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The Constitution in Article 1, Section 8, empowers Congress "to establish post-offices and post roads" and "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Yet, the Congress has passed wide-reaching statutes regulating use of the mails, and, under the commerce clause, the Racketeer Influenced Corrupt Organizations Act (RICO) to fight crime. Under postal and RICO laws, state and local officeholders can be charged with corruption and convicted by the United States. From the prosecutor to judge, every federal official involved is appointed, not elected. Not a single constituent's vote is cast for any of the federal officials whose combined acts can deprive the defendant of liberty and property. If the defendant were tried by the state, at least the functionaries who effect the conviction would have to stand the test of the ballot box.

While the 10th Amendment remains in the Constitution, one might say that the limitation still stands and in a proper case can be relied upon.

But that belief is no longer tenable. In *Garcia vs. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 1985, the U.S. Supreme Court responded to a 10th Amendment argument:

Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the commerce clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of commerce clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' "

Thus the Court deprived the 10th Amendment of any significance as a substantive limitation upon Congress or the federal executive branch. Three years later, that Court said, "Where, as here, the national political process did not operate in a defective manner, the 10th Amendment is not implicated" (*South Carolina vs. Baker*).

How gross a contrast with the soothing prediction of Madison, in *Federalist* no. 45:

"The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state" (emphasis added).

How wide a departure from Madison's words in *Federalist* no. 51: "First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself" (emphasis added).

Even so, the 10th Amendment was insisted upon as a safeguard against excess by the central government.

the U.S. Constitution Article 8, Section 18 (the necessary and proper provision) and Article 6, Section 2 (the supreme law of the land provision), Hamilton said in *Federalist* no. 33:

"These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear after all this clamor to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."

Yet a casual survey of the annotations will show that the supreme law of the land provision has been extensively relied upon by the courts in upholding federal authority, whereas in *Garcia* and *South Carolina* the 10th Amendment has been reduced to a condition of impotence.

Garcia dealt with labor law; *South Carolina* with taxation of bond interest. But those topics are not of transcendent importance.

The emasculating of the 10th Amendment, adopted to reserve without question to the states their authority in all matters not delegated, first

among which is personal liberty, is the most dramatic constitutional event of our time. So cavalier a holding, that states' citizens must beg relief from a far-off Congress from whatever that Congress may vote to do to them, staggers belief and would have been dismissed as airy speculation not only by the advocates of the 10th Amendment, but by Madison himself.

The emasculation of the 10th Amendment, adopted to reserve without question to the states their authority in all matters not delegated, first among which is personal liberty, is the most dramatic constitutional event of our time.

One might say, "I rest content for the preservation of my liberty upon the good judgment of the people and their elected officers." What then of the taxpayer's pocketbook? As fiscal necessity throttles federal grants, may we assume that Congress will accordingly suspend its mandating of costly programs upon cities, counties and states?

The members of Congress are elected, as they see it, to legislate, and legislate they will. Under *Garcia* and *South Carolina*, there is absolutely no constitutional protection against their "meeting a need" (unmet "needs" are as easy to find as vocal constituents) by mandating a national program upon all cities, counties or states, and furnishing not one cent to pay for it. Payment will be had by mulcting again local taxpayers through their state and local governments. Those governments cannot create money as can the federal government. The bill must be paid by money exacted from savings or property, and if not paid will be seized from the city, county or state treasury by a decree from the federal court.

Where then can relief be found for cities, counties and states, made up of their citizens, taxpaying and jealous of their liberties? In humble petition to the Court which has crumpled their shield? In humble application, as the Supreme Court has instructed, to the Congress, to which the Supreme Court has given unlimited license? Hardly so.

The first order of the day must be constitutional amendment, for the preservation of Americans' liberties, and their property as well, under and by means of the federal system.

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Linking Constitutional Reform to Local Self-Governance

by Robert B. Hawkins, Jr.

In today's complex information age, a hierarchical structure of power based on command and control does not work well. Yet, as citizens demand more voice in governing their local institutions, the federal government is usurping local and state control. What is needed is a constitutional amendment to restore the balance of power in our federal system.

There appears to be growing interest in some type of constitutional remedy to the U.S. Supreme Court's abdication of its role in protecting the constitutional balance of powers in the federal system.

The conditional is used here because we have seen similar interest in years past evaporate in the midst of congressional compromises that gave state and local governments at least half the loaf they sought in the political process. However, this is a new day in federal relations. *South Carolina vs. Baker* reaffirms the statistician's law that two points start a trend. Thus, *South Carolina* reaffirms the judgment of *Garcia* that the Supreme Court has little specific language in the U.S. Constitution with which to protect the states and local governments.

To restore balance to the federal system, we must know what we want to restore, why it is worth restoring, and how to accomplish this end. The best place to start this examination is with the U.S. Constitution.

It may seem astounding to do so, but we must ask the question, do constitutions make a difference? To those who are versed in the seemingly archaic intricacies of the constitutional foundations of federalism, or to federalism junkies, the answer is a categorical "yes." It might be argued

that Americans are a constitutional people, and even if they cannot cite chapter and verse, they implicitly act as if constitutions are important. Today, Americans clearly see a direct relationship between the Constitution and individual liberties. The constant stream of cases before the state and federal courts that seek to expand the constitutional protections of individual rights attests to this understanding.

The Bork nomination hearings were fascinating from this perspective. The main attack on Judge Robert Bork was that he did not see the constitutional grounds for many of the new civil and criminal rights the U.S. Supreme Court has established for individuals. When it came to federalism, however, almost no time was spent on the issue in the hearings, in part, because Judge Bork asserted that federalism is now a settled issue (via *Garcia*) and, thus, is not very interesting.

Even if federalism and the Constitution are not burning issues in the public mind, this does not mean that the Constitution has no effect on federal-state-local relationships. The *Garcia* decision is gradually transforming politics in this country. On the federal side, there is a slow but steady usurpation of state and local authority. There is almost no interest on the part of members of Congress — liberal or conservative, Democrat or Republican — in addressing the underlying principles of our federal system. While compensation issues in *Garcia* were modified by legislation to provide some relief for state and local governments, the bureaucrats in the U.S. Depart-

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ment of Labor now are implementing tighter controls on them. In the 101st Congress, the dual banking system is likely to disappear, and increased regulations are likely to be promulgated that hinder or restrict state and local authority.

Politics of Federalism

This course of events can be predicted with some certainty. The Congress is under tremendous pressure to balance the federal budget without massive tax increases. Yet the desire of members of Congress to assist constituents has not diminished. Thus, *Garcia* gives Congress the green light to set the limits of state and local authority. In simple terms, the Court has given the Congress the proverbial political genie: It can reward constituents by shifting responsibilities and authority without having to suffer the fiscal consequences.

Local self-governance is the first and strongest rationale for a reinvigorated state and local government sector capable of linking individuals and institutions.

On the state and local side, we are beginning to see understandable yet lamentable changes in the posture of state and local associations toward Washington. They are focusing their attention on Congress and on developing lobbying strategies that will effectively represent their interests. Several of these approaches are ingenious, well planned and ably executed by highly capable staff. While these approaches might be given high grades, their necessity is lamentable because they underscore the tragedy of *Garcia* and affirm its dictum that state and local governments must look to the Congress for the scope of their political authority.

What this dictum will do over time is change the politics of federalism. It will change it from a politics of conflict, negotiation and compromise between partners having independent authority, to a politics of dependency — a politics where state and local governments will be no different than other interest groups trying to get Congress to fix the rules of the political game. This politics is, and will be, fundamentally different from constitutionally based politics.

