HB

8

<TARGET><BILL>HB 8</BILL><SUBJECT>HB 8</SUBJECT><COMM>HFIN27</COMM></TARGET>

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: February 18, 2011 **FURTHER REFERRALS:**

Date of Committee Action: 3/30/11

The FINANCE Committee considered: **HB 8**

HOUSE BILL NO. 8
"An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

HB 8 FEDERAL REGULATIONS & EXECUTIVE ORDERS

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* HB 8 (FIN)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR _____ **[ ] Same Title [✓] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	LAW			✓

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Anna L. Fairclough	FAIRCLOUGH	✓			
	Gattenberger				A
	Gara			✓	
Tammie Wilson	T. WILSON	✓			
	Jaramillo			✓	
Mike Hawker	Hawker	✓			
Costello	COSTELLO	✓			
Bryce Edgmon	Edgmon			✓	
	DOOGAN		✓		
Chair:	Stoltze	✓			
Chair:	Thomas	2			

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CSHB008(FIN) \B**
() Publish Date

Identifier (file name): HB008CS(FIN)-LAW-CIV-03-30-11
Dept. Affected: Law
Title: An Act relating to federal reg. and presidential exec. orders; relating to the duties of attorney general; and providing for an effective date.
Appropriation: Civil
Allocation: Opinions, Appeals and Ethics
Sponsor: Representative(s) Keller
Requester: (H) Finance
OMB Component Number: 2716

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost **0.0**

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Fiscal note changed to zero from indeterminate due to changes in bill language.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 3/30/11 11:30 AM
Approved by: John J. Burns, Attorney General — Date: 3/30/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB008(FIN) \B

Analysis

CSHB 008( ), Version "B" would require the Attorney General file a report with the chairs of the appropriate legislative committees if the Attorney General were to find that a federal statute, regulation, [or] executive order, or secretarial order (1) is unconstitutional or was not properly adopted and (2) would preempt a state law if it were constitutional and properly adopted. The Attorney General would be required to include in the report an explanation of the grounds for the finding and a written opinion that analyzes the basis for the finding.

There is no anticipated fiscal impact to Department of Law.

CS FOR HOUSE BILL NO. 8(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLER, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act relating to certain federal statutes, regulations, presidential executive orders, and secretarial orders; relating to the duties of the attorney general; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS. The legislature finds that

(1) the Supremacy Clause of art. VI, clause 2, Constitution of the United States, provides that the Constitution of the United States and the laws of the United States made under and in conformity with the Constitution of the United States are the supreme law of the land;

(2) the United States Supreme Court, in City of New York v. Federal Communications Commission, 486 U.S. 57 (1988), stated that "[t]he phrase, 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are

properly adopted in accordance with statutory authorization";

(3) federal statutes, regulations, presidential executive orders, and secretarial orders that are unconstitutional or not properly adopted in accordance with constitutional and statutory authority are not laws of the United States for the purposes of the Supremacy Clause; and

(4) federal regulations, presidential executive orders, and secretarial orders that are not properly adopted in accordance with statutory authority may not preempt state laws that are not in conflict with federal statutory authority, regulations, and secretarial orders properly adopted in accordance with that statutory authority.

* **Sec. 2.** AS 01.10 is amended by adding a new section to read:

Article 5. Laws of the United States.

Sec. 01.10.200. Federal preemption; effect of certain federal statutes, regulations, presidential executive orders, and secretarial orders. A federal statute, regulation, presidential executive order, or secretarial order that is unconstitutional or was not properly adopted in accordance with federal statutory authority may not be considered to preempt a state law.

* **Sec. 3.** AS 24.05 is amended by adding a new section to article 4 to read:

Sec. 24.05.188. Federal statutes, regulations, presidential executive orders, and secretarial orders. After receiving a report from the attorney general under AS 44.23.020(h) that a state law is in conflict with a federal statute, regulation, presidential executive order, or secretarial order that is unconstitutional or was not properly adopted in accordance with federal statutory authority, the house and senate committees having jurisdiction over judicial matters may each consider whether legislative action is necessary in response to the findings by the attorney general.

* **Sec. 4.** AS 44.23.020 is amended by adding a new subsection to read:

(h) If the attorney general finds that a federal statute, regulation, presidential executive order, or secretarial order would preempt a state law if constitutional and properly adopted in accordance with federal statutory authority but also finds that the federal statute, regulation, presidential executive order, or secretarial order is unconstitutional or was not properly adopted in accordance with federal statutory authority, the attorney general shall report the findings to the chairs of the house and

senate committees having jurisdiction over judicial matters. The report must include

(1) a copy of the federal statute, regulation, presidential executive order, or secretarial order that the attorney general finds was not properly adopted in accordance with federal statutory authority or is unconstitutional;

(2) a citation to the state law that is in conflict with the federal statute, regulation, presidential executive order, or secretarial order identified in (1) of this subsection;

(3) a written opinion explaining

(A) the basis for finding that the federal statute, regulation, presidential executive order, or secretarial order is unconstitutional or was not properly adopted in accordance with federal statutory authority;

(B) the conflict between the federal statute, regulation, presidential executive order, or secretarial order identified in (1) of this subsection and the state law identified in (2) of this subsection and why, if properly adopted, the federal statute, regulation, presidential executive order, or secretarial order would preempt the state law; and

(C) the effect on the state if the state law identified in (2) of this subsection is found by a court to be preempted by the federal statute, regulation, presidential executive order, or secretarial order identified in (1) of this subsection; and

(4) other information relevant to the findings by the attorney general.

* **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature
HOUSE FINANCE COMMITTEE
Agenda
1:30 PM

Wednesday, March 30, 2011

✓ HB 8 – Federal Regulations & Executive Orders
✓ HB 105 – Southeast State Forest
✓ HB 150 – Protection of Vulnerable Adults/Minors
✓ HB 140 – Appropriation: Community Quota Loan Fund
✓ HB 141 – Loans to Community Quota Entities/Permits
HB 120 – AIDEA: New Markets Tax Credit Program
HB 164 – Insurance: Health Care and Other
HB 104 – Alaska Performance Scholarships
HB 121 – Loan Funds: Charters/Mariculture/Microloan
HB 125 – Alcoholic Beverage Control Board

HB 80 Resched to Mon @ 6pm

Alaska State Legislature
HOUSE FINANCE COMMITTEE
Agenda
1:30 PM

Wednesday, March 30, 2011 House Finance Room 519 – 1:30 PM

HB 8-FEDERAL REGULATIONS & EXECUTIVE ORDERS
New Fiscal Note LAW 0 replaces #1
NEW CS WORK DRAFT 27-LS0052\B

HB 10-NONCOMMERCIAL TRAILER REGISTRATION FEE
New Fiscal Note ADM $ replaces #1

HB 64-PERMANENT MOTOR VEHICLE REGISTRATION
2 NEW Fiscal Notes All Previous Published Notes replaced! ADM NEW $, DEC 0 NEW

HB 105-SOUTHEAST STATE FOREST
OFF NET
Rick Rogers from the Division of Forestry will be here in person to present HB 105 and Marty Parsons from the Division of Mining, Land & Water will be available via off-net to answer questions during today's hearing on HB 105: SE State Forest.

