding, and Compensatory Education. Still, even with this recent growth, between 1980 and 1993 discretionary funding declined 18.2 percent in real dollars—an average annual real decrease of 1.4 percent.

In simple terms, over the last decade or so, State and local governments have gotten less of the Federal carrot and more of the Federal stick. The Committee has responded to State and local officials' calls for change, and has reported out bipartisan mandate reform legislation.

III. Legislative History

In the 103d Congress, eight bills were introduced and referred to the Committee that addressed, at least in part, the subject of Federal mandates on State and local governments. Bill sponsors included: S. 480—Levin; S. 563—Moseley-Braun; S. 648—Gregg; S. 993—Kempthorne; S. 1188—Coverdell; S. 1592—Dorgan; S. 1604—Glenn; and, S. 1606—Sasser. Several major concepts were contained in most of the bills, among them: analysis of the costs of legislation and regulation on State and local governments; a prohibition or restriction on new Federal mandates without funding; and, points of order enforcement. Senator Kempthorne's legislation, the original S. 993—the ''Community Regulatory Relief Act of 1993''—had the strongest support, with more than 50 cosponsors. After two

hearings and extensive meetings and discussions with State and local government organizations, the Administration, Senators and their staff, and the public interest community, the Committee crafted a legislative proposal that drew from many of the provisions of the eight bills, as well as incorporating several new provisions.

On June 16, the Committee marked up and reported out S. 993 with an amendment and an amendment to the title. Chairman Glenn offered a substitute bill to the original Kempthorne Bill, titled the "Federal Mandate Accountability and Reform Act of 1994", which passed by unanimous voice vote. Several other amendments offered by members of the Committee were also adopted, including an amendment by Senator Dorgan to include the private sector under the CBO and Committee mandate cost analysis requirements of Title I of S. 993, and a Glenn amendment to allow CBO to waive the private sector cost analysis if CBO cannot make a "reasonable estimate" of the bill's cost.

S. 993 as amended and reported by the Committee was considered by the Senate on October 6, 1994, without a time agreement. After some debate and the introduction of several additional amendments to the bill, the Senate proceeded to other items without taking any votes. The Senate adjourned without further consideration of S. 993.

In the 104th Congress, Senator Kempthorne introduced S. 1—the "Unfunded Mandate Reform Act of 1995"—on January 4, 1995, and the bill was concurrently referred both to the Governmental Affairs Committee. On January 5, the Governmental Affairs Committee held a joint hearing on the bill with the Budget Committee. On January 9, the Government Affairs Committee voted to report the bill, S. 1, by a vote of 9–4 after adopting an amendment by Senator Glenn and two by Senator Levin. Voting "aye" were Senators Roth, Stevens, Cohen, Thompson, Cochran, Grassley, Smith, Glenn, and Nunn (with Senators McCain and Dorgan voting "aye" by proxy). Voting "nay" were Senators Levin, Pryor, Lieberman, and Akaka.

IV. Section-by-Section Analysis

S. 1 sets up a legislative and regulatory framework that is based on three relatively simple concepts:

To better understand the impact of Federal mandates on State, local and tribal governments, and on the private sector, before policymakers act in either the Congress or the Executive Branch.

To ensure that the needs and views of State and local governments are given full consideration before the Congress or the Executive Branch imposes new Federal mandates without funding.

To establish a point of order in the Congress against unfunded federal mandates on State, local and tribal governments.

A more detailed description of the most important provisions in the bill follows below.

SECTION 1. SHORT TITLE

This section identifies the short title as the "Unfunded Mandate Reform Act of 1995."

SECTION 2. PURPOSES

This section establishes the purpose of the Act.

SECTION 3. DEFINITIONS

This section breaks the definition of Federal mandates into two components: Federal intergovernmental mandates and Federal private sector mandates.

The section amends the Congressional Budget and Impoundment Control Act of 1974, by adding several new definitions. It stipulates that a "Federal intergovernmental mandate" means any legislation, or a provision therein, or regulation that imposes a legally binding duty on State, local or tribal governments. This would include legislation or regulation that seeks to eliminate or reduce the authorization of appropriations of Federal financial assistance to State, local and tribal governments should they not comply with that legislation's or regulation's duties. The subsection also provides that legislation or regulation would be considered a Federal intergovernmental mandate if it sought to reduce or eliminate an existing authorization of appropriations for the purposes of complying with some previously imposed duty. The Committee believes that if the Federal government imposes legally binding duties on State, local or tribal governments, and provides financial assistance to them to carry out or comply with those duties, then S. 1's provisions should apply if the Federal government subsequently reduces the authorization of that aid, while continuing to keep the existing duties in place. Exempted from the provisions of this subsection is legislation or regulation that authorizes or implements a voluntary discretionary aid program to State, local and tribal governments that has requirements or conditions of participation specific to that program.

Included, as part of the definition of Federal intergovernmental mandates, are Federal entitlement programs that provide $500 million or more annually to State, local or tribal governments. This would currently include nine large Federal entitlement programs, seven of which are either exempt from sequestration or subject to a special rule under the Budget Act. The nine are: Medicaid; AFDC; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilition State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and, Child Support Enforcment. Any legislation or regulation would be considered a Federal intergovernmental mandate if it: a) increases the stringency of State, local or tribal government participation in any one of these nine programs, or b) caps or decreases the Federal government's responsibility to provide funds to State, local or tribal governments to implement the program, including a shifting of costs from the Federal government to those governments. The legislation or regulation would not be considered a Federal intergovernmental mandate if it allows those governments the flexibility to amend their specific programmatic or financial responsibilities within the program while still remaining eligible to par-

ticipate in that program. In addition to the nine previously-mentioned programs, also included are any new Federal-State-local entitlement programs (above the $500 million threshold) that may be created after the enactment of this Act. The Committee has included this provision in the legislation because of its concern over past and possible future shifting of the costs of entitlement programs by the Federal government onto State governments.

Subsection (c)(i) (I) and (II) addresses the estimated costs of intergovernmental mandates. It is the intention of the Committee that reauthorization of existing laws not be subject to the requirements of S. 1 where the costs of the reauthorized legislation do not exceed the existing costs of the mandate plus the applicable thresholds established in the bill. This principle would apply to laws for which authorizations of appropriation may have expired.

''Federal private sector mandate'' is defined to include any legislation, or a provision therein, that imposes a legally binding duty on the private sector.

''Direct costs'' is defined to mean aggregate estimated amounts that State, local and tribal governments and the private sector will have to spend in order to comply with a Federal mandate. Direct costs of Federal mandates are net costs; estimated savings will be subtracted from total costs. Further, direct costs do not include costs that State, local and tribal governments and the private sector currently incur or will incur to implement the requirements of existing Federal law or regulation. In addition, the direct costs of a Federal mandate must not include costs being borne by those governments and the private sector as the result of carrying out a State or local government mandate. Finally, the Committee intends that direct costs be calculated on the assumption that State, local and tribal governments and the private sector are in compliance with relevant codes and standards of practice established by recognized professional organizations or trade associations.

''Private sector'' is defined to cover all persons or entities in the United States except for State, local or tribal governments. It includes individuals, partnerships, associations, corporations, and educational and nonprofit institutions.

Independent regulatory agencies are excluded from the definition of a Federal ''agency''. The definition of ''small government'' is made consistent with existing Federal law which classifies a government as small if its population is less than 50,000. ''Tribal government'' is defined according to existing law.

SECTION 4. EXCLUSIONS

The Committee believes that several types of unfunded mandates should be properly excluded from the requirements of this Act. These include Federal legislation or regulation that: enforces constitutional rights of individuals; establishes or enforces statutory rights to prohibit discrimination on the basis of race, religion, gender, national origin, or handicapped or disability status; requires compliance with Federal auditing and accounting procedures; provides emergency relief assistance or is designated as emergency legislation; and, is necessary for national security or ratification or implementation of international treaties.

A number of these exemptions are standard in many pieces of legislation in order to recognize the domain of the President in foreign affairs and as Commander-in-Chief as well as to ensure that Congress's and the Executive Branch's hands are not tied with procedural requirements in times of national emergencies. Further, the Committee thinks that Federal auditing, accounting and other similar requirements designed to protect Federal funds from potential waste, fraud, and abuse should be exempt from the Act.

The Committee recognizes the special circumstances and history surrounding the enactment and enforcement of Federal civil rights laws. During the middle part of the 20th century, the arguments of those who opposed the national, uniform extension of basic equal rights, protection, and opportunity to all individuals were based on a States rights philosophy. With the passage of the Civil Rights Acts of 1957 and 1964 and the Voting Rights Act of 1965, Congress rejected that argument out of hand as designed to thwart equal opportunity and to protect discriminatory, unjust and unfair practices in the treatment of individuals in certain parts of the country. The Committee therefore exempts Federal civil rights laws from the requirements of this Act.

SECTION 5. AGENCY ASSISTANCE

Under this section, the Committee intends for Federal agencies to provide information, technical assistance, and other assistance to the Congressional Budget Office [CBO] as CBO might need and reasonably request that might be helpful in preparing the legislative cost estimates as required by Title I. Through the implementation of various Presidential Executive Orders over the last decade, agencies have developed a wealth of expertise and data on the cost of legislation and regulation on State, local and tribal government and the private sector. CBO should be able tap into that expertise in a useful and timely manner. Other Congressional support agencies may also have developed information on cost estimates and the estimating process which might be helpful to CBO in performing its duties. CBO should not attempt to duplicate analytical work already being done by the other support agencies, but rather use as needed that information.