Many think that constitutional-based politics has served this country well. Self-rule through shared rule has allowed for change and experimentation. It has been the bedrock of our commercial republic. If we want to re-energize this system, then we must understand how we have gotten to the point where most citizens and poli-

cy-makers fail to understand the political principles that underpin our experiment in self-governance. We also must comprehend why it is imperative that we have such a system as we enter the information age with its complexity and new imperatives. In short, we need a new rationale for why a federal system is essential to our way of life and to our remaining a dynamic society. The key to such a rationale is to again link citizens and their local institutions.

Local Politics: Business or Self-Governance?

There is no question that local institutions suffered from the nationalism that emerged in the late 1800s and was accelerated by two world wars. The Great Depression clearly increased the strength and role played by the national government. Yet, the most decisive factor is what might be called the politics of production. Beginning in the early 1900s, with Americans' disdain for boss rule, local politics came to be seen as a business. Reformers in those days maintained that if state and local governments modernized like corporations, there would be no need for centralization. Reformers became fascinated with consolidations, large-scale operations, comprehensive planning, and a whole litany of schemes that mimicked what they thought corporate America was all about.

Some of these corporate ideas enabled local governments to provide the infrastructure and management capacity to deal with growth in the 20th century. The major problem with the equation, however, was that it forgot about politics and citizens. While many of the boss-led machine cities were corrupt, most citizens were intimately linked to those political organizations. Local liberty has always been a strong force in American politics. While the managerial approach to local government diminished local liberty, it did not snuff it out.

The driving forces behind the ill-conceived War on Poverty also show that local liberty excites liberals as well as conservatives. The advent of the War on Poverty and community action attempted to re-energize citizen participation, especially among the poor. Clearly, politics were seen as supplanted by management and unresponsive to the needs of a given clientele. In turn, the War on Poverty was replaced by the neighborhood movement, which today, in many cities, is an unofficial means of representation. As with the War on Poverty, some of this representation is a negative rather than a positive integration into the politics of a local community.

Yet this trend is part of a larger ongoing change that is sure to be an imperative of the informa-

tion age: Citizens want greater control of the institutions that shape and affect their daily lives. This desire can be a positive force and a rationale for local self-governing institutions. Self-governance links federalism and individuals if it can be forcefully articulated by local leaders. The idea of local self-governance is clearly a stronger force and passion than the idea that local governments are nothing more than good service providers. After all, many private firms are good service providers.

Local self-governance is the first and strongest rationale for a reinvigorated state and local government sector capable of linking individuals and institutions. The second rationale is less direct, but just as important. It is found in the imperatives of the rapidly developing information age. The emerging consensus of organizational theorists and practitioners is that large hierarchical organizations based on command and control will not work well in an information age because they do not manage complexity well and are inefficient in coordinating complex activities. Likewise, small organizations, while having the virtues of flexibility, speed and the ability to manage complex activities, must have a set of institutions that establishes the rules and incentives for productive behavior. These imperatives will force government to adopt different strategies for governing. But it should be clear that state and local governments must play a key role in managing our complex society. It cannot be done by commands and edicts from Washington, D.C.

A Constitutional Remedy

What does all of this have to do with *Garcia* and constitutional reform that will strengthen state and local governments? Everything. For one of the key tools that we will have in managing complexity and self-governing institutions are constitutions: federal, state and local. We must understand that constitutions and charters are vital governing mechanisms, that modern societies have greater needs for such instruments than their predecessors, and that we must educate the public on their importance.

Thus, to seek a constitutional remedy to the *Garcia* dictum is not just a self-interested effort to save state and local institutions. Rather, it is an effort to fashion new institutional arrangements that will allow the United States to manage its affairs effectively and efficiently in the coming years. It is also an effort to re-energize the self-governing foundations of our institutions so that citizens, through reflection and choice, can have a voice in and a commitment to the institutions they create.

Consequently, there are important reasons for starting the process of constitutional change. In

part, the Supreme Court has taken the first step by abdicating its responsibility for maintaining a balance of powers in the federal system. We must now ask how we should proceed.

If we are to succeed, we must start a constitutional dialogue throughout the United States. This dialogue must communicate clear and convincing reasons to the citizens of this country that some type of change is needed to bring their state and local institutions back under their control. While this might sound like a populist call — and it may be — its genius is nothing more than knowing politically that citizens will support those changes that they see benefiting them for the best reasons.

The best way to start this dialogue is to draft a remedy to the Supreme Court dictum in *Garcia*: a constitutional remedy. What form that remedy ought to take may be less important than the process that is used to draft it. Like the process in Philadelphia in 1787, a group of concerned leaders needs to undertake a process that drafts a remedy that fits the problem and that brings to the process representatives of those institutions that will be affected by change. Since the National Conference of State Legislatures, the National Governors' Association, The Council of State Governments and the Advisory Commission on Intergovernmental Relations have worked on this issue, they would seem to be the core groups from which the process should be started. Equally important, members of the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors and the International City Management Association must be active participants.

The importance of developing a workable constitutional amendment is that it creates the mechanism around which debate and action can start. It will be the basis upon which the politics of constitutional change can start. Clearly, NCSL can play a critical role in this process by starting the resolution process to memorialize Congress to pass such an amendment. Just as important will be the role that the Bush administration will play in supporting such an approach.

What is clear is that those who are deeply committed to strong local and state institutions must start the process of constitutional change. For too long we have hoped that fiscal, managerial and intergovernmental remedies would work. After 30 years of dialogue, we know that improved management and fiscal capacity on the part of state and local governments does not impress the Congress and the Supreme Court. What will impress them is a proper celebration of the bicentennial of the Constitution: an amendment to the Constitution that restores balance to the federal system so that each governmental partner can play its proper and unique role.

Treasurers urge remedy:

Public Works Financing Endangered

by Stacey Crane

Treasurers and other state officials are working to protect tax exemptions for state and local bonds. Restrictions on these bonds are endangering the rebuilding of badly needed public works.

Federal action interfering with the ability of states to finance public works' projects has prompted state treasurers to seek a constitutional amendment protecting tax exemptions for state and local finance.

The National Association of State Treasurers says the amendment is necessary because it would restore constitutional protection for intergovernmental tax immunity — a basic principle of federalism.

Restrictions on state and local government financing imposed by Congress in the 1986 Tax Act have become especially acute because of Reagan's federalist agenda. Reagan has attempted over the past eight years to decentralize government by placing increasing responsibility at the state and local level. In theory, this policy has considerable merit in that the government closest to the people is most likely to best meet their needs.

The problem facing state and local governments, however, is that the tax-exempt bonds needed to provide public services are no longer as easily available as they once were. Strict limitations have been placed on how they must be used.

Over the years, tax-exempt bonds have emerged as an essential financing mechanism for providing schools, courthouses, jails, transportation systems, water and sewer systems, civic centers and the like. Government officials across the country are increasingly aware of the need for increased spending on public facilities. Estimates of the annual spending shortfall on physical infrastructure range from \$17.4 billion to \$71.3 billion. The

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National Council on Public Works Improvement suggested in a 1988 report that annual infrastructure spending might have to double in the near future for the U.S. to meet its needs.

Because state treasurers believe that tax-exempt issuance must be protected, they have asked for President Bush's support for intergovernmental tax immunity and have created a coalition to fight for the issue.