HB 140-APPROP: COMMUNITY QUOTA ENTITY LOAN FUND
HB 141-LOANS TO COMMUNITY QUOTA ENTITIES/PERMITS

HB 164-INSURANCE: HEALTH CARE & OTHER
Linda Hall Dir. Div.of Insurance

HB 103-POWER PROJECT; ALASKA ENERGY AUTHORITY

HB 104-ALASKA PERFORMANCE SCHOLARSHIPS
NEW FN EED *
NEW FN REV 0 Treasury and Taxation
NEW FN REV 0 Tax Division
HB 120-AIDEA: NEW MARKETS TAX CREDIT PROGRAM

HB 121-LOAN FUNDS:CHARTERS/MARICULTURE/MICROLOAN

HB 125-ALCOHOLIC BEVERAGE CONTROL BOARD

HB 150-PROTECTION OF VULNERABLE ADULTS/MINORS
NEW FISCAL NOTE LAW 0 replaces #3
Possible Amendment

2011 HOUSE FINANCE COMMITTEE VOTE SHEET

Passed

DATE: 3/30

~~Amendment:~~ Pass Bill From Committee

MEMBER	Favor	Oppose
REP. WILSON	✓	
REP. COSTELLO	✓	
REP. DOOGAN		✓
REP. EDGMON	✓	
REP. FAIRCLOUGH	✓	
REP. GARA	✓	
REP. GUTTENBERG		✓
REP. JOULE	✓	
REP. ~~NEUMAN~~ Hawker	✓	
REP. THOMAS	✓	
REP. STOLTZE	✓	

YEA 9

NAY 2

2011 HOUSE FINANCE COMMITTEE VOTE SHEET

Failed

DATE: 3/30/11

Amendment: 1 HB 8

MEMBER	Favor	Oppose
REP. COSTELLO		✓
REP. DOOGAN	✓	
REP. EDGMON		✓
REP. FAIRCLOUGH		✓
~~REP. GARA~~		
REP. GUTTENBERG	✓	
REP. JOULE		✓
~~REP. NEUMAN~~ Hawker		✓
REP. WILSON		✓
REP. STOLTZE		✓
REP. THOMAS		✓

YEA 2

NAY 8

Adopted 3/30/11

27-LS0052\B
Bullock
3/14/11

CS FOR HOUSE BILL NO. 8( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLER, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

"An Act relating to certain federal statutes, regulations, presidential executive orders, and secretarial orders; relating to the duties of the attorney general; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS. The legislature finds that

(1) the Supremacy Clause of art. VI, clause 2, Constitution of the United States, provides that the Constitution of the United States and the laws of the United States made under and in conformity with the Constitution of the United States are the supreme law of the land;

(2) the United States Supreme Court, in City of New York v. Federal Communications Commission, 486 U.S. 57 (1988), stated that "[t]he phrase, 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are

properly adopted in accordance with statutory authorization";

(3) federal statutes, regulations, presidential executive orders, and secretarial orders that are unconstitutional or not properly adopted in accordance with constitutional and statutory authority are not laws of the United States for the purposes of the Supremacy Clause; and

(4) federal regulations, presidential executive orders, and secretarial orders that are not properly adopted in accordance with statutory authority may not preempt state laws that are not in conflict with federal statutory authority, regulations, and secretarial orders properly adopted in accordance with that statutory authority.

*** Sec. 2.** AS 01.10 is amended by adding a new section to read:

Article 5. Laws of the United States.

Sec. 01.10.200. Federal preemption; effect of certain federal statutes, regulations, presidential executive orders, and secretarial orders. A federal statute, regulation, presidential executive order, or secretarial order that is unconstitutional or was not properly adopted in accordance with federal statutory authority may not be considered to preempt a state law.

*** Sec. 3.** AS 24.05 is amended by adding a new section to article 4 to read:

Sec. 24.05.188. Federal statutes, regulations, presidential executive orders, and secretarial orders. After receiving a report from the attorney general under AS 44.23.020(h) that a state law is in conflict with a federal statute, regulation, presidential executive order, or secretarial order that is unconstitutional or was not properly adopted in accordance with federal statutory authority, the house and senate committees having jurisdiction over judicial matters may each consider whether legislative action is necessary in response to the findings by the attorney general.

*** Sec. 4.** AS 44.23.020 is amended by adding a new subsection to read:

(h) If the attorney general finds that a federal statute, regulation, presidential executive order, or secretarial order would preempt a state law if constitutional and properly adopted in accordance with federal statutory authority but also finds that the federal statute, regulation, presidential executive order, or secretarial order is unconstitutional or was not properly adopted in accordance with federal statutory authority, the attorney general shall report the findings to the chairs of the house and

senate committees having jurisdiction over judicial matters. The report must include

(1) a copy of the federal statute, regulation, presidential executive order, or secretarial order that the attorney general finds was not properly adopted in accordance with federal statutory authority or is unconstitutional;

(2) a citation to the state law that is in conflict with the federal statute, regulation, presidential executive order, or secretarial order identified in (1) of this subsection;

(3) a written opinion explaining

(A) the basis for finding that the federal statute, regulation, presidential executive order, or secretarial order is unconstitutional or was not properly adopted in accordance with federal statutory authority;

(B) the conflict between the federal statute, regulation, presidential executive order, or secretarial order identified in (1) of this subsection and the state law identified in (2) of this subsection and why, if properly adopted, the federal statute, regulation, presidential executive order, or secretarial order would preempt the state law; and

(C) the effect on the state if the state law identified in (2) of this subsection is found by a court to be preempted by the federal statute, regulation, presidential executive order, or secretarial order identified in (1) of this subsection; and

(4) other information relevant to the findings by the attorney general.

*** Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

3/30/11

Testimony to House Finance Committee 3/30/11 Rep. Neuman's District

I'm Stuart Thompson, a sovereign citizen residing in W[redacted] representing myself. My prepared testimony on HB 8 begins – sorry for any obsolesce.

First, Mr. Chairman, I petition you to have your committee read the recorded & printed testimony I gave at this bill's Judiciary hearing. It has relevant historical and philosophical details worthy of your committee's immediate attention. Today I wish to amplify an overlooked ethical rational for priority passage of this bill.

Your oath of office reads: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as (blank) to the best of my ability."

What constitutes visible evidence that this oath is being exercised – particularly as regards the US Constitution? Can any of you honestly show a significant instance in this Legislative session where you directly supported or defended the US Constitution against opposition? Defense or support by definition means extraordinary effort.

Is submissively passing state law to acquire begging rights for federal money defending and supporting the Constitution? Hardly. This is merely using infrastructure and tradition to follow a path of least resistance to gratify constituents.

Is dog-fighting for state funds for your district defending and supporting the Constitution? Hardly. This most directly supports and defends your bid for the popularity necessary for re-election. Never mind that constitutional rape can produce popularity just as well as honoring the wisdom-based processes for long-term national welfare embedded in our Constitution.

Is passing the buck to the US Supreme Court every time a constitutionally suspect government or corporate act disturbs public complacency supporting and defending the Constitution? Hardly. This is ceding the entire responsibility for the Constitution's support & defense [redacted] to nine federally appointed people who are naturally biased from the prejudices of federal precedents and leaders.

What good is your oath of office if the bureaucracy initiated by constitutional application runs you and Alaska instead of you and Alaska helping to run it? We Alaskans conduct a lot of whining about destructive encroachment by the federal government. HB 8 is a clear support and defense of the 9th and 10th Amendments that does something about it. Thus this is probably the most ethically substantial bill ever presented to the Alaska Legislature. Oath-bound ethics: coercive law, rules, and even justice can't substitute for it. Do you have what it takes to be respected by posterity? Show your stuff and pass this bill.

Stuart Thompson
POBox 870702, Wasilla, AK 99687
1-877-950-7980

3/30/11

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **CSHB008(JUD) \M**
() Publish Date

Identifier (file name): HB008CS(JUD)-LAW-CIV-03-18-11
Dept. Affected: Law
Title: An Act relating to federal reg. and presidential exec. orders; relating to the duties of attorney general; and providing for an effective date.
Appropriation: Civil
Allocation: Opinions, Appeals and Ethics
Sponsor: Representative(s) Keller
Requester: (H) Finance
OMB Component Number: 2716

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Fiscal note changed to zero from indeterminate due to changes in bill language.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 3/18/11 4:15 PM
Approved by: John J. Burns, Attorney General — Date 3/18/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB008(JUD) \M

Analysis

HB 008 would require the Attorney General file a report with the chairs of the appropriate legislative committees if the Attorney General were to find that a federal regulation or executive order (1) is unconstitutional or was not properly adopted and (2) would preempt a state law if it were constitutional and properly adopted. The Attorney General would be required to include in the report an explanation of the grounds for the finding and a written opinion that analyzes the basis for the finding.