Title I—Legislative Accountability and Reform

SECTION 101. LEGISLATIVE MANDATE ACCOUNTABILITY AND REFORM

This section amends title IV of the Congressional Budget and Impoundment Control Act of 1974 by creating a new section 408 on Legislative Mandate Accountability and Reform. Subsection (a) establishes procedures and requirements for Committee reports accompanying legislation that imposes a Federal mandate. It requires a committee, when it orders reported legislation containing Federal mandates, to promptly provide the reported bill to CBO so that it can be scored. The Committee is concerned that the CBO scoring process not unnecessarily impede or slow the legislative process. With this view in mind, the Committee would urge the relevant authorizing committees to work closely with CBO during the committee process to ensure that legislation containing federal mandates,

as well as possible related amendments to be offered in markup, be scored in a timely fashion.

The committee report shall include: an identification and description of Federal mandates in the bill, including an estimate of their expected direct costs to State, local tribal governments and the private sector, and a qualitative assessment of the costs and benefits of the Federal mandates, including their anticipated costs and benefits to human health and safety and protection of the natural environment. If a mandate affects both the public and the private sectors, and it is intended that the Federal Government pay the public sector costs, the report should also state what effect, if any, this would have on any competitive balance between government and privately owned business.

Some federal mandates will affect both the public and private sectors in similar, and in some cases nearly identical, ways. For example, the costs of compliance with minimum wage laws or environmental standards for landfill operations or municipal waste incineration are incurred by both sectors. There has been some concern expressed that subsidization of the public sector in these cases could create a competitive advantage for activities owned by State, local or tribal governments in those areas where they compete with the private sector. In any instance where this might be the case, Congress should be aware of that impact and the effect on the continuing ability of private enterprises to remain viable, and carefully consider whether the granting of a competitive advantage to the public sector is fair and appropriate.

For Federal intergovernmental mandates, Committee reports must also contain a statement of the amount, if any, of increased authorization of Federal financial assistance to fund the costs of the intergovernmental mandates.

This section also requires the authorizing Committee to state in the report whether it intends the Federal intergovernmental mandate to be funded or not. There may be occasions when a Committee decides that it is entirely appropriate that State, local or tribal governments should bear the cost of a mandate without receiving Federal aid. If so, the Committee report should state this and give an explanation for it. Likewise, the Committee report must state the extent to which the reported legislation preempts State, local or tribal law, and, if so, explain the reasons why. To the maximum extent possible, this intention to preempt should also be clear in the statutory language.

Also set out in this section are procedures to ensure that the Committee publishes the CBO cost estimate, either in the Committee report or in the Congressional Record prior to floor consideration of the legislation.

Duties of the Director

New section 408(b) of the Congressional Budget and Impoundment Control Act requires that the Director of CBO analyze and prepare a statement on all bills reported by committees of the Senate or House of Representatives other than appropriations committees. This subsection stipulates, first, that the Director of CBO must estimate whether all direct costs of Federal intergovernmental mandates in the bill will equal or exceed a threshold of

$50,000,000 annually. If the Director estimates that the direct costs will be below this threshold, the Director must state this fact in his statement on the bill, and must briefly explain the estimate. (Although this provision requires only a determination by CBO that the threshold will not be equalled or exceeded, if, in cases below the threshold, the Director actually estimates the amount of direct costs, the Committee expects that he will include that estimate in his explanatory statement.) If the Director estimates that the direct costs will equal or exceed the threshold, the Director must so state and provide an explanation, and must also prepare the required estimates.

In estimating whether the threshold will be equalled or exceeded, the Director must consider direct costs in the year when the Federal intergovernmental mandate will first be effective, plus each of the succeeding four fiscal years. In some cases, the new duties or conditions that constitute the mandate will not become effective against State, local and tribal governments when the statute becomes effective, but will become effective when the implementing regulations become effective. In such cases, the Director must consider direct costs in the first fiscal year when the regulations are to become effective, and each of the next four fiscal years.

The $50,000,000 threshold in this legislation for Federal intergovernmental mandates is significantly lower than the threshold of $200,000,000 in the State and Local Cost Estimate Act of 1981 (2 U.S.C. 403(c)). The threshold in the 1981 Act also included a test of whether the proposed legislation is likely to have an exceptional fiscal consequence for a geographic region or a level of government. The Committee believes that, in the context of this present legislation, applying a threshold for specific geographic regions or levels of government would be too subjective or too complex. However, the significantly lowered threshold of S. 1 should provide an extra margin of protection for particular geographic regions or levels of government affected by Federal intergovernmental mandates.

If the Director determines that the direct costs of the Federal Intergovernmental mandates will equal or exceed the threshold, he must make the required additional estimates and place them in the statement. These additional estimates may be summarized as follows:

> An estimate of the total amount of direct costs of the Federal intergovernmental mandates. This is an aggregate amount, broken out on an annual basis over the 5-year period.
>
> An estimate of any increase in the bill in authorization of appropriations for Federal financial assistance programs usable by the State, local, and tribal governments for activities subject to the Federal intergovernmental mandates.

The amount of increase in authorization of appropriations would be calculated, as the sum of the increased budget authority of any Federal grant assistance, plus the increased subsidy amount of any loan guarantees or direct loans.

The Director of CBO must also estimate first whether all direct costs of Federal private sector mandates in the bill will equal or exceed a threshold of $200,000,000 annually. In making this estimate, the Director must consider direct costs in the year when the Federal private sector mandate will first be effective, plus each of

the succeeding four fiscal years. In some cases, the new duties or conditions that constitute the mandate will not become effective for the private sector when the statute becomes effective, but will become effective when the implementing regulations become effective. In such cases, the Director must consider direct costs in the first fiscal year when the regulations become effective, and each of the next four fiscal years. If the Director estimates that the direct costs will equal or exceed the threshold, the Director must so state and provide an explanation, and must also prepare the required estimates. These additional estimates may be summarized as follows:

An estimate of the total amount of direct costs of the Federal private sector mandates. This is an aggregate amount, broke out annually over the 5-year period.

An estimate of any increase in the bill in authorization of appropriations for Federal financial assistance programs usable by the private sector for activities subject to the Federal private sector mandates.

If the Director determines that it is not feasible for him to make a reasonable estimate that would be required with respect to Federal private sector mandates, the Director shall not make the estimate, but shall report in the statement that the reasonable estimate cannot be reasonably made. No corresponding section applies for Federal intergovernmental mandates.

If the Director estimates that the direct costs of a Federal mandate will be below the specified threshold, the Director must state this fact in his statement on the bill, and must briefly explain the estimate. (Although this provision requires only a determination from CBO of whether the threshold will or will not be exceeded, if, in cases below the threshold, the Director actually estimates the amount of direct costs, the Committee expects that he will include this estimate in his explanatory statement.)

Point of order in the Senate

This section provides that a point of order lies against any bill or joint resolution reported by a committee that contains a Federal mandate, but does not contain a CBO estimate of the mandate's direct costs. A point of order would also lie against any bill, joint resolution, amendment, motion, or conference report that increased the costs of a Federal intergovernmental mandate by an amount that caused the $50,000,000 threshold to be exceeded, unless that same amount were fully funded to State, local and tribal governments.

Such action would have to specify that the funding of the mandate's full costs would be by way of; (1) an increase in entitlement spending with a resulting increase in the Federal budget deficit, (2) an increase in direct spending paid for by an increase in tax receipts, or (3) an increase in the authorization of appropriations.

If the third alternative is used (authorization of appropriations), the specific appropriation bill that is expected to provide funding must be identified. The mandate legislation must also designate a responsible Federal agency that shall either: implement an appropriately less costly mandate if less than full funding is ultimately appropriated (pursuant to criteria and procedures also provided in the mandate legislation), or declare such mandate to be ineffective.

In other words, the authorizing committee should expect that unless it expressly plans otherwise, its mandate will be voided if the appropriations committee at any point in the future under-funds the mandate. Therefore, if a "less money, less mandate" alternative is both feasible and desired, it is incumbent upon the authorizing committee to specify how the agency shall implement that alternative.

Appropriations bills are not subject to a point of order under this section. If such a bill did seek to impose a federal mandate, it would likely be subject to the point of order that lies against legislating on an appropriations bill.

The Committee expects that during those instances when the Parliamentarian must rule on a point of order under this section, there may be occasions when there is a need for consultation regarding the applicability of this Act. This section provides that on all such questions that are not within the purview of either the House or Senate Budget Committee, it is the Senate Governmental Affairs Committee or House Government Reform and Oversight Committee that shall make the final determination. For example, on the question of whether a particular mandate is properly excluded from coverage of the Act as bill which enforces constitutional rights of individuals, the Governmental Affairs Committee would be the appropriate Committee to consult. On a question regarding the particular cost of such a mandate, the Budget Committee would be the appropriate committee.

SECTION 102. ENFORCEMENT IN THE HOUSE OF REPRESENTATIVES

This section specifies the procedures to be followed in the House of Representatives in enforcing the provisions of this Act.

SECTION 103. ASSISTANCE TO COMMITTEES AND STUDIES

This section requires the Director of CBO to consult with and assist committees of the Senate and the House of Representatives, at their request, in analyzing proposed legislation that may have a significant budgetary impact on State, local or tribal governments or a significant financial impact on the private sector. It provides for the assistance that committees will need from CBO to fulfill their obligations under the provisions of S. 1.

This section also states that CBO should set up a process to allow meaningful input from those knowledgeable, affected, and concerned about the Federal mandates in question. One possible way to establish this process is through the formation of advisory panels made up of relevant outside experts. The Committee leaves it to the discretion of the Director as to when and where it is appropriate to form an advisory panel; however, the Committee does encourage the Director to form these panels where feasible and helpful in performing the requisite studies. The membership of the panels should represent a fair balance of interests and constituencies, as well as include those expert in the areas of economic and budgetary analysis, but the Committee believes that when the Director convenes an advisory panel, he should appoint State, local or tribal officials (including their designated representatives) to the panels.

This section encourages authorizing committees to take a prospective look at the impact of Federal intergovernmental and private sector mandates before considering new legislation. It stipulates that committees should request that CBO undertake studies in the early part of each Congress of the potential budgetary and financial impact of Federal mandates in major legislation expected to be considered in that Congress.