The state treasurers are leading an effort to work with Congress to inform the members of the adverse impact that loss of intergovernmental tax immunity has on their constituents and states. Treasurers are seeking support for an amendment to the U.S. Constitution to restore intergovernmental tax immunity to help protect the continued sovereign status of state and local governments.

States have grown increasingly concerned over their sovereignty in light of constitutional and legislative changes and Supreme Court decisions.

The manner in which the Supreme Court interpreted the Constitution in the recent cases of *Garcia vs. San Antonio Metropolitan Transit Authority* and *South Carolina vs. Baker*, represent a clear and distinct pattern of eroding states' rights and constitutional protections under the 10th Amendment.

These two decisions substantially reduced constitutional protection for state authority, forcing states to make their case with the U.S. Congress much like a special interest group. The *Garcia* decision holds "that the limits are structural, not substantive," resulting in states having to find protection from congressional regulation through the national political process, not through judicially defined spaces of unregulated state activity.

The Supreme Court decision in *South Carolina* not only confirmed the *Garcia* decision but virtually eliminated any remaining 10th Amendment protection. In *South Carolina vs. Baker* the Supreme Court overturned a 100-year-old precedent by stating that the issuance of tax-exempt debt was no longer guaranteed. This attack on the longstanding notion of intergovernmental tax immunity — one of the pillars of federalist society — left states and their municipalities at the mercy of further deleterious cutbacks by Congress.

In her dissent, Justice Sandra Day O'Connor said, "Henceforth, the ability of state and local governments to finance their activities will depend in part on whether Congress voluntarily abstains from tapping this permissible source of additional income tax."

The loss of intergovernmental tax immunity coupled with the enormous federal budget deficit could increase the likelihood that Congress will further restrict the ability of state and local governments to issue tax-exempt bonds. There also is concern that Congress might rescind the deductibility of state and local income taxes and impose a national sales tax or value-added tax that would pre-empt the states' major source of revenue.

The National Association of State Treasurers is working with the major public interest groups

in opposing legislative and regulatory restrictions in the public finance area.

Treasurers are seeking support for an amendment to the U.S. Constitution to restore intergovernmental tax immunity to help protect the continued sovereign status of state and local governments.

The association also has supported House and Senate resolutions introduced in the 101st Congress banning changes regarding the taxation of state and local bonds and prohibiting the taxation of the interest earned on those bonds.

Legislatures in Oklahoma, South Carolina and Utah have adopted resolutions calling for a constitutional amendment protecting the tax exemption of municipal bonds. Similar efforts are underway in Texas, New Mexico, Minnesota and North Dakota.

State treasurers and other state and local government officials are ready to develop strategies to stop federal encroachment of state sovereignty and restore the ability of state and local governments to rebuild this country's deteriorating infrastructure and meet other capital financing needs.

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A Proposal to Strengthen Federalism

by John Kincaid

Federalism could be strengthened immensely by requiring a three-fourths vote of the U.S. Supreme Court to void state law.

Two recent decisions by the U.S. Supreme Court — *Garcia vs. San Antonio Metropolitan Transit Authority* (1985) and *South Carolina vs. Baker* (1988) — have heightened concern about the erosion of state and local authority in our federal system. These decisions, plus other political and economic developments, have prompted discussion of possible constitutional reform to strengthen the states and, indirectly, local governments in the federal union.

Proposals for reform have taken two general forms: (1) substantive limits on the scope of national decisionmaking, such as a constitutional amendment to protect tax exemptions for state and local bonds, as proposed by the National Association of State Treasurers and by U.S. Sen. William V. Roth, and (2) procedural rules to enhance the voice of the states in national decisionmaking, such as the 1988 proposal by the National Governors' Association to amend Article V of the U.S. Constitution to make it easier for states to initiate constitutional amendments (U.S. ACIR 1989).

There is, however, no widespread agreement on the need for constitutional reform, or on the best type of reform. Even so, discussion of reform is healthy, and helps to focus public attention on fundamental questions of federalism.

This article calls attention to the role of the U.S. Supreme Court in nationalizing the federal system and advances a modest proposal that the U.S. Supreme Court be constitutionally required to reach a three-fourths vote to void a state law or local ordinance. This rule would apply to state or local acts that are said to violate the U.S. Constitution or a federal statute enacted pursuant to congressional and presidential interpretations of national power under the U.S. Constitution.

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The immediate impetus for the proposal is the fact that the 1985 *Garcia* decision, which overruled *National League of Cities vs. Usery* (1976), was decided by a 5-4 vote, as was *NLC*. This sequence of important, narrowly decided, federalism decisions is troubling for many reasons, but two are particularly relevant. First, the decisions illustrate the extraordinary power that can be exercised by a bare majority of the Court in our democracy — five persons (and sometimes only four) who are not elected and who hold office "during good behaviour." Second, this historically speedy reversal of one decision by another, or "Court Flip-Flop" as *Time* magazine put it, illustrates the uncertainty and instability that can be introduced into the federal system in a short time period by simple majority voting on the Court.

The basic premise for the three-fourths vote proposal is that federalism is a fundamental constitutional value. A key problem in protecting this value is that a federal distribution of powers can be stipulated in general terms, and with a few specifics, but not in detailed constitutional terms capable of meeting all future contingencies. Therefore, enduring decision rules and representative structures must be established to protect fundamental values — such as federalism, the separation of powers and individual rights. It is not enough, for example, to stipulate a separation of powers, one must also structure the separation so that, in James Madison's words: "Ambition [can] be made to counteract ambition"

One decision rule that is frequently invoked to protect fundamental values in a democratic society is to require an extraordinary majority vote on certain questions. In framing a constitution, the people decide which questions shall be subject to such a voting rule and then apply the rule to themselves as a whole, to legislative bodies, to plural executive councils and/or to courts. A familiar judicial application of this rule is the

requirement that a jury reach a unanimous verdict of guilty in many types of criminal cases. This voting rule strikes most citizens as being fair and democratic because a criminal trial places a defendant's fundamental rights to liberty or life in jeopardy. Even though some guilty defendants escape punishment, we accept this voting hurdle as a necessary price of justice in our democracy. Many Americans are also familiar with extraordinary vote rules in voluntary associations when, for example, a two-thirds or three-fourths vote may be required to amend an association's constitution or covenant.

Surprisingly, for a document otherwise attentive to checks and balances, the U.S. Constitution provides no voting rules for the U.S. Supreme Court, nor for that matter does it provide for judicial review, the size of the Court, or written decisions. Yet, state constitutions at least stipulate the size of the state high court or courts. Many state constitutions also require written opinions with "the grounds stated;" many establish a quorum rule; and some require the state high court to sit *in banc* for certain cases. The North Dakota Constitution goes so far as to say that "supreme court shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide." For the U.S. Supreme Court, however, judicial review, nine members, written decisions and simple majority voting are all traditions.

The absence of constitutional rules governing these matters is an important reason why the U.S. Supreme Court is so independent and powerful. The Court has had considerable freedom to define its powers. For much of U.S. history, the Court exercised a large measure of restraint. It was not the powerful player that it is today in the political system, although it occasionally tried to be such a player, as in the infamous *Dred Scott* case (1857). Now, however, the Court exerts considerable power and makes policies having far-ranging effects on American society. One key to this power is that it can be wielded by as few as five or even four justices. The question, then, is whether the Court's current power position was anticipated by the people of the several states who ratified the Constitution — a position that may now require a reconsideration of the constitutional provisions governing the Court, at least to provide better protection for the state-local share of the constitutional distribution of powers. The original provisions for the Court may have been compatible with the design of the Constitution because they envisioned a restrained judiciary, but now that the Court is much more aggressive vis-a-vis the states, one must ask whether the Court's behavior has altered the design of the Constitution. If we still value federalism, then just as we protect defendants in criminal trials, it may be time to consider an extraordinary vote

rule for those occasions when a traditional power or the very status of the states as semi-sovereign polities is challenged before the highest court in the land.

"Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial."

— Brutus, 1788

The Least Dangerous Branch?

Writing in defense of the proposed Constitution in 1788, Alexander Hamilton asserted that the federal "judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them" (Federalist 78). After all, argued Hamilton, the U.S. Supreme Court would not dispense honors, hold "the sword of the community," command the purse, or prescribe "the rules by which the duties and rights of every citizen are to be regulated." Thus, unless Hamilton was slipping a Trojan horse into the ratification debate, we have to take him at his word: even though the Court would be highly independent and would exercise the power of what we now call judicial review, the Court would not be a major center of power or an independent instrument for the aggrandizement of national power. Sufficient checks had been placed on the federal judiciary to prevent such a development.

Although the judiciary was not a prominent target of critics of the proposed Constitution, Brutus, who was one of the most important and articulate Antifederalist essayists, disagreed with Hamilton. Brutus argued that the judiciary would become the most dangerous branch, at least with respect to the preservation of state powers. "Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial," he wrote in 1788 (Storing 1981). "The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner . . . an entire subversion of the legislative, executive and judicial powers of the individual states." Brutus was convinced: "That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction."

Brutus' observations also are useful for the light they shed on the origins of the 10th Amendment. Brutus believed that if the Constitution were adopted, it would be essential to add amendments to protect the states as well as individual

rights. Here, he was expressing a widely held view that led to the ratification bargain of 1788, namely, the agreement that the first Congress would propose amendments to mitigate the aggrandizing features of the Constitution and afford greater protection for the states. One of those amendments ratified three years later was the 10th Amendment.

The 10th Amendment was not, therefore, a mere truism; it was to be both a substantive limit on national power and a guideline for interpreting the U.S. Constitution.

This history suggests that the 10th Amendment had meaning; it was not a rhetorical affirmation of what was already enshrined in the Constitution. Yet the U.S. Supreme Court majority dismissed this understanding of the 10th Amendment in its *Garcia* and *South Carolina* rulings. Although it is correct to say that the framers of the Constitution — namely, those who drafted the document and viewed it as a good product — believed that state powers would be protected by the representative structures and procedural safeguards built into the national political process, critics of the document were much less sanguine. Therefore, the critics pressed for, and obtained, a promise of amendments from supporters of the Constitution, a promise that was fulfilled by the Bill of Rights.

The 10th Amendment was not, therefore, a mere truism; it was to be both a substantive limit on national power and a guideline for interpreting the U.S. Constitution. The Supreme Court majority surely aggravated its error in *Garcia* by holding in *South Carolina* that to obtain judicial relief from expansions of national power, states will have to show that the national political process was defective. The whole point of the 10th Amendment, as well as the other amendments, was to correct a process that was already viewed as defective. If the state ratifying conventions had viewed the process as adequate to protect the states in the first place, we would not have the 10th Amendment. We have the U.S. Constitution because most Americans did not believe that the Articles of Confederation provided for a sufficiently strong national government, but we have the 10th Amendment because most Americans did not believe that the originally proposed Constitution provided for the preservation of sufficiently strong states.

In retrospect, the U.S. Supreme Court has been neither as tame as predicted by Hamilton nor as dangerous as expected by Brutus. The Court has not sought "to abolish entirely the state governments, and to melt down the states into one entire government," as Brutus thought it would do.

Yet the Court has become much more powerful and has had a more corrosive effect on state powers than Hamilton led his readers to believe in 1788. By declaring the 10th Amendment to be a "mere truism" in 1942 (*United States vs. Darby*) and by holding in the 1980s that the states must protect their interests through a deficient political process that the 10th Amendment was designed to correct, the Supreme Court has abrogated the ratification agreement of 1788, opened the door to unchecked congressional interpretations of its own powers vis-a-vis the states, and altered even the design of the original Constitution that was to have made the federal judiciary the least dangerous branch.

If state and local governments wish to remedy this situation, they must, as the Court said, turn to the political process. Although the Supreme Court majority had the congressional and presidential arenas in mind when it told the states to protect their interests through the national political process, there is no reason to construe this process so narrowly. The national political process also includes Article V, namely, constitutional amendment. Constitutional politics is high politics and should not be entered into lightly, but it is fully provided for in the U.S. Constitution.

Court Erosion of State Authority

Brutus was perhaps most correct in arguing that the federal judiciary would be partisan. As an agency of the national government, the federal judiciary would naturally favor expansions of national power over state powers. In this, the federal courts also would have a self-interest because any expansion of national power would be an expansion of federal judicial power.

One way of looking at how this observation has been tested by history is to examine U.S. Supreme Court decisions that have held congressional acts, state laws and local ordinances to be unconstitutional. From 1789 through mid-1986, the Supreme Court had declared only 121 acts of Congress to be unconstitutional in whole or in part. During that same period, however, the Court held 1,026 state acts and 113 local ordinances to be unconstitutional in whole or in part (Congressional Research Service 1987). The exercise of this power has grown during 25-year periods (except 1964-1986) since 1789 (table 1). Clearly, the data in table 1 indicate that the Court was comparatively restrained for about the first 130 years of U.S. history. Looking at the exercise of judicial review from 1789 until the 1920s, one might well agree with Hamilton that the federal judiciary was the least dangerous branch. Since World War I, however, the Court has become much more interventionist.

During the 73 years from 1914 through mid-1986, the Court overturned more congressional and state-local acts than it did during the first 125 years of U.S. history. Put another way, 72 percent of all congressional acts and 78 percent of all state-local acts voided by the U.S. Supreme Court since 1789 were overturned during a period that accounted for only 37 percent of U.S. history.

It is also apparent, however, that the Court has been comparatively restrained in voiding acts of Congress. This restraint is another reason why the Court has acquired power. The Congress and the president can strike back at the Court. By being restrained in attacking congressional and presidential exercises of power that erode state authority, the Court protects itself from its natural competitors (or predators).

Indeed, when the Court first mounted an historically unusual assault on congressional-presidential legislation in the 1920s and 1930s, it soon found itself under siege. Although President Franklin D. Roosevelt's court-packing plan failed, the "switch in time that saved nine" clearly signaled that the Court got the message. The states, however, do not have the same ability to strike back. As a result, having been tamed and put back into its "least dangerous" place with respect to the other two branches of the national government, the Court has, during the past 50 years, regained power and prestige by turning its attention to state powers — a direction that not only makes the Court king of a new hill, but also mollifies its competitors on Capitol Hill.

Given that the Court voided 48 congressional acts from 1964 through mid-1986, one might think that this apparently bold re-entry into the congressional-presidential thicket would have provoked another counterattack. Yet this has not been the case, in large part because there is a crucial difference today. More than three-quarters of the Court's decisions overturning acts, or usually portions of acts, of Congress during 1964-1986 involved questions of individual civil, criminal, or welfare rights having benefits for persons but only marginally frustrating effects on national policies.