There is no anticipated fiscal impact to Department of Law.

ALASKA STATE LEGISLATURE

Interim:
600 East Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 373-1842
Fax: (907) 373-4729

Session:
State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-2186
Fax: (907) 465-3818

REPRESENTATIVE WES KELLER
DISTRICT 14

Committee Substitute for House Bill 8(JUD)
Sponsor Statement

"An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

CS for HB 8 clarifies in Alaska Statute that a federal regulation or a presidential executive order that is not properly adopted or is unconstitutional does not preempt state law. The Attorney General will continue to review and report federal regulations and executive orders that appear to have not been properly adopted. Under CSHB 8 those reports will be forwarded to the legislature for consideration.

CS for HB 8 presumes Alaska Legislative interest in an important legal process called "nullification". Nullification is when a state 'nullifies' a federal law, proclaiming it to be void and inoperative, or 'non-effective' within the boundaries of that state. In other words it is not a law as far as that state is concerned. In CSHB 8 a negative review by the Attorney General would generate an alert to our Judiciary Committees so nullification legislation can be considered.

There has been disagreement regarding nullification going back to the late eighteenth century. Not surprisingly, federal courts have often leaned toward favoring federal power over state sovereignty in spite of the fact that our founding fathers clearly intended otherwise. Federalism is our historically unique and profound arrangement where sovereign and separate states got together and carefully designed a central government with carefully limited powers. It is an illogical perversion of one of our most important founding principles to presume states must comply with unconstitutional federal laws. CSHB 8 presumes a proper State responsibility to uphold and protect our constitution.

CS for HB 8 is intended to provide important information to the Alaska State Legislature by tapping the expertise and evaluation of our Attorney General. Certainly the legislature has a responsibility to consider its response whenever there is question of constitutionality of a federal regulation or executive order.

ALASKA STATE LEGISLATURE

Interim:
600 East Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 373-1842
Fax: (907) 373-4729

Session:
State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-2186
Fax: (907) 465-3818

REPRESENTATIVE WES KELLER
DISTRICT 14

MEMO

To: Members of the Alaska Legislature

Date: February 18, 2011

Re: Sectional of CS for House Bill 8 (JUD) (27-LS0052\M)

Committee Substitute for House Bill 8 is broken into five sections:

1. Legislative findings that establish an understanding of the Supremacy Clause in relationship to state statute. It also recognizes that the U.S. Supreme Court has ruled that federal regulations, provided they are properly adopted, may also apply in Supremacy rules. The section also indicates that some executive orders and federal regulations do not always meet the constitutional or properly adopted criteria and therefore may not preempt state law.

2. Places into state statute that unconstitutional or improperly adopted executive orders and regulations do not preempt state statute.

3. Directs the Judiciary committee's in each house upon receipt of a report from the Attorney General that an executive order or regulation that preempts state statute and does not meet stated criteria to consider a response to the findings.

4. **Eliminated from the HB-** the requirement that the AG review all E.O's and C.F.R.'s Directs the Attorney General to submit reports of potential preemptive executive orders or regulations that are unconstitutional or improperly adopted to the appropriate committees and establishes what documents need to be included in that report.

5. Effective date

Please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

E-Mail: Representative_Wes_Keller@legis.state.ak.us
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

SUPREMACY CLAUSE

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

U.S. Const. art. VI, Paragraph 2

The Tenth Amendment to the U.S. Constitution reads:
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Submitted by the office of Representative Wes Keller quoting the Constitution of the United States.

HOUSE RESOLUTION NO. 9

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES KELLY, Johnson, Keller, Harris, Gatto, Johansen, Dahlstrom, Wilson

Introduced: 2/25/09
Referred: Rules

A RESOLUTION

Relating to sovereign powers of the state.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

WHEREAS the Tenth Amendment to the Constitution of the United States reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; and

WHEREAS the Tenth Amendment defines the total scope of federal power as being that specifically granted by the Constitution of the United States and no more; and

WHEREAS the scope of power defined by the Tenth Amendment means that the federal government was created by the states specifically to be an agent of the states; and

WHEREAS some federal actions weaken states' rights protected by the Tenth Amendment to the Constitution of the United States; and

WHEREAS the Tenth Amendment assures that we, the people of the United States of America and each sovereign state in the Union of States, now have, and have always had, rights the federal government may not usurp; and

WHEREAS art. IV, sec. 4, Constitution of the United States, reads, "The United States shall guarantee to every State in this Union a Republican Form of Government," and

the Ninth Amendment to the Constitution of the United States reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and

WHEREAS the United States Supreme Court has ruled in New York v. United States, 112 S.Ct. 2408 (1992), that the United States Congress may not simply commandeer the legislative and regulatory processes of the states; and

WHEREAS all states, including Alaska, find themselves regularly facing proposals from the United States Congress that weaken states' rights protected by the Tenth Amendment;

BE IT RESOLVED that the House of Representatives hereby claims sovereignty for the state under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States; and be it

FURTHER RESOLVED that this resolution serves as Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of these constitutionally delegated powers; and be it

FURTHER RESOLVED that all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding be prohibited or repealed.

COPIES of this resolution shall be sent to the Honorable Barack Obama, President of the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Nancy Pelosi, Speaker of the U.S. House of Representatives; the Honorable Lisa Murkowski and the Honorable Mark Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress; and all other members of the 111th United States Congress.

Executive Orders

Dateline: 12/18/97

Executive Orders Defined
An Executive Order (EO) is a directive issued to executive-level agencies, department heads, or other employees from the President under the President's statutory, or constitutional powers. In many ways, the EO is similar to written orders, or instructions the president of a corporation might send to department heads or directors.Thirty days after it is officially published in the Federal Register, an EO becomes law. While the EO does bypass the U.S. Congress and the standard legislative law making process, no part of an EO may be illegal or unconstitutional. The first EO was issued in 1789 by none other than George Washington. Not until 1907 were EOs given official numbers.

Reasons for Issuing an Executive Order
Presidents typically issue an EO for one of these purposes:
1. Operational management of the executive branch
2. Operational management of federal agencies or officials
3. To carry out statutory presidential responsibilities

- - In 1970, President Nixon used this 398 word Executive Order establishing NOAA.

How Executive Orders May be Vacated
The President can retract an EO at any time. The President may also issue an EO that supersedes an existing one. New incoming Presidents may choose to follow the EOs of their predecessors, replace them with new ones of their own, or revoke the old ones completely. In extreme cases, Congress may pass a law that alters an EO, and the Supreme Court can declare them unconstitutional.

Executive Orders vs. Proclamations
Presidential Proclamations differ from EOs in that they are either ceremonial in nature or deal with issues of trade and may or may not carry legal effect. All EOs become law.

Constitutional Authority for Executive Orders
Article II, section 1 of the Constitution reads, in part, *"The executive power shall be vested in a president of the United States of America."* And, Article II, section 3 asserts that, *"The President shall take care that the laws be faithfully executed..."* Since the Constitution does not specifically define executive power, critics of Executive Orders argue that these two passages do not imply Constitutional authority. But, Presidents of the United States since George Washington have argued that they do.

Modern Use of Executive Orders
Until World War I, the Executive Order was used for relatively minor, usually unnoticed acts of state. A trend that changed drastically with passage of the War Powers Act of 1917. This act passed during WWI granted the President temporary powers to immediately enact laws regulating trade, economy, and other aspects of policy as they pertained to enemies of America. A key section of the War Powers act also contained language specifically excluding American citizens from its effects.