SECTION 104. AUTHORIZATION OF APPROPRIATIONS

This paragraph authorizes appropriations for CBO of $4,500,000 per year for FY 1996 through 2002. The Committee recognizes that additional resources and personnel are needed for CBO to fully perform its duties under this Act along with continuing to carry out its current responsibilities. The Committee understands that the current policy and practice at CBO is to rely on in-house personnel to conduct studies and cost estimates, rather than contracting these duties to outside entities. The Committee supports this policy and urges the Appropriations Committee, in funding this authorization, to increase CBO's authority to hire additional personnel in order to fulfill its new duties under this Act.

SECTION 105. EXERCISE OF RULEMAKING POWERS

This section provides that the terms of title I are enacted as an exercise of the rulemaking power of the Senate and the House of Representatives, and that either house may change such rules at any time.

SECTION 106. REPEAL OF THE STATE AND LOCAL COST ESTIMATE ACT OF 1981

This paragraph rescinds the provisions of the State and Local Cost Estimate Act of 1981.

SECTION 107. EFFECTIVE DATE

Title I will take effect on January 1, 1996 and apply only to legislation introduced on or after that date. This is to give CBO the time to develop the proper methodologies and analytical techniques in order to develop a more thorough cost estimating process, as well as to give Congress opportunity to provide adequate resources to CBO in the annual appropriations process.

Title II—Regulatory Accountability and Reform

SECTION 201. REGULATORY PROCESS

Under this section, agencies must assess the effects of their regulations on State, local and tribal governments, and the private sector, including resources available carry out Federal intergovernmental mandates contained in those regulations. In keeping with both statutory and regulatory objectives, agencies shall seek ways to minimize regulatory burdens that significantly effect State, local and tribal governments.

Subsection (b) requires agencies to develop an effective process to permit elected officials of those governments (or their designated representatives) to provide meaningful and timely input into the

development of regulatory proposals that contain significant Federal intergovernmental mandates. This provision mirrors Section 1(b) of President Clinton's Executive Order 12875—"Enhancing the Intergovernmental Partnership"—which seeks to establish a closer partnership between Federal agencies and elected and other State, local and tribal officials in the regulatory process. The Committee expects agencies to fully and faithfully implement this section as well as the other provisions in the E.O. On January 11, 1994, OMB Director Leon Panetta and OIRA Administrator Sally Katzen issued guidance on the implementation of the E.O. Concerning Section 1 of the E.O., that guidance states, "intergovernmental consultation should take place as early as possible, and preferably before publication of the notice of proposed rulemaking or other regulatory action proposing the mandate. Consultations may continue after publication of the regulatory action initiating the proposal, but in any event they must occur 'prior to the formal promulgation' in final form of the regulatory action 'containing the proposed mandate.'" Early and extensive intergovernmental consultation can help promote the development of more cost-effective Federal regulation as well as help all the participants in the process reach a better understanding of the proper needs and responsibilities of each level of government in implementing or complying with a Federal requirement.

OMB's guidance also outlines with whom agencies should consult in State, local and tribal government. The Committee feels strongly that agencies should follow the OMB guidance concerning consultation with elected officials, including their representatives, from all levels of smaller governments because these officials are responsible for balancing the competing claims on their government's revenue base from many program responsibilities. The OMB guidance further discusses how Federal agencies should also confer with the designated representatives of elected officials as well as with program and financial officials from State, local and tribal governments. Program officials clearly are able to offer information and guidance to their Federal counterparts on the likely effectiveness of any Federal regulatory proposal, while financial officials can offer important perspectives on their government's ability to pay for the mandate. In consulting with financial officials, Federal agencies should look to the applicable treasury, budget, tax-collection, or other financial officers in State, local and tribal governments.

Subsection (b) also states that the intergovernmental consultations should be consistent with the requirements established in existing Federal law governing the regulatory process. In particular, the Committee believes that agencies must ensure that the consultation process not subvert or violate in any way the public disclosure and sunshine provisions of existing law and Executive Order, including the Administrative Procedure Act.

Subsection (c)(1) has agencies establishing plans to inform, advise, involve and consult with small governments before implementing regulations that might significantly or uniquely affect those governments. The Committee believes that Federal agencies should undertake a special effort to ensure that officials from small governments have an opportunity for significant input into the regulatory process. According to the Census Bureau, small govern-

ments (population below 50,000) make up 97 percent of all general purpose governments in the United States. A full 67 percent of all general purpose governments serve fewer than 2,500 people. Yet despite their prevalence, small governments have a relatively small presence in the Nation's Capital where Federal regulatory policies and decisions are made. It is the Committee's sense that Federal agencies have not always been aware of, or have adequately considered, small governments' capabilities in implementing certain regulatory requirements. This has resulted in the promulgation of regulations in certain cases that have not only over-burdened small governments to the point of widespread non-compliance, but in so doing fails to achieve those regulations' goals and objectives. The Committee believes that one way to achieve the twin goals of more cost-effective regulation and greater rates of compliance on significant regulations that impact small governments is for agencies to establish plans for outreach to small governments. Such plans might incorporate activities such as greater technical assistance to small governments; regional planning activities, conferences, and workshops; and establishment of small government advisory committees, or appointment of small government representatives on existing advisory committees. One good approach is embodied in the recommendations of the National Performance Review Report for the Environmental Protection Agency. The NPR EPA Report recommends that the agency convene a series of town meetings across the United States to discuss more flexible ways to achieve environmental protection.

SECTION 202. STATEMENTS TO ACCOMPANY SIGNIFICANT REGULATORY ACTIONS

This section states that before a Federal agency promulgates any final rule or notice of proposed rulemaking that includes any intergovernmental mandate that is estimated to result in an annual aggregate expenditure of $100,000,000 or more by State, local or tribal governments, and the private sector, the agency must complete a written statement containing the following:

Estimates of the anticipated costs to State, local and tribal governments, and the private sector, of compliance with the mandate, including the availability of Federal funds to pay for those costs;

Future costs of Federal intergovernmental mandate not estimated above, including estimates of any disproportionate budgetary effects on any particular regions of the United States or on particular States, local governments, tribal governments, urban or rural or other types of communities;

A qualitative, and if possible, a quantitative assessment of costs and benefits anticipated from any Federal intergovernmental mandate, including enhancement of public health and safety and protection of the natural environment;

An estimate of the effect on the national economy of the mandate's impact on private sector costs;

A description and summary of input, comments, and concerns received from State, local and tribal government elected officials; and,

A summary of the agency's evaluation of those comments and concerns, and the agency's position supporting the need to issue the regulation containing the Federal intergovernmental mandates.

Subsection (b) requires agencies to summarize their written statements and include that summary in the promulgation of the notice of proposed rulemaking and in the final rule. Subsection (c) states that preparation of the written statements may done in conjunction with other analyses. This subsection ensures that agency actions be compatible with the regulatory planning and coordination provisions of the President's scheme for regulatory review as governed by Executive Order 12866—Regulatory Planning and Review.

The Committee believes that proper agency assessment of the impact of major regulations on State, local and tribal governments can lead to better and more cost-effective Federal regulation as well as reduce unreasonable burdens on smaller governments. The spirit and intent of this section is meant to be entirely consistent with the relevant portions of E.O. 12866. As part of its principles, the E.O. states, ''each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.'' The Committee strongly endorses these principles and supports their full implementation.

SECTION 203. ASSISTANCE TO THE CONGRESSIONAL BUDGET OFFICE

This section requires the Director of the Office of Management and Budget to collect the written statements prepared by agencies under Section 202 and submit them on a timely basis to CBO. The reason for this section is that CBO may find useful agency assessments and analyses in performing the required cost estimates on legislation. As OMB already collects these assessments and related information from all agencies under Executive Order authority, it makes good sense that OMB also supply that information to CBO as a matter of routine.

SECTION 204. PILOT PROGRAM ON SMALL GOVERNMENT FLEXIBILITY

This section requires OMB, in consultation with Federal agencies, to establish at least two pilot programs to test innovative and more flexible regulatory approaches that reduce reporting and compliance burdens on small governments while continuing to meet overall statutory goals and objectives.

The Committee believes that Federal agencies should experiment with some new and innovative approaches on regulations that affect small governments. Such a pilot program would embody some of the recommendations of the Vice President's National Performance Review. For example, the NPR report for the Environmental Protection Agency recommends that the agency establish a pilot project to assist a community in assessing its environmental and

community health risks and how to direct resources to priority problems. The Committee's wish is that similar sorts of initiatives be tried by at least one other agency.

Title III—Baseline Study

SECTION 301. BASELINE STUDY OF COSTS AND BENEFITS

This section establishes a Commission on Unfunded Federal Mandates.

SECTION 302. REPORT ON UNFUNDED FEDERAL MANDATES BY THE COMMISSION

This section provides that the Commission shall review the role and impact of unfunded Federal mandates in intergovernmental relations, and make recommendations to the President and Congress on how State and local governments can participate in meeting national objectives without the burden of such mandates. It shall also make recommendations on how to allow more flexibility in complying with mandates, reconcile conflicting mandates, terminate obsolete ones, and simply reporting and other requirements. The Commission shall first develop criteria for evaluating unfunded mandates, and then shall publish a preliminary report on its activities under this title within 9 months of the enactment of this Act. A final report shall be submitted within 3 months of the preliminary report.

SECTION 303. MEMBERSHIP

This section provides that the Commission shall be composed of 9 members—3 appointed by the Speaker of the House of Representatives (in consultation with the minority leader), 3 by the majority leader of the Senate (in consultation with the minority leader), and 3 by the President. No Member or employee of Congress may be a member of the Commission.

SECTION 304. DIRECTOR AND STAFF OF COMMISSION; EXPERTS AND CONSULTANTS

This section provides for the appointment of the staff and Director of the Commission, without regard to certain Civil Service rules. It also grants the Commission the authority to hire on a temporary basis the services of experts and consultants for purposes of carrying out this title, as well as the right to receive details from Federal agencies on a reimbursable basis, if approved by the agency head.