Except for a few decisions, such as *National League of Cities vs. Usery*, now overturned by the Court, and *Oregon vs. Mitchell* (1970), now overruled by the 26th Amendment (18-year-old voting), the Supreme Court has not been thwarting congressional and presidential policies that expand national power or contract state power. Furthermore, some of those 48 decisions have benefited one or both of the other branches. For example, *INS vs. Chadha* (1983), which overturned the legislative veto, benefited the president, while *Buckley vs. Valeo* (1986), which voided certain campaign-spending limits, benefited the electoral interests of members of Congress and numerous aspirants for federal office. No wonder

Table 1
Congressional and State-Local Acts Held Unconstitutional By the U.S. Supreme Court 1789-1986

Period	Number of Acts Declared Unconstitutional	
	Congressional	State-Local
1789-1813	1	3
1814-1838	0	15
1839-1863	1	20
1864-1888	15	99
1889-1913	17	118
1914-1938	31	301
1939-1963	8	183
1964-1986	48	399
Totals	121	1,139

SOURCE: Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* (Washington, DC: U.S. Government Printing Office, 1987) and 1986 Supplement.

the Court is so powerful. By doing favors for its sister branches, the Court stays well out of harm's way.

Unwilling to meddle with the powers of its strong sister branches in a significant way, the Court meddles with the powers of what are now routinely regarded as the nation's "lower level" governments. This is an astonishing development because it means that the Court is not vigorously policing the borders created by two of the most fundamental features of our national Constitution: the separation of powers and federalism. Hamilton was right. No sibling rivalry here. For Congress and the president, the federal judiciary is the least dangerous branch. For the states, however, Brutus had more than an idle point.

Decline in Respect for Precedent

Another way of looking at the Court's impact on stability and predictability in the federal system is to examine the number of times the Court has overruled itself. Through 1938, the Court displayed comparatively high regard for precedent by overruling itself only 48 times during the first 150 years of U.S. history (table 2). From 1939 through mid-1986, however, the Court overturned previous decisions 136 times. Put another way, 74 percent of the decisions overturning precedent have been made during the last 24 percent of U.S. history. One also sees (column 2) an increase in the number of precedents overturned in each new period of U.S. history, except the 1889-1913 period. Given the Court's enlarged agenda and active policy-making, the increased number of precedents overturned should not be surprising. Even so, *stare decisis* has not fared well in recent decades.

Table 2
Trends in U.S. Supreme Court
Overruling of Precedents, 1789-1986

Period	Number of Decisions Overruling Precedent	Number of Precedents Overruled	Average Age (Years) of Precedents Overruled	Era in which Overruled Precedents were made
1789-1813	1	1	2	6
1814-1838	2	3	17	7
1839-1863	4	9	18	13
1864-1888	17	19	18	26
1889-1913	4	5	41	38
1914-1938	20	28	23	67
1939-1963	51	82	24	70
1964-1986	85	102	32	22
Totals	184	249	—	249

SOURCE: Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* (Washington, DC: U.S. Government Printing Office, 1987) and 1986 Supplement.

The third column in table 2 shows the average age in years of decisions overruled by the Supreme Court in each 25-year period. One might expect the average age of overruled decisions to increase as more old decisions presumably become outmoded by the passage of time. On average, however, the precedents overruled by the Court have been less than 25 years old. Again, the principal exception was the 1889-1913 Court, but that Court overruled only five precedents, one of which was 99 years old.

The average-age figure of 32 years for 1964-1986 indicates that today's Supreme Court has been reaching farther back into history than usual to overturn precedent. This average figure, however, obscures a kind of schizophrenic peculiarity of the current Court. That is, 47 percent of the precedents overruled by the Court during 1964-1986 were more than 25 years old (compared to 37 percent for the 1939-1963 Court), while 53 percent were 25 years old or less. Such shifting between older and newer precedents as targets for reversal does not promote stability or predictability. Indeed, the states felt the effects of this wandering through history when the Court overturned the 9-year-old *NLC* decision in *Garcia* and then the 93-year-old *Pollock vs. Farmers' Loan and Trust Co.* decision in *South Carolina*. One cannot count on time to settle precedent for the Court. The 1964-1986 Court went back as far as 121 years to overturn precedent.

The fourth column in table 2 shows the periods in which overruled decisions were originally made by the Court. For example, 70 of the precedents overturned by the Court were originally made during the 1939-1963 period. Fully 55 percent of the precedents subsequently overruled by the Court were made during two periods, 1914-1938 and 1939-1963. Again, these data illustrate

the uncertainty produced by the Court's repudiation of even relatively recent precedent.

The Rise of Split Voting

Changing patterns of voting on the Supreme Court add another element of unpredictability to the status of state and local governments in the federal system. From 1789 through 1929, some 64 percent of the Court's decisions striking down state laws and local ordinances were made by unanimous votes. Since 1929, however, only about 50 percent of these decisions have been unanimous — a significant decline in Court agreement on questions of federalism and a significant increase in the ability of a small number of nationalist-minded justices to overturn the work of numerous governors and perhaps thousands of state legislators.

Another indicator of dissension is David G. Savage's examination of 38 Supreme Court decisions affecting state and local governments in 1987. States and localities won 21 and lost 17 of those 1987 cases. Strikingly, only seven (18 percent) of those 38 decisions were unanimous. Fully 14 of the decisions (37 percent) were decided by 5-4 votes, while another seven (18 percent) were decided by 6-3 votes (Savage 1988). Such voting behavior hardly lends confidence to the idea that the justices are dispassionately interpreting the same document.

Figure 1 graphically illustrates the historical trends discussed here. The graph shows the dramatic rise in Supreme Court decisions striking down state and local acts as unconstitutional, as well as the trends in dissenting behavior. Since 1789, there have been three periods of sharp increases in Court nullifications of state and local acts: (1) the 1860s through the 1880s, (2) the 1910s and 1920s, and (3) the 1960s through mid-1986.

There have been six decades in which the number of cases having one or more dissenters has equaled or exceeded 50 percent: the 1820s (50 percent), the 1840s (56 percent), the 1850s (86 percent), the 1940s (66 percent), the 1950s (58 percent) and the 1980s (50 percent). Overall, however, all six decades since 1929 have been marked by historically high levels of dissent.

What Might Have Been?

If the Supreme Court had been required since 1789 to reach a three-fourths vote (7-2 today) in order to void state laws and local ordinances, what would have been the effects of the rule on state and local governments? We cannot, of course, be certain what behavior would have been like in the past; however, we can get an indication by tallying the numbers of cases in which state and local acts were voided on constitutional grounds by less than three-quarters of the justices. The results of this tally are presented in table 3.

Except for the 1850s when 71 percent of the voided state acts (5 of 7 cases) would have been upheld, the three-fourths rule would have had modest but useful benefits for state and local governments (table 3). National supremacy within the domain constitutionally assigned to the national government would not have been severely compromised by the rule, but state and local governments would have gained varying degrees of relief from expansive national powers. This is why the three-fourths rule is a "modest" reform proposal. It would change the rules of the game so as to give the benefit of the doubt to state and local governments, but it would not upset the constitutional apple cart or paralyze the national government. Thus, so far in the 1980s, the national government would still have won 68 percent of the cases, but 32 percent (or nearly a third) of the state and local acts voided by the Court would not have been vacated if the rule had been in effect — no small measure of relief in this era of nationalization.

One question that comes to mind immediately, though, is: What would have been the effect of the three-fourths rule on historic decisions, especially those involving individual rights? Although any list of historic decisions is a matter of judgment, what follows is a list of what would probably be generally accepted as historic decisions, each of which would have withstood the three-fourths rule.