The War Powers Act remained in effect and unchanged until 1933 when a freshly elected President Franklin D. Roosevelt found America in the panic stage of the Great Depression. The first thing FDR did was to convene a special session of Congress where he introduced a bill amending the War Powers Act to remove the clause excluding American citizens from being bound by its effects. This would allow the President to declare "national emergencies" and unilaterally intact laws to deal with them. This massive amendment was approved by both houses of Congress in under 40 minutes without debate.

Hours later, FDR officially declared the depression a "national emergency" and stared issuing a string of Executive Orders that effectively were the "New Deal."

While some of FDR's actions were, perhaps, constitutionally questionable, history recognizes them as averting the growing panic and starting our economy on its way to recovery.

All Those Opposed
Many people strongly oppose the Executive Order as being an unconstitutional, even potentially dictatorial application of power. While the purpose of this article is not to state an opinion, or editorialize either way, I feel it only fair that this alternative point of view be represented.

The WINDS.org - Presidential Executive Orders

The opinions expressed in the web sites linked above are those of their authors, contributors, and representatives only and in no way represent the opinions of this Web site, your Guide, or the Mining Company, Inc.

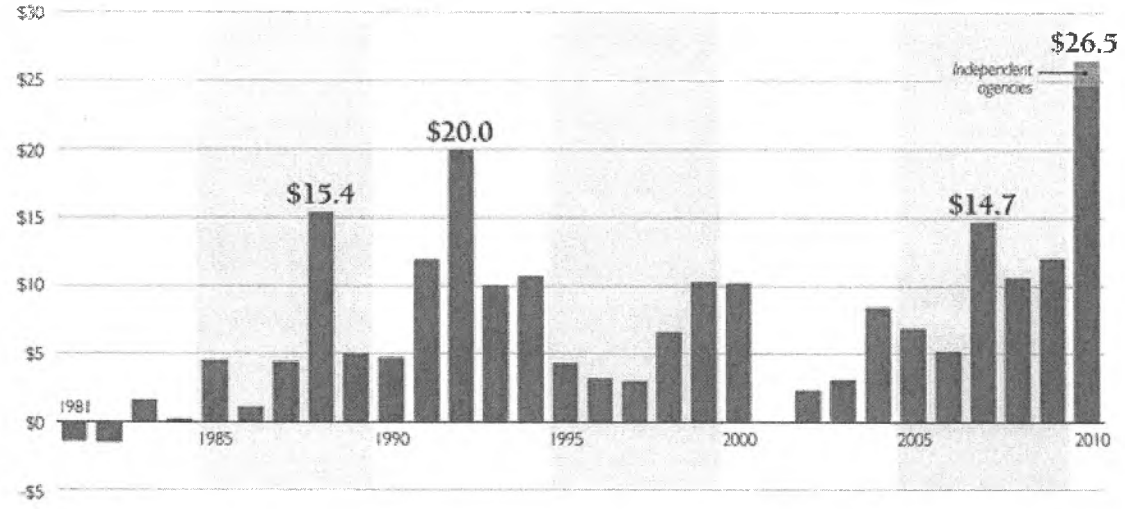
Constitutional Authority for Executive Orders
Article II, section 1 of the Constitution reads, in part, *"The executive power shall be vested in a president of the United States of America."* And, Article II, section 3 asserts that, *"The President shall take care that the laws be faithfully executed..."* Since the Constitution does not specifically define executive power, critics of Executive Orders argue that these two passages do not imply Constitutional authority. But, Presidents of the United States since George Washington have argued that they do

Submitted by the office of Representative Wes Keller with information provided by About.com

As of Feb 9, 2011 76 Executive Orders

Cost of Major New Regulations

In Billions of 2009 Dollars, by Fiscal Year



Sources: Figures for 1981–2009: U.S. Office of Management and Budget; 2010 figures: Heritage Foundation calculations based on reports from individual agencies

Chart 1 • B 2482 heritage.org

Among the most costly of the FY 2010 crop are:

- Fuel economy and emission standards[6] for passenger cars, light-duty trucks, and medium-duty passenger vehicles imposed jointly by the EPA and NHTSA. Annual cost: $10.8 billion (for model years 2012 to 2016). For automakers to recover these increased outlays, NHTSA estimates the standards will lead to increases in average new vehicle prices ranging from $457 per vehicle in FY 2012 to $985 per vehicle in FY 2016.[7]
- Mandated quotas for renewable fuels. Annual cost: $7.8 billion (for 15 years). Utilizing farmland to grow corn and other crops used in renewable fuels will displace food crops, leading food costs to increase by $10 per person per year—or $40 for a family of four, according to the EPA.[8]
- Efficiency standards for residential water heaters, heating equipment, and pool heaters. Annual cost: $1.3 billion. The appliance upgrades necessary to comply with the new standards will raise the price of a typical gas storage water heater by $120.[9]
- Limits on "effluent" discharges from construction sites imposed by the EPA. Annual cost: $810.8 million. The cost of the requirements will force the closure of 147 construction firms and the loss of 7,257 jobs, according to the EPA. Homebuyers also will bear some of the costs, with an increase in mortgage costs of about $1,953.

Regulatory Reductions Missing in Action

Measures to reduce regulatory burdens, by contrast, were few and far between in FY 2010. Only five significant rulemakings adopted last year reduced burdens. Of these, cost reductions were quantified for only two, for reported savings of $1.5 billion. This leaves a net increase in the regulatory burden of $26.5 billion.

Moreover, one of the five measures—though technically deregulatory in nature—relates to an unparalleled *expansion* of EPA powers. Due to its determination last year that greenhouse gases are pollutants, the agency is moving to set emissions limits for such gases. To follow the standards in the Clean Air Act would corral millions of currently unregulated "facilities," including offices and apartment buildings, shopping malls, restaurants, hotels, hospitals, schools, houses of worship, theaters, and sports arenas into the EPA regulatory regime. In hopes of quieting political outrage over so sweeping a dictate, the EPA's "Tailoring Rule"[10] set a minimum threshold level for regulation. Therefore, fewer facilities would be subject to permit requirements, making imposition of the emissions limits more feasible. Rather than reduce overall burdens, this action actually facilitated increased burdens.[11]

Actual Costs Likely Higher

The actual cost of regulations adopted in FY 2010 is almost certainly much higher than $26.5 billion. As a first matter, the cost of non-economically significant rules—rules deemed not likely to have an annual impact of $100 million or more—is not calculated (although such rules are believed to constitute only a small portion of total regulatory costs). Moreover, costs were not quantified for 12 of the economically significant rules adopted in FY 2010.

Many of the rules lacking quantified costs involve financial regulation. The Federal Reserve Board, for instance, did not quantify any costs for its new "Truth in Lending"[12] regulations—which impose fee and disclosure requirements for credit card accounts—although the new rules are generally expected to be costly. Similarly, costs were not calculated for new Federal Reserve Board regulations on prepaid electronic gift cards.[13]

It should also be noted that reported costs are likely minimized by allowing agencies to make the initial calculations, thereby casting their proposals in the best light. This could have a substantial impact: Overall, there is evidence that agencies systematically understate regulatory costs. In its 2005 report to Congress, the OMB's Office of Information and Regulatory Affairs conducted *ex ante* analyses of regulations to test the accuracy of cost-benefit estimates. The study determined that regulators overestimated benefits 40 percent of the time and underestimated costs 34 percent of the time.[14]

Even a finding that costs exceed benefits does not necessarily stop a new rule from going into effect. For instance, in evaluating new regulations for train-control systems, the Department of Transportation identified costs of $477.4 million, and benefits of a mere $22 million. Nevertheless, due to a statutory mandate, the regulations were adopted.