SECTION 305. POWERS OF COMMISSION

This section provides the Commission with the authority to hold hearings, obtain official data, use the U.S. mails, acquire administrative support services from the General Services Administration, and contract for property and services.

SECTION 306. TERMINATION

The Commission shall terminate 90 days after submitting its final report.

SECTION 307. AUTHORIZATION OF APPROPRIATIONS

This section authorizes the appropriation to Commission of $1 million.

SECTION 308. DEFINITION

This section defines the term "unfunded federal mandate", as used in title III.

Title IV—Judicial Review

SECTION 401. JUDICIAL REVIEW

This section provides that nothing under the Act shall be subject to judicial review, that no provisions of the Act shall be enforceable in an administrative or judicial action, and that no ruling or determination under the Act shall be considered by any court in determining the intent of Congress or for any other purposes.

V. Regulatory Impact Statement

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires Committee reports to evaluate the legislation's regulatory, paperwork, and privacy impact on individuals, businesses, and consumers.

S. 1 addresses Federal government process, not output. It will directly affect and change both the legislative and regulatory process. It will not have a direct regulatory impact on individuals, consumers, and businesses as these groups are not covered by the bill's requirements.

However, the implementation of S. 1 will likely have an indirect regulatory impact on these groups since a primary focus of the bill is to ensure that Congress assess the cost impact of new legislation on the private sector before acting. In so much as information on private sector costs of any particular bill or resolution may influence its outcome during the Congressional debate, it is possible that this bill may ease the regulatory impact on the private sector—both on individual pieces of legislation as well as overall. However, it is impossible at this time to determine with any specificity what that level of regulatory relief may be.

S. 1 does address the Federal regulatory process in three ways:

(1) It requires agencies to estimate the costs to State, local and tribal governments of complying with major regulations that include Federal intergovernmental mandates;

(2) It compels agencies to set up a process to permit State, local and tribal officials to provide input into the development of significant regulatory proposals; and

(3) It requires agencies to establish plans for outreach to small governments.

However, with the exception of the third provision, the bill will not impose new requirements for agencies to implement in the regulatory process that are not already required under Executive Orders 12866 and 12875. The bill merely codifies the major provisions of the E.O.s that pertain to smaller governments.

The legislation will have no impact on the privacy of individuals. Nor will it add additional paperwork burdens to businesses, con-

sumers and individuals. To the extent that CBO and Federal agencies, will need to collect more data and information from State, local and tribal governments and the private sector, as they conduct their requisite legislative and regulatory cost, estimates, it is possible that those entities will face additional paperwork. However, although smaller governments are certainly encouraged to comply with agency and CBO requests for information, they are not bound to.

VI. CBO Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, January 9, 1995.

Hon. William V. Roth,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1, the Unfunded Mandate Reform Act of 1995.

Enactment of S. 1 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer, *Director*.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 1.
2. Bill title: Unfunded Mandate Reform Act of 1995.
3. Bill status: As ordered reported by the Senate Committee on Governmental Affairs on January 9, 1995.
4. Bill purpose: S. 1 would require authorizing committees in the House and Senate to include in their reports on legislation a description and an estimate of the cost of any federal mandates in that legislation, along with an assessment of their anticipated benefits. Mandates are defined to include provisions that impose duties on states, localities, or Indian tribes ("intergovernmental mandates") or on the private sector ("private sector mandates"). Mandates also would include provisions that reduce or eliminate any authorization of appropriations to assist state, local, and tribal governments or the private sector in complying with federal requirements, unless the requirements are correspondingly reduced. In addition, intergovernmental mandates would include changes in the conditions governing certain types of entitlement programs (for example, Medicaid). Conditions of federal assistance and duties arising from participation in most voluntary federal programs would not be considered mandates.

Committee reports would have to provide information on the amount of federal financial assistance that would be available to carry out any intergovernmental mandates in the legislation. In addition, committees would have to note whether the legislation preempts any state or local laws. The requirements of the bill would

not apply to provisions that enforce the constitutional rights of individuals, that are necessary for national security, or that meet certain other conditions.

The Congressional Budget Office (CBO) would be required to provide committees with estimates of the direct cost of mandates in reported legislation other than appropriation bills. Specific estimates would be required for intergovernmental mandates costing $50 million or more and, if feasible, for private sector mandates costing $200 million or more in a particular year. (CBO currently prepares estimates of costs to states and localities of reported bills, but does not project costs imposed on Indian tribes or the private sector.) In addition, CBO would probably be asked to assist the Budget Committees by preparing estimates for amendments and at later stages of a bill's consideration. Also, at times other than when a bill is reported, when requested by Congressional committees, CBO would analyze proposed legislation likely to have a significant budgetary or financial impact on state, local, or tribal governments or on the private sector, and would prepare studies on proposed mandates. S. 1 would authorize the appropriation of $4.5 million to CBO for each of the fiscal years 1996–2002 to carry out the new requirements. These requirements would take effect on January 1, 1996, and would be permanent.

S. 1 would amend Senate rules to establish a point of order against any bill or joint resolution reported by an authorizing committee that lacks the necessary CBO statement or that results in direct costs (as defined in the bill) of $50 million or more in a year to state, local, and tribal governments. The legislation would be in order if it provided funding to cover the direct costs incurred by such governments, or if it included an authorization of appropriations and identified the minimum amount that must be appropriated in order for the mandate to be effective, the specific bill that would provide the appropriation, and a federal agency responsible for implementing the mandate.

Finally, S. 1 would require executive branch agencies to take actions to ensure that state, local, and tribal concerns are fully considered in the process of promulgating regulations. These actions would include the preparation of estimates of the anticipated costs of regulations to states, localities, and Indian tribes, along with an assessment of the anticipated benefits. In addition, the bill would authorize the appropriation of $1 million, to be spent over fiscal years 1995 and 1996, for a temporary Commission on Unfunded Federal Mandates, which would recommend ways to reconcile, terminate, suspend, consolidate, or simplify federal mandates.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1995	1996	1997	1998	1999	2000
Congressional Budget Office:						
Authorization of appropriations	.....	4.5	4.5	4.5	4.5	4.5
Estimated outlays	.....	4.0	4.4	4.4	4.4	4.4
Commission on Unfunded Federal Mandates:						
Authorization of appropriations	1.0	.....	.....	.....	.....	.....
Estimated outlays	0.4	0.6	.....	.....	.....	.....

[By fiscal year, in millions of dollars]

	1995	1996	1997	1998	1999	2000
Bill total:						
Authorization of appropriations	1.0	5.5	4.5	4.5	4.5	4.5
Estimated outlays	0.4	4.6	4.4	4.4	4.4	4.4

The costs of this bill fall within budget function 800.

Basis of Estimate: CBO assumes that the specific amounts authorized will be appropriated and that spending will occur at historical rates.

We estimate that executive branch agencies would incur no significant additional costs in carrying out their responsibilities associated with the promulgation of regulations because most of these tasks are already required by Executive Orders 12875 and 12866.

6. Comparison with spending under current law: S. 1 would authorize additional appropriations of $4.5 million a year for the Congressional Budget Office beginning in 1996. CBO's 1995 appropriation is $23.2 million. If funding for current activities were to remain unchanged in 1996, and if the full additional amount authorized were appropriated, CBO's 1996 appropriation would total $27.7 million, an increase of 19 percent.

Because S. 1 would create the Commission on Unfunded Federal Mandates, there is no funding under current law for the commission.

7. Pay-as-you-go considerations: None.

8. Estimated cost to State and local governments: None.

9. Estimate comparison: None.

10. Previous CBO estimate: None.

11. Estimate prepared by: James Hearn.

12. Estimate approved by: Paul Van de Water, Assistant Director for Budget Analysis.

VII. ADDITIONAL VIEWS OF SENATOR GLENN

I support, with reservations noted below, passage and enactment of S. 1—the Unfunded Mandate Reform Act of 1995. The main premise of the legislation is that Congress and the Executive Branch more carefully consider the impact on State and local government of proposed legislation and regulation prior to final action on those measures. I believe that it will contribute to a much needed debate over the reordering and sorting out of Federal, State, local and tribal responsibilities in many program areas.

S. 1 is based largely on S. 993—last year's Kempthorne-Glenn Bill, legislation that had 67 cosponsors and nearly passed the Senate. However, there are some new provisions that have been added to S. 1 that give me some cause for concern. These provisions deal with points of order application on amendments, private sector regulatory analysis, and Committee jurisdiction over monitoring implementation of the legislation.

As I noted at the Committee's hearing on January 5th and subsequent markup on the 9th, I think it's worth stepping back and taking a look at the evolution of the Federal-State-local relationship over the last decade and a half so we can put this debate into some historical context. During the last 10 to 15 years, Federal aid to State and local governments was severely cut, or even eliminated, in a number of key domestic program areas. At the same time, enactment and subsequent implementation of various Federal statutes passed on new costs to State and local governments. Let me quote just a few facts and figures highlighted in the Committee report (S. Rpt. 103–330) on last year's Federal mandate reform bill.

> According to CBO, 89 bills were reported out of Congressional Committees between 1983 and 1988 that had an annual estimated cost to State and local governments in excess of $200 million each. A total of 382 bills were reported out that had some new costs to State and local governments. Obviously, not all of these bills became law, but CBO's figures do give pause for reflection.
>
> EPA estimates that the cost of environmental mandates to State and local governments will rise from $22 billion in 1987 to $37 billion by the year 2000. The Vice President's National Performance Review puts this figure at $44 billion by 2000, after allowing adjustments for inflation.
>
> According to the Federal Funds Information Service, Federal discretionary aid to State and local governments fell 28 percent in real terms during the decade of the 1980s. In 1986, the general revenue sharing program was terminated, a program that provided approximately $4.5 billion a year in flexible funds to State and local governments and a program that had provided $83 billion in funding since its inception in 1972.