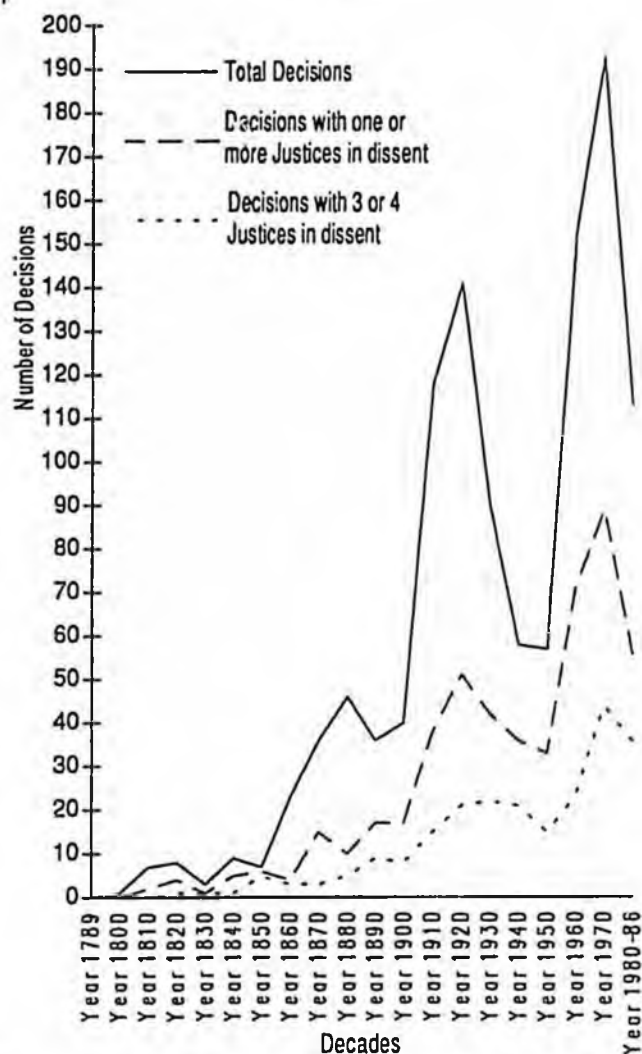
Fletcher vs. Peck, 1810 (Georgia law violates contracts clause).

McCulloch vs. Maryland, 1819 (state tax on U.S. Bank violates supremacy clause).

Dartmouth College vs. Woodward, 1819 (New Hampshire law altering private charter violates contracts clause).

Gibbons vs. Ogden, 1824 (New York cannot grant exclusive rights to navigate interstate waters).

Figure 1
U.S. Supreme Court Decisions and Dissents
in Decisions Holding State Acts and
Local Ordinances Unconstitutional
1789-1986



Brown vs. Maryland, 1827 (state cannot regulate foreign commerce or levy import duty).

DeJonge vs. Oregon, 1937 (state criminal syndicalism law violates First Amendment).

Hague vs. C.I.O., 1939 (Jersey City ordinance prohibiting distribution of printed matter and public assembly without permit violates First Amendment).

Thornhill vs. Alabama, 1940 (state law prohibiting publicizing of facts in a labor dispute violates First Amendment).

Cantwell vs. Connecticut, 1940 (state law prohibiting solicitation for religion without license and proof of religious cause violates First Amendment).

Joseph Burstyn, Inc. vs. Wilson, 1952 (New York prohibition of showing of film deemed sacrilegious violates First Amendment).

Table 3
Percent of Voided State-Local Acts That Would Have Been Upheld if Three-Fourths Rule Had Been in Effect, 1789-1986

Decade	Percent	Decade	Percent
1789-1799	—	1890-1899	28
1800-1809	0	1900-1909	20
1810-1819	0	1910-1919	13
1820-1829	13	1920-1929	15
1830-1839	33	1930-1939	25
1840-1849	11	1940-1949	36
1850-1859	71	1950-1959	26
1860-1869	13	1960-1969	15
1870-1879	8	1970-1979	23
1880-1889	11	1980-1986	32

Brown vs. Board of Education, 1954 (state laws segregating white and black children in public schools violates 14th Amendment).

Gomillion vs. Lightfoot, 1960 (Alabama law altering Tuskegee boundary to exclude black voters violates 15th Amendment).

Tbrasco vs. Watkins, 1961 (Maryland religious test for public office violates First Amendment).

Gideon vs. Wainwright, 1963 (Florida law not giving indigent defendant court-appointed counsel violates 14th Amendment).

Abington School District vs. Schempp, 1963 (Pennsylvania law requiring public-school Bible-reading violates First Amendment).

Westberry vs. Sanders, 1964 (Georgia law creating congressional districts of unequal population size violates Article I, Section 2).

Reynolds vs. Sims, 1964 (Alabama law creating state legislative districts of unequal population size violates 14th Amendment).

Dombrowski vs. Pfister, 1965 (Louisiana subversive and Communist law violates First Amendment).

Griswold vs. Connecticut, 1965 (law prohibiting use of contraceptives violates privacy).

Stanley vs. Georgia, 1969 (law prohibiting private possession of obscenity violates First Amendment).

Lemon vs. Kurtzman, 1971 (state laws providing certain aid to sectarian schools violate First Amendment).

Roe vs. Wade, 1973 (Texas law narrowly limiting abortion violates 14th Amendment).

What are some important decisions that would not have withstood the three-fourths voting rule? One decision of continuing concern for state and local governments is *National Bellas Hess* (1967), decided by a 6-3 vote. Another decision is *Kassel vs. Consolidated Freightways Corp.* (1981), which voided state laws prohibiting 65-foot double-trailer trucks on state highways where all neighboring states permitted them. *Democratic Party vs. Wisconsin ex rel. La Follette* (1981), a 6-3 decision, further strengthened national political-party powers. In *First National Bank vs. Bellotti* (1978), a 5-4 decision, the Court struck down a criminal statute prohibiting banks and business corporations from spending money to influence referen-

dum votes on questions not directly affecting them.

Two major rights decisions that would not have withstood the three-fourths rule are *Near vs. Minnesota* (1931), which struck down a newspaper gag law by a 5-4 vote, and *Furman vs. Georgia* (1972), which struck down state death-penalty statutes by a 5-4 vote. Other rights decisions that would not have passed three-fourths muster include *Nixon vs. Condon* (1932), which struck down a Texas white primary law, and *Shapiro vs. Thompson* (1969), which voided one-year residency requirements for welfare assistance.

Looking farther into the past, however, there is a now infamous rights ruling that also would not have passed muster: *Lochner vs. New York* (1905), a 5-4 decision. This ruling struck down state efforts to regulate working hours on behalf of employees. Although today we tend to view the Supreme Court as an institution that expands individual rights over against restrictive state and local laws, in the late 19th and early 20th centuries, the Court often struck down rights-expanding state legislation designed to protect workers, farmers and consumers.

Such Court behavior, moreover, may not be a thing of the past. The recent 6-3 ruling in *City of Richmond vs. J. A. Croson Co.* (1989), which restricted municipal affirmative action programs intended to benefit minority contractors, suggests that the Court may increasingly overturn state and local policies that can be described as progressive or rights-expanding. In some cases, it will be possible to rescue state and local policies by grounding them in state constitutional law (Kincaid 1987); however, in the absence of a three-fourths voting rule on the U.S. Supreme Court, the much-heralded resurgence of the states, which has involved the institutionalization of many now widely accepted reforms and federally induced policies, may be thwarted by narrow

majorities on the Court. A small number of justices deinstitutionalized liberal state and local policies by asserting national supremacy just as readily as they deinstitutionalized conservative state and local policies. The knife cuts both ways.