The EPA is prohibited by law from considering costs in devising regulations under the Clean Air Act and other major environmental statutes. Thus, the agency recently set new, more stringent standards on emissions of nitrogen dioxide without formally considering the economic or technical feasibility of compliance.[15] While the EPA did prepare a cost-benefit analysis—concluding that the costs exceed the benefits—agency officials conceded they had no way of determining the number of localities that would be out of compliance under the new rule.

Lastly, it should be noted that annual compliance costs constitute only part of the economic burden of regulation. New rules also entail start-up costs for new equipment, conversions of industrial processes, and devising data collection and reporting procedures. These "first-year" costs exceed $3.1 billion for the 43 new FY 2010 regulations. For example, new restrictions on "short sales"[16] imposed by the Securities and Exchange Commission will require initial costs of more than $1 billion[17] for modifications to computer systems and surveillance mechanisms, and for information-gathering, management, and recordkeeping systems. Likewise, the EPA estimates one-time implementation costs of nearly $745 million for new limits on emissions from diesel engines used in energy production.[18]

More Rules on the Way

Many, many more regulations are in the pipeline. According to one estimate, financial regulation legislation recently adopted by Congress, known as the Dodd–Frank bill, will require 243 new formal rule-makings by 11 different federal agencies.[19] So wide-ranging are regulators' new powers, in fact, that the Department of Health and Human Services has failed to meet one-third of the deadlines mandated by the new federal health care law, according to a report by the Congressional Research Service.[20]

Meanwhile, the new Consumer Financial Protection Bureau created under the Dodd–Frank measure will wield vaguely defined powers to regulate financial products and services, including mortgages, credit cards, even student loans. And, the Federal Communications Commission is mulling new regulations to limit how Internet service providers manage their networks. Such "net neutrality" rules, if enacted, would undermine investment incentives, thereby robbing the nation of much-needed broadband upgrades.[21]

Taken together, these initiatives embody a stunningly full regulatory agenda—indicating that this year's record for regulatory increases will not stand for long.

Conclusion

The regulatory burden increased at an unprecedented rate during FY 2010, as measured by both the number of new major rules as well as their reported costs. Even more are on the way in 2011.

A number of steps have been proposed to stem this growth, ranging from automatic sunsetting of rules[22] to requiring congressional approval of all new major rules.[23]

Mere procedural reforms will not be enough to stem this regulatory tide. Regulatory costs will rise until policymakers appreciate the burdens that regulations are imposing on Americans and the economy, and exercise the political will necessary to limit—and reduce—those burdens.

Submitted by the office of Representative Wes Keller, jointly written by ***James L. Gattuso*** *is Senior Research Fellow in Regulatory Policy,* ***Diane Katz*** *is Research Fellow in Regulatory Policy, and* ***Stephen A. Keen*** *is a Research Assistant, in the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation.*

486 U.S. 57

108 S.Ct. 1637

100 L.Ed.2d 48

CITY OF NEW YORK, City of Miami, City of Wheaton and National League of Cities, Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION et al.

No. 87-339.

Argued March 29, 1988.

Decided May 16, 1988.

Syllabus

In 1974, after two years of unsatisfactory experience with conflicting federal and local technical standards governing the transmission of cable television broadcast signals, the Federal Communications Commission (FCC or Commission) promulgated regulations pre-empting the field of signal-quality regulation. In 1984, this Court broadly approved the pre-emptive authority that the FCC had asserted over cable system regulation. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580. A few months later, Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), which empowers state or local authorities to enfranchise cable systems and to specify the facilities and equipment that franchisees could use, but which also authorizes the FCC to establish technical standards for such facilities and equipment. Pursuant to the latter provision, the FCC adopted regulations establishing technical standards governing the quality of cable signals and forbidding local authorities to impose more stringent technical standards. Petitioners sought review of the regulations in the Court of Appeals, contesting the scope of the FCC's claimed pre-emptive authority and asserting that franchising authorities could impose stricter technical standards than the Commission's. The court upheld the regulations.

Held: The FCC did not exceed its statutory authority by forbidding local authorities to impose technical cable signal quality standards more stringent than those set forth in the Commission's regulations. Pp. 63-70.

(a) Whether a federal agency has properly determined that its authority in a given area is exclusive and pre-empts any state regulatory efforts does not depend on the existence of express congressional authorization to displace state law. Rather, the correct focus is on the agency itself and on the proper bounds of its lawful authority to undertake such action. If the agency's decision to pre-empt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute, the accommodation should not be disturbed unless it appears from the statute or its legislative history that the accommodation "is not one that Congress would have

sanctioned." *United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908. Pp. 63-64.

(b) In adopting the regulations at issue, the FCC explicitly stated its intent to continue its prior policy of exercising exclusive authority and of pre-empting state and local regulation, in order to address the potentially serious adaptability and cost problems created for cable system operators and consumers by technical standards that vary from community to community. Thus, this case does not turn on whether there is an actual conflict between federal and state law, or whether compliance with both federal and state standards would be physically impossible. Pp. 65-66.

(c) The FCC acted within its authority under the Cable Act when it pre-empted state and local regulation. In adopting the statute, Congress acted against a 10-year background of federal pre-emption on this particular issue and at a time shortly after *Crisp* approved FCC pre-emption in very similar respects. Nevertheless, Congress sanctioned in relevant respects the regulatory scheme that the Commission had already been following, without indicating explicit disapproval of the Commission's pre-emption of local technical standards. Given the difficulties the FCC had experienced with inconsistent local standards, it is doubtful that Congress would have meant to overturn pre-emption without discussion or even any suggestion that it was doing so. To the contrary, the legislative history makes clear that the Cable Act was not intended to work any significant change. Thus, nothing in the Act compels the conclusion that the decision to pre-empt "is not one that Congress would have sanctioned." Pp. 66-70.

259 U.S.App.D.C. 191, 814 F.2d 720 (1987), affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Stephen J. McGrath, New York City, for petitioners.

Lawrence G. Wallace, Washington, D.C., for federal respondent, F.C.C.

H. Bartow Farr, III, Washington, D.C., for respondent, National Cable Television.

Justice WHITE delivered the opinion of the Court.

1

The Federal Communications Commission has adopted regulations that establish technical standards to govern the quality of cable television signals and that prohibit local authorities from imposing more stringent technical standards. The issue is whether in doing so the Commission has exceeded its statutory authority.

2

* This case deals with yet another development in the ongoing efforts of federal, state, and local authorities to regulate different aspects of cable television over the past three decades. See *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 700-705, 104 S.Ct. 2694, 2700-2703, 81

L.Ed.2d 580 (1984); *United States v. Southwestern Cable Co.,* 392 U.S. 157, 161-178, 88 S.Ct. 1994, 1996-2005, 20 L.Ed.2d 1001 (1968). With the incipient development of cable television in the 1950's and 1960's from what had been more generally known as community antenna television systems, the Federal Communications Commission began to assert regulatory authority in this area. See *CATV Second Report and Order,* 2 F.C.C.2d 725 (1966). In 1972, the Commission first asserted authority over technical aspects of cable television and devised technical standards to govern the transmission of broadcast signals by cable, though without pre-empting regulation of similar matters by state or local franchising authorities. *Cable Television Report and Order,* 36 F.C.C.2d 143, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union v. FCC,* 523 F.2d 1344 (CA9 1975).1 Within two years, however, the Commission became convinced from its experience with conflicting federal and local technical standards that there is "a compelling need for national uniformity in cable television technical standards" which would require it to pre-empt the field of signal-quality regulation in order to meet the "necessity to rationalize, interrelate, and bring into uniformity the myriad standards now being developed by numerous jurisdictions." *Cable Television Report and Order,* 49 F.C.C.2d 470, 477, 480 (1974). The Commission explained that a multiplicity of mandatory and nonuniform technical requirements undermined "the ultimate workability of the over-all system," could have "a deleterious effect on the development of new cable services," and could "seriously imped[e]" the "development and marketing of signal source, transmission, and terminal equipment." *Id.* at 478-479.2

3

In 1984, the Court approved the pre-emptive authority that the Commission had asserted over the regulation of cable television systems. We held that in the Communications Act of 1934, Congress authorized the Commission "to regulate all aspects of interstate communication by wire or radio," including the subsequently developed medium of cable television, and that the Commission's authority "extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities.' " *Crisp, supra,* 467 U.S. at 700, 104 S.Ct. at 2701, quoting *FCC v. Midwest Video Corp.,* 440 U.S. 689, 706, 99 S.Ct. 1435, 1444, 59 L.Ed.2d 692 (1979). Although the state law that was invalidated in *Crisp* regulated commercial advertising on cable television, rather than the technical quality of cable television signals, the Court recognized that for 10 years the Commission had "retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards." *Crisp, supra,* 467 U.S. at 702, 104 S.Ct. at 2702.