In simple terms, State and local governments have ended up receiving less of the Federal carrot and more of the Federal stick. This year's Committee report makes many of the same points and arguments made in last year's report.

Hopefully, we will be able to restore harmony to the now-dysfunctional intergovernmental family with passage of S. 1—The legislation will set new standards for fiscal understanding and discipline for Congress to meet when it considers legislation that may impose Federal mandates on State and local governments. S. 1 has requirements for cost analyses on State and local impacts of both legislation and regulation. It has provisions to encourage greater and cooperation and coordination among all branches of government in the implementation of many Federal programs. Finally, and most importantly, the bill establishes a point of order mechanism to trigger a recorded vote on the imposition of any future mandate.

However, there are some serious flaws in S. 1 which I would like to see corrected between now and enactment. The bill's point of order mechanism now extends to floor amendments which S. 993 did not cover. My concern in applying the point of order requirements for CBO cost estimates and State and local funding to amendments is that it will unnecessarily bog down the legislative process, particularly for the first year or two when this Act goes into effect. It's possible that someone might raise points of order in almost every floor amendment that is offered to almost any one bill. Also, CBO's cost estimating responsibilities would increase substantially if they have to score amendments. I understand that points of order can currently be raised under the Budget Act on amendments that affect Federal direct spending but have not been scored by CBO. I also understand that those seeking to "game" S. 1's requirements could do so by offering legislation containing unfunded Federal mandates in amendment form as opposed to free-standing legislation. However, S. 1's point of order requirements do extend to Conference Reports. So any unfunded Federal mandate that passes as an amendment to another bill would be picked up and scored by CBO coming back from Conference.

Further, in the Budget Committee markup, Senators Domenici and Exon offered an amendment, which was adopted, to strike the references in Section 101 of the legislation regarding the responsibilities of the Senate Committee on Governmental Affairs and the Senate Committee on Budget in overseeing implementation of the legislation's requirements. The original provisions in S. 1 gives the Committee on Governmental Affairs the authority to determine whether the provisions in S. 1 would apply to any legislation being considered. I support that. Further, the section gives the Budget Committee a role in overseeing the level of Federal mandates in any bill or joint resolution and CBO's estimates of those levels. I agree that the Budget Committee, given their responsibility for CBO, should have a role here. However, in striking these provisions in markup, the Budget Committee has now left S. 1 silent as to who is responsible for the determination of whether S. 1's provisions apply to any particular bill, joint resolution, amendment or conference report. This raises the question of whether the bill now vests this responsibility in the Director of CBO, instead of to a

body of elected officials. That possibility raises some interesting Constitutional questions of the appropriateness of vesting that much authority in the hands of a non-elected official. I would urge that the Senate re-insert the original provisions on Committee determination back into S. 1.

Another problematic change from S. 993 is the expansion of the "regulatory accountability and reform" provisions of Title 2 to go beyond intergovernmental mandates to address any and all regulatory effects on the private sector. The intended purpose of S. 1 is to control unfunded Federal mandates on State and local governments. I have always supported that goal. Moreover, I believe that if we keep the bill sharply focused on that purpose, we can get the legislation passed quickly and signed into law. If, however, we let the bill be stretched to cover other issues, we hurt prospects for enactment and we break our pledge to our friends in State and local governments.

Title 2 as it appears in S. 1 does not serve this purpose to the extent it requires agencies to analyze the effects of their regulations on the private sector apart from intergovernmental mandates. I believe the bill should be brought back to its original purpose by limiting regulatory analysis to intergovernmental mandates. Under this legislation, agencies should have to analyze private sector costs of complying with an intergovernmental mandate, but should not under this law have to analyze private sector costs imposed by other sorts of laws and regulations. In short, I support using this legislation to control intergovernmental regulatory costs. I oppose using this bill to address broader regulatory reform issues.

Accordingly, I argued in Committee mark-up that the Committee should strike the words "private sector" from section 201(a)(1) in order to maintain the section's intended purpose of requiring agencies to assess the effects of their regulations on State, local, and tribal governments, "including specifically the availability of resources to carry out any Federal intergovernmental mandates in those regulations". The intended scope of section 201 is clearly shown by the language of subsection (a)(2): "[agencies shall] seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving statutory and regulatory objectives." Adding the words "private sector" to section 201 thus was inconsistent with the clear meaning of the section—those words should be removed.

Along these same lines, I also argued that section 202(a)(4) be amended to substitute "intergovernmental" for "private sector" mandate and be moved to be a new subsection (a)(2)(C) to appropriately require that agencies "to the extent. . .reasonably feasible [estimate] the effect of the Federal intergovernmental mandate on the national economy. . . ." Again, the clear purpose of the underlying section, that is, sec. 202, is to require the preparation of a written agency regulatory analysis of intergovernmental mandates (see p. 33, 1. 25) that have a major national economic impact. The attempt to insert a free-standing requirement to analyze private sector costs (as is seen in section 202(a)(4) of S. 1 as introduced) is wrong, inconsistent with the section and the purpose of the bill.

I agree that we need to address the issue of Federal regulatory burdens on the private sector. But we should not do so on legisla-

tion dealing with intergovernmental mandates. Regulatory reform involves questions about cost/benefit analysis, risk assessment, private property rights, review of existing regulations, presidential regulatory review, and more. These are complicated and unsettled issues. Inserting the words "private sector" into an intergovernmental regulatory analysis requirement is not the way to go. I am serious about addressing the broader regulatory reform issues. I have already introduced legislation (S. 100) to establish a comprehensive regulatory analysis and review process. I understand, also, that the Committee intends to hold hearings in early February on these issues. This is the way we should proceed.

In sum, I support the thrust of S. 1 and look forward to working toward its eventual enactment. My hope is that we will be able to resolve my concerns as we move forward in the legislative process.

JOHN GLENN.

VIII. MINORITY VIEWS

Last year, the Committee reported out a bill, S. 993, addressing the problems of unfunded mandates. We each not only voted for that bill but cosponsored it as well. Our committee had worked hard last Congress to come up with a reasonable solution to the problem of federal mandates—a real dilemma faced by our state, local and tribal officials—and we were pleased to support S. 993.

This bill, S. 1, however, has gone too far. What previously required an authorization for the amount of the estimated cost of an intergovernmental mandate to overcome a point of order, now requires the authorizing committee to place on the appropriate agency the requirement that the mandate be made ineffective or proportionately cut back should a future appropriation not meet the level of the CBO cost estimate for each year of the authorization.

In providing for a point or order which creates the presumption that we will either pay for mandates on state, local or tribal governments or we will waive those mandates, this bill takes a major step beyond its stated purpose.

The purposes section to S. 1 reads in part:

> (3) to assist Congress in its consideration of proposed legislation establishing or revising * * * Federal mandates * * * by—
>
> (A) providing for the development of information about the nature and size of mandates in proposed legislation and
>
> (B) establishing a mechanism to bring such information to the attention of the Senate and the House of Representatives before the Senate and the House of Representatives vote on proposed legislation;
>
> (4) to promote informed and deliberate decisions by Congress on the appropriateness of Federal mandates in any particular instance;
>
> (5) to require that Congress consider whether to provide funding to assist State, local and tribal governments in complying with Federal mandates, to require analyses of the impact of private sector mandates, and through the dissemination of that information provide informed and deliberate decisions by Congress and Federal agencies and retain (sic) competitive balance between the public and private sectors * * *

We agree with that purpose, and believe that is what S. 993 accomplished. S. 1, however, takes a CBO estimate of the cost of legislation to state, local and tribal governments (an estimate that CBO states may be impossible to obtain in a number of cases) and says that if we don't appropriate money at the level of the CBO estimate then the legislation that we passed requiring radon abate-

ment or an increase in the minimum wage or tougher sewage treatment standards or reductions in dioxin, will be ineffective. That proposal is simply too extreme.

In order to improve the bill to clarify certain provisions and to refine the bill's application to legislation, several amendments were offered at the mark-up. All but two technical amendments were defeated.

One amendment, offered by Senator Levin, would have excluded from coverage of the point of order legislation which establishes employee rights. Such legislation would apply to state, local and tribal governments in their capacity as employers, as it would apply to all employers. We supported that amendment, because we couldn't find a compelling reason to treat state, local and tribal governments any differently than every other employer when it comes to laws governing employer-employee relations, such as minimum wage and Family and Medical Leave. Why would we want to exempt state, local and tribal governments from the requirements of such legislation, particularly since we are in the process of making sure the Congress is covered by such laws. We also could not forsee the situation in which we would agree that state, local and tribal governments should be paid for the costs in implementing employer-related legislation, since it would be legislation that is designed to apply to every entity in the country in its capacity as an employer. For that reason we support excluding this type of legislation from the point of order. The amendment was not adopted, however.

This issue raises the problem of the inherent unfairness in the bill's treatment between the public and private sector. This legislation requires us to overcome a point of order if we don't pay for a federal intergovernmental mandate, but it doesn't create a similar point of order for private sector mandates. There is a presumption created thereby that we should fund the mandate or not apply it to the public sector. (The majority views go beyond this and suggest, counter to many assurances otherwise, that authorizing committees should not plan on overcoming the presumption by 51 vote waiver on the point of order.) This is particularly troubling when the state, local or tribal government is acting in the same capacity as a private sector entity.

We are uneasy about the presumption of disparate treatment established in S. 1. The presumption potentially could result in a significant competitive disadvantage for private enterprises engaged in the same activities that the state, local or tribal governments are engaged in. And it potentially could result in disproportionate health protection for our citizens. S. 1 could result in vastly different levels of protection for citizens throughout this country and even in one state. Citizens living near or downwind from a publicly owned facility could be exposed to toxins emitted from an incinerator exempt from pollution control standards while citizens living near a private facility would be protected from those emissions because the private facility is not exempt.