Rationales For a Three-Fourths Rule

The basic reason for proposing that three-fourths of the justices on the U.S. Supreme Court be required to reach an agreement to vacate state laws and local ordinances is that federalism is an important value deserving protection in its own right. This is not the place to make the case for federalism, but suffice to say that there is no evidence that conditions in the modern world require unabated centralization and nationalization. Evidence from around the world suggests that decentralization in both private and public sector organizations has many progressive and adaptive benefits. Of course, there continues to be a vital role for national governments. Blind across-the-board decentralization would be as unwise as blind across-the-board centralization. Hence, we are back to questions of balance in the federal system and to the original challenge faced by the framers of the United States Constitution: How can we have a strong union with strong states?

This question cannot be answered for all time by a comprehensive list of national and state powers. This is why proposals to rewrite the 10th Amendment are futile. Even if we could agree on a revision, there would be no way of knowing how the Supreme Court would interpret the new language 20, 50, 100 or 200 years from now. Even a simple change, such as adding "expressly" to the 10th Amendment, would conflict with other portions of the Constitution and still leave the task of interpretation to a Court that can usually find a way to strengthen national powers when four or five justices have a will to do so. Similarly, proposals to require the Court to enforce the 10th Amendment are, under current Court voting rules, tantamount to inviting the wolf to come back to guard what's left of the flock.

What is needed is a procedural or deliberative rule that can afford a greater measure of protection for state and local authority than has been the case for practically a century, a rule that can also restrain a Congress and, indirectly, an executive branch that now exhibit all the liabilities of bigness and power. The distinct advantage of a procedural rule is that it allows us to adapt to circumstances. It does not freeze a dynamic principle like federalism into a deadweight, and it does not require us to answer in advance questions that cannot be answered in advance. A procedural rule is also a neutral principle; it cuts both ways on the political spectrum. Most important,

a procedural rule recognizes that most questions of balance in the federal system are, in the final analysis, matters of judgment. The key issue, then, is who should render this judgment.

In short, to protect the lawful powers of the states and the nation and thereby federalism, the Constitution erects, among other things, extraordinary vote rules.

One set of proposed procedural reforms would change the way we amend the Constitution. These proposals seek to make it easier for states to initiate constitutional amendments by either resolving or avoiding the problem of a runaway constitutional convention. This fear of a runaway convention is ironic because a constitutional convention is the highest expression of popular sovereignty — the very foundation of our constitutional republic — but the fear exists nonetheless. Hence, changes in the amendment process are worth exploring, but such change would clearly be a major step, the outcome of which is uncertain.

An interim and perhaps sufficient step could be the proposed three-fourths voting rule on the Supreme Court. This procedural rule recognizes that the U.S. Constitution is, in a *de facto* sense, amended by interpretation, mainly by the Court. The Supreme Court is the umpire or gatekeeper of our federal system. Much of the development and change in the federal system can be attributed to the Court. The problem is that the Court has opened the gate too frequently to allow national power to escape from its constitutional corral. Moreover, the Court in *Garcia* and *South Carolina* has removed the 10th Amendment gate, thus compelling the states and their local governments to protect themselves from injury in the political stampede.

It is this *de facto* amendment power of the Supreme Court that highlights the need for an extraordinary vote rule because, where else do we find such a rule already embedded in the Constitution? We find it in Article V. No amendment can go into effect without the consent of the legislatures or popular conventions in three-fourths of the states. The Congress cannot propose amendments unless two-thirds of both Houses deem it necessary. Amendments also can be initiated by two-thirds of the states, in which case the Congress "shall call a Convention." Here, no extraordinary vote rule is provided for the Congress because the call originates from the people of two-thirds of the states. Given that Congress is the servant of the people, it must call a convention. No voting rule is provided for a convention because a convention is an expression of popular sovereignty, and any amendments proposed by it

would still require ratification by three-fourths of the states.

"We the people" inserted these extraordinary vote rules in Article V for three basic reasons. First, the Constitution is fundamental law that should not be subjected to the vagaries of simple majority voting. Second, except for conventions, the actors in the amendment process are legislative bodies. The extraordinary vote rules greatly increase the likelihood that legislatively enacted amendments will reflect as much public consensus as is possible in a diverse society without paralyzing the union by a rule of unanimity. Third, the Constitution establishes the fundamental distribution of powers between the nation and the states. This is the basic federal bargain, and the framers knew that to make this bargain vulnerable to simple majority voting would be to jeopardize the whole arrangement. Indeed, in order to go into effect itself, the proposed Constitution needed the consent of conventions in nine of the 13 states — the original extraordinary vote rule that brought the union into being.

Those who supported the 10th Amendment could not possibly have believed that the Supreme Court would be able to ignore it, to say nothing of ignoring it by a 5-4 vote.

In short, to protect the lawful powers of the states and the nation and thereby federalism, the Constitution erects, among other things, extraordinary vote rules. Note too that neither party to the agreement, state or nation, can amend the Constitution unilaterally. It takes two to do the amendment tango. Furthermore, Article V is ultimately more protective of state powers than national powers because the only discretionary authority given to Congress is to propose amendments. If the Congress refuses to propose amendments, then two-thirds of the states can require it to call a constitutional convention. Thus, when two-thirds of the states believe that the national government is being truculent, they can appeal to the ultimate sovereign, the people, to arbitrate the issue. The states, moreover, get to ratify all amendments; whether they originate in the Congress or a convention. Congress, however, can neither approve nor veto amendments proposed by a convention. No wonder the Congress is so fearful of a convention. The principal protection for national powers in Article V is the three-fourths state ratification rule. The Congress needs only a minority of states to side with it to block an unfriendly amendment.

If this is not enough evidence that extraordinary vote rules were intended to be important procedural devices for protecting federalism and especially state powers, then consider another

major extraordinary vote rule in the Constitution: Treaties must be ratified by two-thirds of the members of the U.S. Senate who are present. Given that treaties can expand national powers and damage the interests of all or some states, the Constitution gives the states extra protection here. Still another extraordinary vote protection for the states is that a two-thirds vote is needed in the U.S. House to expel a member.

There are still more extraordinary vote rules in the Constitution. A two-thirds vote in both houses of Congress is needed to override a presidential veto of legislation. A conviction in an impeachment trial requires a two-thirds vote of the members of the U.S. Senate who are present.

Two very important patterns underlie these extraordinary vote rules.

First, the Congress is their primary target. They impose procedural restrictions on the Congress because the Congress is the principal repository of the powers delegated to the national government and because the Congress is the principal institutional vehicle for majority rule. Thus, the Constitution's extraordinary vote rules are designed to prevent the Congress, the potentially most dangerous branch, from tyrannizing both its sister branches and the states.

Second, therefore, these extraordinary vote rules are designed to afford a substantial, but not paralyzing, measure of protection for the Constitution's distribution of powers within the national government and between the nation and the states. In other words, when it came to protecting two of the most fundamental features of our national Constitution — federalism and the separation of powers — "we the people" decided that the measure of nationwide consensus required by extraordinary majority voting on fundamental questions is superior to the intrigue, instability and divisiveness that can arise from simple majority voting. Extraordinary vote rules are among what Madison called republican remedies for republican diseases (Federalist 10).