4

A few months after the Court's decision in *Crisp,* Congress enacted the Cable Communications Policy Act of 1984 (Cable Act or Act), 98 Stat. 2780, 47 U.S.C. §§ 521-559 (1982 ed., Supp. IV). Among its objectives in passing the Cable Act, Congress purported to "establish a national policy concerning cable communications" and to "minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. §§ 521(1), (6) (1982 ed., Supp. IV). The Act was also intended to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems" through procedures and standards that "encourage the growth and development of cable systems and which assure that cable

systems are responsive to the needs and interests of the local community." §§ 521(3), (2) (1982 ed., Supp. IV).

5

The Cable Act left franchising to state or local authorities; those authorities were also empowered to specify the facilities and equipment that franchisees were to use, provided such requirements were "consistent with this title." Cable Act, §§ 624(a), (b), 47 U.S.C. §§ 544(a), (b) (1982 ed., Supp. IV). Section 624(e) of the Cable Act provided that "[t]he Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. § 544(e) (1982 ed., Supp. IV).

6

In 1985, the Commission promulgated regulations that would establish technical standards governing signal quality for one of four different classes of cable television channels and that would forbid local cable franchising authorities to impose their own standards on any of the four classes of channels. 50 Fed.Reg. 7801, 7802 (1985), 47 CFR pt. 76 (1986). The Commission eventually adopted a modified version of these regulations, which reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television. 50 Fed.Reg., at 52462, 52464-52465. The Commission found its statutory authority to adopt the regulations in § 624(e) of the Cable Act, 47 U.S.C. § 544(e) (1982 ed., Supp. IV), and in 47 U.S.C. §§ 154(i) and 303(r). 50 Fed.Reg., at 52466. Petitioners (the cities of New York, Miami, and Wheaton, and the National League of Cities) sought review of the regulations in federal court, where they contested the scope of the pre-emptive authority claimed by the Commission and insisted that franchising authorities could impose stricter technical standards than those specified by the Commission.

7

The Court of Appeals granted partial relief to petitioners. 259 U.S.App.D.C. 191, 814 F.2d 720 (1987). It noted that the Commission had adopted technical standards applicable to one class of cable television channels, but had left the other three classes of channels completely unregulated. It agreed with petitioners that the Commission had acted arbitrarily and capriciously when it did not adopt technical standards for the latter three classes of channels, yet prohibited local authorities from adopting such standards and ignored the apparent conflict between these actions and the language of the Cable Act. It therefore vacated this part of the rule and remanded to the Commission for further proceedings. The court's holding was unanimous on this point, and that part of its decision is not at issue here.3

8

The Court of Appeals divided, however, over the propriety of the Commission's technical standards that apply to the first class of cable channels and that pre-empt more stringent local regulations. The majority of the panel upheld pre-emption, ruling that Congress intended federal regulations like these to supersede local law and that the Commission acted within the broad

confines of the pre-emptive authority delegated to it by Congress when it adopted the regulations with respect to this one class of channels. One judge dissented, contending that the majority had sanctioned pre-emption without a clear manifestation of congressional intent, contrary to this Court's decisions. We granted certiorari, 484 U.S. 962, 108 S.Ct. 449, 98 L.Ed.2d 389 (1987), and we now affirm.

II

9

When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. The phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, see *Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986), we have also recognized that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law. *Id.,* at 369, 106 S.Ct. at 1898-1999.

10

This case involves the latter kind of pre-emption, and here the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power. Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn. v. De la Cuesta,* 458 U.S. 141, 154, 102 S.Ct. 3014, 3023, 73 L.Ed.2d 664 (1982). Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. *Crisp,* 467 U.S., at 700, 104 S.Ct. at 2700; *De la Cuesta, supra,* 458 U.S., at 152-154, 102 S.Ct., at 3022-3023. It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have

sanctioned." *United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961); see also *Crisp, supra,* 467 U.S., at 700, 104 S.Ct., at 2700.

III

A.

11

In this case, there is no room for doubting that the Commission intended to pre-empt state technical standards governing the quality of cable television signals. In adopting the regulations at issue here, the Commission said:

12

"Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes. To address this problem, we proposed in the *Notice* to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations.

13

* * * * *

14

"After a review of the record in this proceeding, we continue to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act. This pre-emption policy has constrained state and local regulation of cable technical performance to Class I channels and has prohibited performance standards more restrictive than those contained in the Commission's rules. The reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted." 50 Fed.Reg., at 52464.

15

As noted above, the policy adopted by the Commission in 1974, which was continued in effect by the 1985 regulations, was a pre-emptive policy applying in the area of technical standards governing signal quality. 49 F.C.C.2d, at 477-481. Since the Commission has explicitly stated its intent to exercise exclusive authority in this area and to pre-empt state and local regulation, this case does not turn on whether there is an actual conflict between federal and state law here, or whether compliance with both federal and state standards would be physically impossible. *De la Cuesta, supra,* 458 U.S., at 153, 102 S.Ct., at 3022.

B

16

The second part of the inquiry is whether the Commission is legally authorized to pre-empt state and local regulation that would establish complementary or additional technical standards, where it clearly is possible for a cable operator to comply with these standards in addition to the federal standards. We have identified at least two reasons why this part of the inquiry is crucial to our determination of the pre-emption issue. "First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Public Service Comm'n,* 476 U.S., at 374, 106 S.Ct., at 1901. The second reason was particularly relevant in *Louisiana Public Service Comm'n* because there we were obliged to assess the import of a statutory section in which Congress appeared to have explicitly limited the Commission's jurisdiction, so as to prohibit it from pre-empting state laws concerning the manner in which telephone companies could depreciate certain plant and equipment. *Id.,* 476 U.S., at 369-376, 379, 106 S.Ct., at 1899-1902, 1904, construing 47 U.S.C. § 152(b).

17

We conclude here that the Commission acted within the statutory authority conferred by Congress when it pre-empted state and local technical standards governing the quality of cable television signals. When Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption on this particular issue. For the preceding 10 years, the Commission had pre-empted such state and local technical standards under its broad delegation of authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter [the communications laws, Title 47 of the U.S. Code, Chapter 5]," as a means of implementing its legitimate discretionary power to determine what the "public convenience, interest, or necessity requires" in this field. 47 U.S.C. §§ 303 and 303(r); see also 49 F.C.C.2d, at 481; 47 U.S.C. § 154(i). The Court's decision in *Crisp,* which was handed down during the time Congress was considering the legislation that within a few months became the Cable Act, broadly upheld the Commission's pre-emptive authority in very similar respects. 467 U.S., at 701-705, 104 S.Ct., at 2701-2703.