Obviously, results like this would also put private entities at a competitive disadvantage relative to state, local and tribal governments that operate the same kind of businesses. In a letter to Senator Kempthorne dated December 16, 1994, Browning-Ferris Indus-

tries, a waste management company, discussed some of the potential consequences of unfunded mandates legislation. It wrote:

> The results would severely skew the marketplace in favor of government rather than the private sector services because the private sector would have to add in prices to its customers for compliance with these various federal rules that customers of the compliance with these various federal rules that customers of the public sector would not have to pay.

The unintended consequences of the legislation in fact may be to encourage an expansion of government at the state and local levels. Government could be stimulated to contract out fewer services to private industry because the costs charged by private industry probably would be higher. This could result in an expansion of government in quasi-private industry.

At the same time, by exempting the smokestacks and discharge pipes operated by local and state governments from complying with environmental standards, S. 1 could force a wide range of businesses to bear even more of the burden to meet overall clean air and clean water goals.

We will be working on an amendment to address these concerns including competitiveness and unfairness against the private sector when the bill comes to the floor.

Another amendment, offered by Senator Levin, would have added to the pubic sector cost estimate a provision that the bill currently contains for the private sector cost estimate. That provision states that if CBO can't estimate the cost of the private sector mandate, it must so state and explain why. This is simple enough provision, but it was rejected at the committee mark-up as applied to the public sector cost estimate, apparently, because the bill intends that CBO must come up with an estimate for the cost of a public sector mandate whether or not it is able to do so. We don't think that's intellectually straight or appropriate, and that's why we supported the Levin Amendment. CBO must have the option, and the bill should specifically provide, to tell us if they simply can't estimate the cost of a public sector mandate. That doesn't mean they should be excused from doing everything reasonably in their power to obtain an estimate, but it does mean that if they decide after making a reasonable attempt that they cannot make an estimate, they should say so and tell us why the estimate is impossible. Dr. Robert Reischauer, CBO Director, has already states in testimony before the Committee and in a letter to Senator Levin dated December 30, 1994, that there are bills containing mandates on state, local and tribal governments for which a cost estimate is ''virtually impossible.''

The problems with the CBO cost estimate cannot be ignored.

The heart of this bill is the point of order. And the heart of the point of order is the determination of the cost of the intergovernmental mandate which is based on the CBO estimate. When a program is being authorized, CBO is required to estimate the cost of any intergovernmental mandates in the program on an aggregate basis for the 87,000 state and local jurisdictions in the country. The

cost estimate is supposed to reflect the direct costs to the state and local governments and net out any direct savings.

These CBO cost estimates are to be made not for just one year, but for the life of the program. If the authorization is for 5 years, the CBO cost estimate is to be for each of the five fiscal years. If the authorization is for 10 years, the CBO estimate is to be for each of the 10 fiscal years.

Under the new version, S. 1, when CBO does this estimate at the time of the authorization, that estimate becomes the benchmark against which all future appropriations to pay for any intergovernmental mandates are measured. It becomes locked in concrete, so to speak, as the standard that has to be met in order to avoid a point of order on the Senate floor.

This is troubling because of the extreme difficulty CBO is going to have in making a rational and serious estimate. CBO's difficulty stems from a number of problems, including the following:

1. The condition of the state and local governments with respect to any mandate is going to vary widely. One state may have extreme air quality problems, while another may have very limited ones. One state may have imposed strict clean air requirements years ago, while another may have done nothing in the area.

2. The alternative courses that may be followed in order to comply with a mandate may be as varied as the number of state and local governments. One government may choose to construct a whole new building to meet ramp requirements; another may decide to modify an existing building; another may decide to rent an already ramped building; another may decide to use teleconferencing instead of constructing a ramp. The choices for compliance may be too numerous to anticipate.

3. There is no way to tell how a law will be implemented by an agency. Many laws give agencies broad discretion. Some use words that are open to many interpretations—such as "best efforts" or "reasonable technology" or "safe levels". It is up to the agency to decide how the law will be applied, and CBO can't possibly know the outcome. Radon abatement is an excellent example. Implementation would depend entirely on EPA deciding what level of radon was unusually high and then determining which jurisdictions had that level. In situations like that, until the agency—in this case EPA—acts, there's no way for CBO to know how many state, local and tribal governments will be affected.

4. There is no way to tell when a law will be implemented by an agency. The issuance of regulations can take months or years. Complicated regulations may require extensive public hearings and maybe several comment periods. Litigation can sidetrack the implementation of regulations. CBO will not be able to predict with any degree of certainty just when a mandate will actually take effect.

5. CBO is supposed to consider the direct benefits of any mandates. It has little to no experience in this area. If Congress establishes a radon abatement program in public buildings CBO will have to determine what the health benefits from decreased radon are to state, local and tribal governments.

That's why CBO has said that it will be "virtually impossible" in some situations where it will matter the most, to determine the cost of intergovernmental mandates. Any cost estimate in such situations would necessitate at best a wide range of possible costs. Moreover, CBO reports that the most important source for its cost estimates will be the state and local governments themselves. Yet these are the very entities to whom the money will be going and who will benefit most from high cost estimates.

A third amendment, offered by Senator Levin, would have addressed two problems. It would have placed a sunset on the Title I of S. 1, and it would have clarified the fact that the bill is intended to cover only new federal mandates and not any reauthorizations to the extent they continue the level of existing mandates. We believe that, while the cost estimates and the point of order are well-intentioned as a procedural device to insure that we openly consider the costs we may be imposing on state, local and tribal governments and the private sector when we legislate, we also believe that these very devices may cause serious problems in the legislative process. CBO may not be able to reach an estimate on the cost of mandates; amendments may be offered in committee and on the floor that could cause serious delays because of a lack of cost estimates; uncertainties could arise as to how a mandate is identified and who has the final say in determining the required amount of the authorization. It is possible that this bill could turn gridlock into a trainwreck. We don't want that to happen.

The requirement for a cost estimate will apply to both bills and amendments. That means that as an amendment is offered on the floor, that could possibly involve a mandate, that amendment will be subject to a point of order until the Budget Committee comes up with a cost estimate. Now that cost estimate will be just as difficult to ascertain as the cost estimates for the bills themselves. But unless the point of order is waived, that legislation could be delayed for months.

We are also giving to the Budget Committee a tremendous amount of power. Based on their estimates—programs may live or die. Now some say that's no different from what the Budget Committee does now. But that's with CBO assessing how much a program will cost the federal government—not how much a program will cost 87,000 state and local governments. It's a task of a very different dimension.

So we strongly support a sunset provision which will make sure that we review the implementation of this legislation and make any appropriate corrections.

We should not be fearful of sunsetting this process in a relatively short period of time, because there is strong support for the process, and we all know that without an actual sunset date it can take years for Congress to address problems in existing law. Sunset is an action-enforcing mechanism to make sure we have the opportunity to correct any serious problems with the process. And since the process created by S. 1 is so new and so dramatically different from current procedures, we owe it to ourselves and the public to have a reasonably early check-in.

We also have to recognize that we may not even be addressing what the real fiscal problems of the state, local and tribal govern-

ments will be in the next 10 years—and that's an actual pull out of federal funding and involvement.

For example, the federal government has various programs to assist state and local governments in meeting the needs of the homeless. If, in our efforts to reduce the size of the federal government and to cut programs, we eliminate the federal programs relating to the homeless, that wouldn't be a mandate covered by this bill. We wouldn't be requiring state, local and tribal governments to do anything with respect to the homeless; we would just be pulling out. That doesn't mean the problems of the homeless go away. That doesn't mean the state and local governments don't have to address the problems of the homeless, it means that the federal government won't be involved in helping to solve the problem. There's not point of order on our actions to do that. That does not come within the definition of a mandate, and it is not covered by this bill. But, that type of action by Congress is probably the most likely and most frequent action we are going to be taking with respect to state and local governments over the next several years. We will probably not be imposing new mandates; we will be cutting back—not reaching out. And this legislation is not going to address that.

Many of us on this committee have had direct experience in local government. We know that federal funding of local initiatives is a two-edged sword—that the federal government can both give and take away—and that the federal government can impose requirements that in Washington seem logical but in small communities across America don't work. That's why we're sympathetic with the desire of state and local governments to raise the issue of federal mandates to a top priority. We should not mindlessly impose costly burdens on state and local governments to meet needs we've identified at the national level as we should not mindlessly impose costly burdens on anyone. We should have the best information available to assess the impact of what we are legislating, and we should have to act with our eyes open and our ears sensitive to the warnings of both the public and private sectors as to what we are doing. No one can argue with that.

But S. 1, if amended, has the potential of causing havoc in the legislative process and aiding in the very gridlock we are all so desperate to avoid.

It's very important that we require an analysis of the impact of costs on state and local governments and the private sector before a committee reports a bill to the full Senate for consideration. That's what the hearing process is supposed to be about. The public is supposed to let us know just what the consequences of our proposals could be. And, it's very important that the requirement for a cost analysis be enforced by saying that a point of order will lie against a bill that doesn't have that cost analysis. We agree with that approach. But to go to the next step and say that an often problematical cost estimate will now become the actual cost—that what CBO estimates will be the cost to state and local governments for each year of the authorization, moves from being a cost estimate to an assertion of actual costs and that that level of costs should be funded—that's a leap we're unwilling to make without several important changes. We lost those proposed changes in Com-

mittee; we will attempt to include them on the floor, and we hope we will be successful so we can be in support of final passage.

CARL LEVIN.
JOE LIEBERMAN.

IX. CHANGES TO EXISTING LAW

Paragraph 12 of rule XXVI of the Standing Rules of the Senate requires that Committee reports indicate the changes to existing law of the proposed legislation. Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman.

THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

DEFINITIONS

SEC. 3. IN GENERAL.—For purposes of this Act—
(1) The terms "budget outlays" and "outlays" mean * * *
(2) The term "budget authority" means * * *

* * * * * * *

(11) The term 'Federal intergovernmental mandate' means—
(A) any provision in legislation, statute, or regulation that—
(i) would impose an enforceable duty upon States, local governments, or tribal governments, except—
(I) a condition of Federal assistance or
(II) a duty arising from participation in a voluntary Federal program, except as provided in subparagraph (B)); or
(ii) would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that would be provided to States, local governments, or tribal governments for the purpose of complying with any such previously imposed duty unless such duty is reduced or eliminated by a corresponding amount; or
(B) any provision in legislation, statute, or regulation that relates to a then-existing Federal program under which $500,000,000 or more is provided annually to States, local governments, and tribal governments under entitlement authority, if the provision—
(i)(I) would increase the stringency of conditions of assistance to States, local governments, or tribal governments under the program; or
(II) would place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding to States, local governments, or tribal governments under the program; and
(ii) the States, local governments, or tribal governments that participate in the Federal program lack authority under that program to amend their financial or programmatic responsibilities to continue providing required services that are affected by the legislation, statute or regulation.

(12) The term "Federal private sector mandate" means any provision in legislation, statute, or regulation that—

(A) would impose an enforceable duty upon the private sector except—

(i) a condition of Federal assistance; or

(ii) a duty arising from participation in a voluntary Federal program; or

(B) would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with such duty.

(13) The term "Federal mandate" means a Federal intergovernmental mandate or a Federal private sector mandate, as defined in paragraphs (11) and (12).

(14) The terms "Federal mandate direct costs" and "direct costs"—

(A)(i) in the case of a Federal intergovernmental mandate, mean the aggregate estimated amounts that all States, local governments, and tribal governments would be required to spend in order to comply with the Federal intergovernmental mandate; or

(ii) in the case of a provision referred to in paragraph (11)(A)(ii), mean the amount of Federal financial assistance eliminated or reduced.

(B) in the case of a Federal private sector mandate, mean the aggregate estimated amounts that the private sector will be required to spend in order to comply with the Federal private sector mandate;

(C) shall not include—

(i) estimated amounts that the States, local governments, and tribal governments (in the case of a Federal intergovernmental mandate) or the private sector (in the case of a Federal private sector mandate) would spend—

(I) to comply with or carry out all applicable Federal, State, local, and tribal laws and regulations in effect at the time of the adoption of the Federal mandate for the same activity as is affected by that Federal mandate; or

(II) to comply with or carry out State, local governmental, and tribal governmental programs, or private-sector business or other activities in effect at the time of the adoption of the Federal mandate for the same activity as is affected by that mandate; or

(ii) expenditures to the extent that such expenditures will be offset by any direct savings to the States, local governments, and tribal governments, or by the private sector, as a result of—

(I) compliance with the Federal mandate; or

(II) other changes in Federal law or regulation that are enacted or adopted in the same bill or joint resolution or proposed or final Federal regulation and that govern the same activity as is affected by the Federal mandate; and

(D) shall be determined on the assumption that State, local, and tribal governments, and the private sector will take all rea-

sonable steps necessary to mitigate the costs resulting from the Federal mandate, and will comply with applicable standards of practice and conduct established by recognized professional or trade associations. Reasonable steps to mitigate the costs shall not include increases in State, local, or tribal taxes or fees.

(15) The term 'private sector' means all persons or entities in the United States, except for State, local, or trial governments, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions.

(16) The term 'local government' has the same meaning as in section 6501(6) of title 31, United States Code.

(17) The term 'tribal government' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (83 Stat. 688; 43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their special status as Indians.

(18) The term 'small government' means any small governmental jurisdictions defined in section 601(5) of title 5, United States Code, and any tribal government.

(19) The term 'State' has the same meaning as in section 6501(9) of title 31, United States Code."

(20) The term 'agency' has the meaning as defined in section 551(1) of title 5, United State Code, but does not include independent regulatory agencies, as defined in section 3502(10) of title 44, United States Code.

(21) The term 'regulation' or 'rule' has the meaning of 'rule' as defined in section 601(2) of title 5, United States Code.

DUTIES AND FUNCTIONS

SEC. 202 (a) ASSISTANCE TO BUDGET COMMITTEES.—It shall be * * *

(b) ASSISTANCE TO COMMITTEES ON APPROPRIATIONS, WAYS AND MEANS, AND FINANCE.—At the request * * *

(c) ASSISTANCE TO OTHER COMMITTEES AND MEMBERS.—

*(1) At the request * * **

(2) At the request of any committee of the Senate or the House of Representatives, the Office shall, to the extent practicable, consult with and assist such committee in analyzing the budgetary or financial impact of any proposed legislation that may have—

(A) a significant budgetary impact on State, local, or tribal governments; or

(B) a significant financial impact on the private sector.

[2**]** *(3)* At the request * * *

* * * * * * *

(h) STUDIES.—**[**The Director shall conduct continuing studies to enhance comparisons of budget outlays, credit authority, and tax expenditures.**]**

(1) CONTINUING STUDIES.—The Director of the Congressional Budget Office shall conduct continuing studies to enhance com-

parisons of budget outlays, credit authority, and tax expenditures.

(2) FEDERAL MANDATE STUDIES.—

(A) At the request of any Chairman or ranking member of the minority of a Committee of the Senate or the House of Representatives, the Director shall, to the extent practicable, conduct a study of a Federal mandate legislative proposal.

(B) In conducting a study on intergovernmental mandates under subparagraph (A), the Director shall—

(i) solicit and consider information or comments from elected officials (including their designated representatives) of State, local, or tribal governments as may provide helpful information or comments;

(ii) consider establishing advisory panels of elected officials or their designated representatives, of State, local, or tribal governments if the Director determines that such advisory panels would be helpful in performing responsibilities of the Director under this section; and

(iii) if, and to the extent that the Director determines that accurate estimates are reasonably feasible, include estimates of—

(I) the future direct cost of the Federal mandate to the extent that such costs significantly differ from or extend beyond the 5-year period after the mandate is first effective; and

(II) any disproportionate budgetary effects of Federal mandates upon particular industries or sectors of the economy, States, regions, and urban or rural or other types of communities, as appropriate.

(C) In conducting a study on private sector mandates under subparagraph (A), the Director shall provide estimates, if and to the extent that the Director determines that such estimates are reasonably feasible, of—

(i) future costs of Federal private sector mandates to the extent that such mandates differ significantly from or extend beyond the 5-year time period referred to in subparagraph (B)(iii)(I);

(ii) any disproportionate financial effects of Federal private sector mandates and of any Federal financial assistance in the bill or joint resolution upon any particular industries or sectors of the economy, States, regions, and urban or rural or other types of communities; and

(iii) the effect of Federal private sector mandates in the bill or joint resolution on the national economy, including the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services.

ANNUAL ADOPTION OF CONCURRENT RESOLUTION ON THE BUDGET

SEC. 301. * * *

* * * * * * *

(d) VIEWS AND ESTIMATES OF OTHER COMMITTEES.—Within 6 weeks after the President submits a budget under section 1105(a) of title 31, United States Code, each committee of the House of Representatives having legislative jurisdiction shall submit to the Committee on the Budget of the House and each committee of the Senate having legislative jurisdiction shall submit to the Committee on the Budget of the Senate its views and estimates (as determined by the committee making such submission) with respect to all matters set forth in subsections (a) and (b) which relate to matters within the jurisdiction or functions of such committee. The Joint Economic Committee shall submit to the Committees on the Budget of both Houses its recommendations as to the fiscal policy appropriate to the goals of the Employment Act of 1946. Any other committee of the House of Representatives or the Senate may submit to the Committee on the Budget of its House, and any joint committee of the Congress may submit to the Committee on the Budget of both Houses, its views and estimates with respect to all matters set forth in subsections (a) and (b) which relate to matters within its jurisdiction or functions. *Any Committee of the House of Representatives or the Senate that anticipates that the committee will consider any proposed legislation establishing, amending, or reauthorizing any Federal program likely to have a significant budgetary impact on any State, local, or tribal government, or likely to have a significant financial impact on the private sector, including any legislative proposal submitted by the executive branch likely to have such a budgetary or financial impact, shall include its views and estimates on that proposal to the Committee on the Budget of the applicable House.*

[ANALYSIS BY CONGRESSIONAL BUDGET OFFICE

[SEC. 403. (a) The Director of the Congressional Budget Office shall, to the extent practicable, prepare for each bill or resolution of a public character reported by any committee of the House of Representatives or the Senate (except the Committee on Appropriations of each House), and submit to such committee—

[(1) an estimate of the costs which would be incurred in carrying out such bill or resolution in the fiscal year in which it is to become effective and in each of the 4 fiscal years following such fiscal year, together with the basis for each such estimate;

[(2) an estimate of the cost which would be incurred by State and local governments in carrying out or complying with any significant bill or resolution in the fiscal year in which it is to become effective and in each of the four fiscal years following such fiscal year, together with the basis for each such estimate;

[(3) a comparison of the estimates of costs described in paragraphs (1) and (2), with any available estimates of costs made by such committee or by any Federal agency; and

[(4) a description of each method for establishing a Federal financial commitment contained in such bill or resolution.

The estimates, comparison, and description so submitted shall be included in the report accompanying such bill or resolution if timely submitted to such committee before such report is filed.

[(b) For purposes of subsection (a)(2), the term "local government" has the same meaning as in section 103 of the Intergovernmental Cooperation Act of 1968.

[(c) For purposes of subsection (a)(2), the term "significant bill or resolution" is defined as any bill or resolution which in the judgment of the Director of the Congressional Budget Office is likely to result in an annual cost to State and local governments of $200,000,000 or more, or is likely to have exceptional fiscal consequences for a geographic region or a particular level of government.]

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SEC. 408. LEGISLATIVE MANDATE ACCOUNTABILITY AND REFORM.