18

In the Cable Act, Congress sanctioned in relevant respects the regulatory scheme that the Commission had been following since 1974. In § 624 of the Cable Act, Congress specified that the local franchising authority could regulate "services, facilities, and equipment" in certain respects, and could enforce those requirements, but § 624(e) of the Act grants the Commission the power to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. §§ 544(a)-(e) (1982 ed., Supp. IV). This mirrors the state of the regulatory law before the Cable Act was passed, which permitted the local franchising authorities to regulate many aspects of cable

services, facilities, and equipment but not to impose technical standards governing cable signal quality, since the Commission had explicitly reserved this power to the Federal Government.

19

It is also quite significant that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the Commission's pre-emption of local technical standards.4 Given the difficulties the Commission had experienced in this area, which had caused it to reverse its ground in 1974 after two years of unhappy experience with the practical consequences of inconsistent technical standards imposed by various localities, we doubt that Congress intended to overturn the Commission's decade-old policy without discussion or even any suggestion that it was doing so. To the contrary, the House Report which discusses this section of the Act portrays it as nothing more than a straightforward endorsement of current law:

20

"Subsection (e) allows the Commission to set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchising agreement. This provision does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to section 624(b) which are not inconsistent with standards established by the FCC under this subsection." H.R.Rep. No. 98-934, p. 70 (1984), U.S.Code Cong. & Admin.News, 1984, pp. 4655, 4707.

21

This passage from the House Report makes clear that the Act was not intended to work any significant change in the law in the respects relevant to this case. By noting that § 624(e) authorizes "the Commission to set technical standards related to facilities and equipment" and that it "does not affect the authority of a franchising authority to establish standards regarding facilities and equipment" that are not inconsistent with Commission standards, the House Report indicates both that Congress did not intend to remove from the Commission its longstanding power to establish pre-emptive technical standards, and that Congress did not intend to "affect the authority of a franchising authority" to set standards in these and similar matters regarding cable facilities and equipment. In particular, Congress did not manifest any intent to "affect the authority" of local franchising authorities by giving them the power to supplement the technical standards set by the Commission with respect to the quality of cable signals, a power which they generally had not been permitted to exercise for the last 10 years and which, according to the Commission's consistent view, disserves the public interest.5 Petitioners insist that under § 624, as evidenced by the passage from the House Report quoted above, a franchising authority may specify any technical standards that do not conflict with Commission standards and hence may set stricter standards for signal quality. But this disregards the Commission's own power to pre-empt, an authority that we do not believe Congress intended to take away in the Cable Act. And it also disregards the Commission's explicit findings, based on considerable experience in this area, that complementary or additional technical standards set by state and local authorities do conflict with the basic objectives of federal policy with respect to cable television—findings that

the Commission first articulated in 1974 and then reiterated in 1986. See 49 F.C.C.2d, at 478-479; 50 Fed.Reg., at 52464-52465.

22

In sum, we find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt local technical standards governing the quality of cable signals "is not one that Congress would have sanctioned." *Shimer,* 367 U.S., at 383, 81 S.Ct. at 1560.6 We therefore affirm the judgment of the Court of Appeals.

23

It is so ordered.

1

The "technical standards" established by the Commission describe, in quantitative terms, various electrical characteristics of the audio and video components of the signals delivered by the cable system to its subscribers, including such specific items as visual carrier frequency, aural center frequency, visual signal level, terminal isolation, and radiation and signal leakage. See 47 CFR §§ 76.601, 76.605 (1987).

2

Although the Commission recognized that "[t]he broad pre-emptive policy we are adopting today will ultimately affect all cable systems," 49 F.C.C.2d, at 480, it fashioned this policy to have a more gradual effect. Because "many of the pre-existing technical standards adopted by cities and states cannot be shown to adversely affect our stated goals," the Commission decided to extend a "grandfather" approval to those technical standards that were already operational or certified to the Commission by January 1, 1975. *Ibid.* In addition, a mechanism was established (and remains in effect) that allows state and local authorities to impose "different or additional technical standards" if they obtain a specific waiver from the Commission. *Id.,* at 480-481; see n. 5, *infra.*

3

At argument, petitioners contended that the question of the Commission's statutory authority to regulate these other three classes of cable channels is properly presented to the Court in this case. Tr. of Oral Arg. 5-7, 9-10. We disagree. The Court of Appeals explicitly failed to resolve this question because it agreed "with petitioner's alternative argument that the FCC's . . . rulemaking was arbitrary and capricious." 259 U.S.App.D.C. 191, 197-198, 814 F.2d 720, 726-727 (1987). The Court of Appeals' disposition with respect to these three classes of cable channels was to vacate those portions of the rule and to remand to the Commission for further proceedings. In their brief, moreover, petitioners refer specifically to "a vote of 2-1 [in] the Court of Appeals" in stating the questions presented, which was the disposition below only with respect to the one class of cable channels. Brief for Petitioners i.

4

Petitioners argue that by empowering local franchising authorities to take into account whether "the quality of the operator's service, including signal quality . . . has been reasonable in light of community needs," 47 U.S.C. § 546(c)(1)(B) (1982 ed., Supp. IV), Congress implicitly recognized that local franchising authorities would need a comprehensive set of additional technical standards in order to carry out this task. Yet this argument simply ignores the fact that local authorities are able to assess signal quality against the technical standards set by the Commission, which it has found are adequate to ensure "an acceptable quality of service at the worst subscriber location and thus a better quality of service to the average subscriber." 50 Fed.Reg. 52462, 52463, n. 2 (1985).

5

Petitioners and other state and local authorities remain free, of course, to petition the Commission for an individualized waiver that would permit them to "impose additional or different requirements," which they may seek to obtain by demonstrating that particular local conditions create special problems that make the federal technical standards inadequate. See 47 CFR § 76.7 (1987).

6

Since we conclude that the Commission is authorized under § 624(e) of the Cable Act to pre-empt technical standards imposed by state and local authorities, we need not also consider whether the Commission retains the same broad pre-emptive authority in the area of cable television under §§ 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303, that it had exercised before the Cable Act was enacted in 1984. In adopting the regulations at issue here, the Commission claimed to possess statutory authority under those two sections of the Communications Act as well as under the new Cable Act. 50 Fed.Reg., at 52466. Petitioners claim that the Cable Act withdrew such authority from the Commission, and their claim draws some support from new language in 47 U.S.C. § 152(a) (1982 ed., Supp. IV), which states that "[t]he provisions of [the Communications Act] shall apply with respect to cable service . . . as provided in [the Cable Act]." On the other hand, the House Report suggests that this language is merely a more explicit grant of "exclusive jurisdiction" to the Commission over specified aspects of cable service, see H.R.Rep. No. 98-934, pp. 95-96 (1984), U.S.Code Cong. & Admin.News 1984, pp. 4732, 4733, which settles matters that had occasionally been in dispute. In addition, § 303 of the Communications Act continues to give the Commission broad rulemaking power "as may be necessary to carry out the provisions of this chapter," 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters. But since in any event the Commission possesses statutory authority to adopt the regulations at issue in this case under § 624(e) of the Cable Act, we do not decide whether the Commission's actions are authorized on this alternative basis as well.

Topix

Null. Void. Of No Effect.

Michael Boldin Tenth Amendment Center
January 21, 2011

When Washington D.C. violates the constitution – as it does every single day – the essential question is –"what do we do about it?"

For countless decades, Americans have been responding through protests, lawsuits, and "voting the bums out." Yet, year in and year out, federal power always grows. And it doesn't matter which political party is in power, or what person occupies the white house either.

THE RIGHTFUL REMEDY

In 1798, Thomas Jefferson wrote that

"whensoever the general government assumes undelegated powers….a nullification of the act is the rightful remedy."[emphasis added]

Notice that TJ didn't advise us to use nullification as a remedy "once in a while." And he certainly didn't tell us that a nullification is the rightful remedy after "we vote some bums out" or "we sue the federal government in federal court" or after anything else for that matter. Jefferson was pretty straightforward and recommended that every single time the federal government exercises powers not delegated to it in the constitution (there's about 30 powers and nothing more), that we're to reject and nullify those acts on a state level as they happen.

HAPPENING NOW

Already, more than two dozen states have virtually stopped the 2005 Real ID act dead in its tracks. How? By refusing to implement it. Fifteen states – most recently Arizona – are using the principles of the 10th Amendment to actively defy federal laws (and a supreme court ruling, too!) on marijuana. Eight states have passed Firearms Freedom Acts in an attempt to reject some federal gun laws and regulations. And seven states have passed Health Care Freedom Acts to block health care mandates from being enforced.

NULL. VOID. OF NO EFFECT.

Get used to reading these words, because the political climate is starting to swing a new direction. There is a growing number of people in America that are recognizing a simple truth – Asking, demanding, or suing to get the federal government to fix problems caused by the federal government just doesn't work.

Take, for example, the Federal Health Care Nullification Act, first introduced in Texas as HB297, and now also introduced in Montana (SB161), Wyoming (HB0035), Oregon (SB498) and Maine (LD58). Here's an excerpt:

"the federal law known as the "Patient Protection and Affordable Care Act," signed by President Barack Obama on March 23, 2010, is not authorized by the Constitution of the United States and

violates its true meaning and intent as given by the Founders and Ratifiers, and is hereby declared to be invalid, shall not be recognized, is specifically rejected, and shall be considered null and void and of no effect."

But these bills, as introduced in Texas, Maine, Montana, Oregon, and Wyoming are far more than mere declarations or position statements

ENFORCEMENT

Implied in any nullification legislation is enforcement of the state law. In the Virginia Resolution of 1798, James Madison wrote of the principle of interposition:
That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

In his famous speech during the war of 1812, Daniel Webster said:

"The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State governments exist"

Here Madison and Webster assert what is required of nullification laws to be successful – that state governments not only have the right to resist unconstitutional federal acts, but that, in order to protect liberty, they are "duty bound to interpose" or stand between the federal government and the people of the state.

All five bills explicitly include this principle, and if passed, would impose penalties on federal agents for attempting to enforce National Health Care mandates in their state. For example, from Wyoming's HB35:

Any official, agent, employee or public servant of the state of Wyoming as defined in W.S. 6-5-101, who enforces or attempts to enforce an act, order, law, statute, rule or regulation of the government of the United States in violation of this article shall be guilty of a felony punishable by a fine of not more than five thousand dollars ($5,000.00), imprisonment in the county jail for not more than two (2) years, or both.

Sources close to the Tenth Amendment Center tell us to expect approximately ten states to introduce such bills in the 2011 legislative session.

Submitted by the office of Representative Wes Keller authored by: Michael Boldin, Tenth Amendment Center

WorldNetDaily wnd commentary
Friday, February 11, 2011

The perversion of the U.S. Constitution

Posted: July 08, 1998
1:00 am Eastern

By Joseph Farah

"Stroke of the pen. Law of the land. Kinda cool."
--Clinton presidential aide Paul Begala, July 1998

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
--Article 1, U.S. Constitution, 1789

The greatest fear of the Founding Fathers was the establishment of a strong central government and an ambitious, power-hungry political leader at the center of that government. They had had their fill of kings and dictators. They believed the best assurance against centralized authority was a loose association of sovereign states, which maintained most governmental power at the local level.

President Clinton's glib announcement that he will issue a barrage of executive orders to further his legislative agenda while bypassing Congress is the ultimate fulfillment of those fears. More chilling yet is the timing of the ominous announcement. It comes less than two months after Clinton issued, while on foreign soil, Executive Order 13083, which annihilates the principles of federalism that have guided the nation for the last 200 years.

The 10th Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Under EO 13083, Clinton has effectively tacked on to that clear, forthright, inspired, unambiguous statement a list of exceptions. He has done it single-handedly, with the stroke of a pen. And, no Mr. Begala, there is nothing cool about totalitarianism.

Say what you will about him, Bill Clinton is a bright and educated man. His actions and his words are carefully considered. He knows what he is doing. That's what makes this trend so frightening. Where does he want to take the nation? How far from its founding principles are we to stray? Is America about to transform itself from a nation governed by laws to a nation ruled by men?

How far we've come from the days of statesmen like James Madison, who believed "That all power is originally vested in, and consequently derived from, the people. That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty and the right of acquiring property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government whenever it be found adverse or inadequate to the purpose of its institution."

Note that Madison said "the people" -- not the government -- have a right to change their government. Bill Clinton has taken on this mission as his own God-given responsibility. He is acting like a strongman, an ayatollah, a czar, a potentate, a Fuhrer.

Even before Clinton abused his office so egregiously, the United States was in grave danger of concentrating too much power in Washington and too much power in the Oval Office. Clinton, ever the opportunist, has taken full advantage of Americans' ignorance of their constitutional heritage and usurped much of the remaining congressional legislative authority.

Potentially, the worst abuse of all is the executive order. For 30 years, Americans have lived under the shadow of executive orders that could -- as Mr. Begala inelegantly stated it -- with "the stroke of a pen," turn America into just another fascist dictatorship. Fortunately, America has been blessed with leaders -- some good, some bad -- who have restrained themselves from signing away our freedoms.

Without congressional approval, the president has the power to relocate whole populations of Americans, the power to shut down the free press, to force a national registration of all people. There doesn't need to be a war to justify such an action -- just a crisis, be it domestic or foreign, violent or merely economic.

I count at least a dozen executive orders, today standing as the law of the land, which would suspend the Constitution and the Bill of Rights in their entirety with such a stroke of the pen. Such power should not be in the hands of any one man -- particularly one as ambitious, driven and morally contemptible as Bill Clinton.

Oh, what a delicate thread from which our liberty is suspended.

Utah Gov. OKs eminent domain use on federal land

Posted: Mar 28, 2010 11:35 AM Updated: Mar 28, 2010 12:36 PM
By BROCK VERGAKIS
Associated Press Writer

SALT LAKE CITY (AP) - Fed up with federal ownership of more than half the land in Utah, Republican Gov. Gary Herbert on Saturday authorized the use of eminent domain to take some of the U.S. government's most valuable parcels.

Herbert signed a pair of bills into law that supporters hope will trigger a flood of similar legislation throughout the West, where lawmakers contend that federal ownership restricts economic development in an energy-rich part of the country.

Governments use eminent domain to take private property for public use.

The goal is to spark a U.S. Supreme Court battle that legislators' own attorneys acknowledge has little chance of success.

But Utah Attorney General Mark Shurtleff and other Republicans say the case is still worth fighting, since the state could reap millions of dollars for state schools each year if it wins.

More than 60 percent of Utah is owned by the U.S. government, and policy makers here have long complained that federal ownership hinders their ability to generate tax revenue and adequately fund public schools.

Utah spends less per student than any other state and has the nation's largest class sizes. Under the measure Herbert has approved, the state will set aside $3 million to defend the law.

Lawmakers recently slashed education funding by $10 million and raised taxes on cigarettes by $1 a pack. Democrats have decried the eminent domain measure as a waste of money, and Democratic gubernatorial hopeful Peter Corroon is making it an issue in this year's special election.

But if the law is as bad as Democrats say it is, a court will quickly overturn it and the state won't have to spend much money defending it, Herbert said.

Initially, the state would target three areas for the use of eminent domain, including the Kaiparowits plateau in Grand Staircase-Escalante National Monument, which is home to large coal reserves.

Many people in Utah are still angry that then-President Bill Clinton's designated the area as a national monument in 1996, a move that stopped development on the land and greatly pleased environmentalists as he ran for re-election.

Utah lawmakers contend the federal government should have long ago sold the land it owns in the state. Because it hasn't, the federal government has violated a contract made with Utah when statehood was granted, they say.

Eminent domain would also be used on parcels of land where Interior Secretary Ken Salazar last year scrapped 77 oil and gas leases around national parks and wild areas.