(a) DUTIES OF CONGRESSIONAL COMMITTEES.—

(1) IN GENERAL.—When a committee of authorization of the Senate or the House of Representatives reports a bill or joint resolution of public character that includes any Federal mandate, the report of the committee accompanying the bill or joint resolution shall contain the information required by paragraphs (3) and (4).

(2) SUBMISSION OF BILLS TO THE DIRECTOR.—When a committee of authorization of the Senate or the House of Representatives orders reported a bill or joint resolution of a public character, the committee shall promptly provide the bill or joint resolution to the Director of the Congressional Budget Office and shall identify to the Director any Federal mandates contained in the bill or resolution.

(3) REPORTS ON FEDERAL MANDATES.—Each report described under paragraph (1) shall contain—

(A) an identification and description of any Federal mandates in the bill or joint resolution, including the expected direct costs to State, local, and tribal governments, and to the private sector, required to comply with the Federal mandates;

(B) a qualitative, and if practicable, a quantitative assessment of costs and benefits anticipated from the Federal mandates (including the effects on health and safety and the protection of the natural environment); and

(C) a statement of the degree to which a Federal mandate affects both the public and private sectors and the extent to which Federal payment of public sector costs would affect the competitive balance between State, local, or tribal governments and privately owned businesses.

(4) INTERGOVERNMENTAL MANDATES.—If any of the Federal mandates in the bill or joint resolution are Federal intergovernmental mandates, the report required under paragraph (1) shall also contain—

(A)(i) a statement of the amount, if any, of increase or decrease in authorization of appropriations under existing Federal financial assistance programs, or of authorization of appropriations for new Federal financial assistance, pro-

vided by the bill or joint resolution to pay for the costs to State, local, and tribal governments of the Federal intergovernmental mandate; and

(ii) a statement of whether the committee intends that the Federal intergovernmental mandates be partly or entirely unfunded, and if so, the reasons for that intention; and

(B) any existing sources of Federal assistance in addition to those identified in subparagraph (A) that may assist state, local, and tribal governments in meeting the direct costs of the Federal intergovernmental mandates.

(5) PREEMPTION CLARIFICATION AND INFORMATION.—When a committee of authorization of the Senate or the House of Representatives reports a bill or joint resolution of public character, the committee report accompanying the bill or joint resolution shall contain, if relevant to the bill or joint resolution, an explicit statement on the extent to which the bill or joint resolution preempts any State, local, or tribal law, and, if so, an explanation of the reasons for such preemption.

(6) PUBLICATION OF STATEMENT FROM THE DIRECTOR.—

(A) Upon receiving a statement (including any supplemental statement) from the Director under subsection (b)(1), a committee of the Senate or the House of Representatives shall publish the statement in the committee report accompanying the bill or joint resolution to which the statement relates if the statement is available at the time the report is printed.

(B) If the statement is not published in the report, or if the bill or joint resolution to which the statement relates is expected to be considered by the Senate or the House of Representatives before the report is published, the committee shall cause the statement, or a summary thereof, to be published in the Congressional Record in advance of floor consideration of the bill or joint resolution.

(b) DUTIES OF THE DIRECTOR.—

(1) STATEMENTS ON BILLS AND JOINT RESOLUTIONS OTHER THAN APPROPRIATIONS BILLS AND JOINT RESOLUTIONS.—

(A) FEDERAL INTERGOVERNMENTAL MANDATES IN REPORTED BILLS AND RESOLUTIONS.—For each bill or joint resolution of a public character reported by any committee of authorization of the Senate or the House of Representatives, the Director of the Congressional Budget Office shall prepare and submit to the committee a statement as follows:

(i) If the Director estimates that the direct cost of all Federal intergovernmental mandates in the bill or joint resolution will equal or exceed $50,000,000 (adjusted annually for inflation) in the fiscal year in which any Federal intergovernmental mandate in the bill or joint resolution (or in any necessary implementing regulation) would first be effective or in any of the 4 fiscal years following such fiscal year, the Director shall so state, specify the estimate, and briefly explain the basis of the estimate.

(ii) The estimate required under clause (i) shall include estimates (and brief explanations of the basis of the estimates) of—

(I) the total amount of direct cost of complying with the Federal intergovernmental mandates in the bill or joint resolution; and

(II) the amount, if any, of increase in authorization of appropriations under existing Federal financial assistance programs, or of authorization of appropriations for new Federal financial assistance, provided by the bill or joint resolution and usable by State, local, or tribal governments for activities subject to the Federal intergovernmental mandates.

(B) FEDERAL PRIVATE SECTOR MANDATES IN REPORTED BILLS AND JOINT RESOLUTIONS.—For each bill or joint resolution of a public character reported by any committees of authorization of the Senate or the House of Representatives, the Director of the Congressional Budget Office shall prepare and submit to the committee a statement as follows:

(i) If the Director estimates that the direct cost of all Federal private sector mandates in the bill or joint resolution will equal or exceed $200,000,000 (adjusted annually for inflation) in the fiscal year in which any Federal private sector mandate in the bill or joint resolution (or in any necessary implementing regulation) would first be effective or in any of the 4 fiscal years following such fiscal year, the Director shall so state, specify the estimate, and briefly explain the basis of the estimate.

(ii) Estimates required under this subparagraph shall include estimates (and a brief explanation of the basis of the estimates) of—

(I) the total amount of direct costs of complying with the Federal private sector mandates in the bill or joint resolution; and

(II) the amount, if any, of increase in authorization of appropriations under existing Federal financial assistance programs, or of authorization of appropriations for new Federal financial assistance, provided by the bill or joint resolution usable by the private sector for the activities subject to the Federal private sector mandates.

(iii) If the Director determines that it is not feasible to make a reasonable estimate that would be required under clauses (i) and (ii), the Director shall not make the estimate, but shall report in the statement that the reasonable estimate cannot be made and shall include the reasons for that determination in the statement.

(C) LEGISLATION FALLING BELOW THE DIRECT COSTS THRESHOLDS.—If the Director estimates that the direct costs of a Federal mandate will not equal or exceed the thresholds specified in paragraphs (A) and (B), the Director shall so state and shall briefly explain the basis of the estimate.

(c) LEGISLATION SUBJECT TO POINT OF ORDER IN THE SENATE.—

(1) IN GENERAL.—It shall not be in order in the Senate to consider—

(A) any bill or joint resolution that is reported by a committee unless the committee has published a statement of the Director on the direct costs of Federal mandates in accordance with subsection (a)(6) before such consideration; and

(B) any bill, joint resolution, amendment, motion, or conference report that would increase the direct costs of Federal intergovernmental mandates by an amount that causes the thresholds specified in subsection (b)(1)(A)(i) to be exceeded, unless—

(i) the bill, joint resolution, amendment, motion, or conference report provides direct spending authority for each fiscal year for the Federal intergovernmental mandates included in the bill, joint resolution, amendment, motion, or conference report in an amount that is equal to the estimated direct costs of such mandate;

(ii) the bill, joint resolution, amendment, motion, or conference report provides an increase in receipts and an increase in direct spending authority for each fiscal year for the Federal intergovernmental mandates included in the bill, joint resolution, amendment, motion, or conference report in an amount equal to the estimated direct costs of such mandate; or

(iii) the bill, joint resolution, amendment, motion, or conference report includes an authorization of appropriations in an amount equal to the estimated direct costs of such mandate, and—

(I) identifies a specific dollar amount estimate of the full direct costs of the mandate for each year or other period during which the mandate shall be in effect under the bill, joint resolution, amendment, motion or conference report, and such estimate is consistent with the estimate determined under paragraph (3) for each fiscal year;

(II) identifies any appropriation bill that is expected to provide for Federal funding of the direct cost referred to under subclause (IV)(aa);

(III) identifies the minimum amount that must be appropriated in each appropriations bill referred to in subclause (II), in order to provide for full Federal funding of the direct costs referred to in subclause (I); and

(IV)(aa) designates a responsible Federal agency and establishes criteria and procedures under which such agency shall implement less costly programmatic and financial responsibilities of State, local, and tribal governments in meeting the objectives of the mandate, to the extent that an appropriation Act does not provide for the estimated direct costs of such mandate as set forth under subclause (III); or

(bb) designates a responsible Federal agency and establishes criteria and procedures to direct that, if an appropriation Act does not provide for the estimated direct costs of such mandate as set forth under subclause (III), such agency shall declare such mandate to be ineffective as of October 1 of the fiscal year for which the appropriation is not at least equal to the direct costs of the mandate.

(2) RULE OF CONSTRUCTION.—The provisions of paragraph (1)(B)(iii)(IV)(aa) shall not be construed to prohibit or otherwise restrict a State, local, or tribal government from voluntarily electing to remain subject to the original Federal intergovernmental mandate, complying with the programmatic or financial responsibilities of the original Federal intergovernmental mandate and providing the funding necessary consistent with the costs of Federal agency assistance, monitoring, and enforcement.

(3) COMMITTEE ON APPROPRIATIONS.—Paragraph (1) shall not apply to matters that are within the jurisdiction of the Committee on Appropriations of the Senate or the House of Representatives.

(4) DETERMINATION OF APPLICABILITY TO PENDING LEGISLATION.—For purposes of this subsection, on questions regarding the applicability of this Act to a pending bill, joint resolution, amendment, motion, or conference report, the Committee on Governmental Affairs of the Senate, or the Committee on Government Reform and oversight of the House of Representatives, as applicable, shall have the authority to make the final determination.

(5) DETERMINATIONS OF FEDERAL MANDATE LEVELS.—For the purposes of this subsection, the levels of Federal mandates for a fiscal year shall be determined based on the estimates made by the Committee on the Budget of the Senate or the House of Representatives, as the case may be.

(d) ENFORCEMENT IN THE HOUSE OF REPRESENTATIVES.—It shall not be in order in the House of Representatives to consider a rule or order that waives the application of subsection (c) to a bill or joint resolution reported by a committee of authorization.

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