This proposed three-fourths voting rule for the U.S. Supreme Court is, therefore, fully consistent with the letter and spirit of the U.S. Constitution. If those who framed and ratified the Constitution had believed that the Court would be as powerful as it is today, they probably would have provided for such a rule. They, however, did not. As Hamilton said, they expected the Court to be the least dangerous branch. Only people like Brutus thought differently, but ratification of the 10th Amendment was to have taken care of the problem. Those who supported the 10th Amendment could not possibly have believed that the Supreme Court would be able to ignore it, to say nothing of ignoring it by a 5-4 vote.

In effect, the constitutional design of our federal system has sprung an enormous leak. The dam constructed by the 10th Amendment and

the Constitution's extraordinary vote rules to contain and regulate the flow of national power has been battered by many developments in this century. Although the legal origins of rising national power lie primarily in the Congress and presidency, ultimately it is the Supreme Court that not only legitimizes that power but also adds to it by independently striking down state and local laws and by refusing to stand tall against its sister branches.

A three-fourths voting rule would plug the leak and repair the dam, not for the purpose of stopping the flow of national power, but of regulating its flow in a manner consistent with the design of the Constitution. The rule also would have the advantage of strengthening the separation of powers by giving the Supreme Court the constitutional backbone to perform its interbranch duty of checking and balancing congressional and presidential exercises of powers.

Conclusion

Requiring a three-fourths vote of the U.S. Supreme Court to void state law and local ordinances would go a long way toward restoring a better balance of power in the federal system. Such a voting rule would be simple, neutral, readily understandable, stabilizing but not paralyzing, minimally disruptive and fully consistent with the design and principles of the U.S. Constitution. Most important, the rule would give the benefit of the doubt to the states and would require the Court to reach more of a consensus on questions of federalism. In some cases, such a judicial consensus would simply reflect a more general public consensus; in other cases, it would be the first step in building a systemwide consensus.

Finally, unlike many other amendment proposals, we can get a good idea of the implications of

the voting rule by looking at how it might have affected past judicial decisions. In this article, we examined only a narrow range of Supreme Court decisions, namely, those decided on constitutional grounds. To get a full measure of the implications, we would have to look at the whole range of decisions affecting state-local powers. We also would need a better and more complete classification of major versus minor decisions. In addition, there is a need to work out technical refinements and to ensure that state and local governments could have cases heard by the Supreme Court.

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Contradictory Trends in Contemporary American Federalism: *Court, Congress and Centralization*

by Daniel J. Elazar

The U.S. Supreme Court has stood the constitution on its head to give the Congress the last word in federal-state relations at the same time that Congress has stepped up its mandates on states. Despite this, states are taking the lead in policy-making, encouraged by Reagan's New Federalism. In this worst and best of times, protecting the rights of states under the Constitution is important to the preservation of all our liberties.

The most striking aspect of contemporary American federalism is the existence of strong contradictory trends within the federal system. On one hand, in the *Garcia* and *South Carolina* decisions, the U.S. Supreme Court has compounded all its previous errors with regard to the proper constitutional relationship between the federal government and the states. The Court has stood the Constitution on its head to give the Congress of the United States the last word in determining the federal-state relationship in matters deemed to be within the purview of the federal government. In doing so, it threw over 200 years of constitutional understanding and nearly that many years of precedent. The Court has done exactly what the Constitution pledged not to do, that is to say, make one of the parties to intergovernmental controversy the arbiter of the results.

It is difficult for students of American constitutionalism to understand the Court's reasoning. Its decisions in this regard have about as much relevance to original constitutional doctrine as the Court's decisions in church-state cases that allow the federal government to effectively subsidize church-sponsored institutions of higher education while forbidding the states to do the

same for elementary and secondary schools. There, too, the Court reversed the original meaning of the religion clauses in the First Amendment that restricted Congress but did not bind the states in any way. In these and similar cases, it is possible to follow the Court's tortured reading of the U.S. Constitution through its self-created prism of the 14th Amendment, but even those who agree with the results must conclude that the decisions were reached through the kind of convoluted interpretation usually confined to theologians seeking to disprove some previously fundamental religious doctrine that they have come to consider primitive.

This writer has not yet concluded that the 1787 Constitution is primitive. Nor it seems has the American public, given the respect accorded the Constitution on the occasion of the bicentennial of its adoption. It is hard to overemphasize the erroneous character of the recent trend in court decision-making. If the states cannot act to amend the Constitution to clarify this matter and prevent the 10th Amendment from disappearing, then more is the pity.

Armed with new power from the Court, the U.S. Congress has not been slow to act. If the states have been able to hold the line on a number of issues directly confronted in the U.S. Supreme Court decisions, they have lost the battle with regard to congressional mandates. When I began studying federalism approximately 35 years ago,

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I was able to write with full confidence that even the great expansion of federal aid to the states had to be undertaken apologetically, with the federal government carefully justifying every demand placed upon the states and making that demand only as a condition for receiving federal funding, which the states could choose to accept or reject. Even 15 years ago, it was possible to conclude that this was still the basic federal position and since the number of federal categorical grants had grown so greatly, the vast smorgasbord of federal aids allowed the states to pick and choose in fact as well as in theory.

Then came "mandating" whereby the Congress in court-justified actions ordered the states to do this and that without pretense of winning them over through federal aid or making those orders contingent upon accepting federal grants. Nearly a decade ago I referred to this as "prefectorial federalism" in a symposium presented at the American Political Science Association and later published as a special issue of *Publius* (vol. 11, no. 2, Spring 1981). At that time, prefectorial federalism seemed to be emanating from the executive branch of the federal government. In the intervening years the executive branch, headed by President Reagan, has turned out to be generally a great friend of federalism while Congress, increasingly detached as it is from state and local ties, has turned out to be a danger second only to the U.S. Supreme Court.

The key here is the detachment of members of Congress from state and local ties. The transformation of American politics from a state and local party-based system to a free-for-all among individuals supported by various national economic, cultural, social and political interests through political action committees has meant fewer members of Congress have had experience in state and local government. Increasingly candidates for Congress are new to the political arena, and depend on projecting their personalities to raise funds from PACs and individuals to cover today's outrageous campaign costs. Hence they come to Washington without state and local political roots. They settle their families within the Beltway year round, and, while they continue to work their districts, they do so as visitors more than as residents. Thus they have no strong personal commitments to state and local interests, much less to the constitutional rights of the states.

Even the Reagan administration has played a role in fostering the trend toward centralization, either by preferring private economic interests over states' rights at critical junctures, for example, in deregulating highway trucking and interstate banking, or by succumbing to popular pressure without regard to states' rights as in the case of the minimum drinking age.

States Reassert Themselves as Polities

Most extraordinary in the face of all this is the other side of the coin, that within this deteriorating constitutional and political framework, the states have become stronger and more vigorous than ever, have reasserted themselves as polities, and have become the principal source of governmental innovation in the United States as well as the principal custodians of most domestic programs. In this extraordinary turnaround, they have been helped by the catastrophes that have befallen previous presidents and by the positive efforts of the Reagan administration.

State officials discovered that they had powers of their own derived from the very existence of their states as states and did not need to wait for federal initiatives or permission — that the states were indeed polities.

Fifteen years ago, the Center for the Study of Federalism expressed concern for the future of the states as polities, committing most of its public effort on the states' behalf to reawakening the sense of the states as polities among governors, state legislators and administrators, as well as among federal elected and appointed officials (Elazar 1974, 1975, 1976). At the time, the center lacked confidence that the idea could be understood by state officials, including governors whose whole political careers had developed while the states were becoming middle managers in a hierarchical federal system. Then came the crises of the Nixon administration — Watergate, the Arab oil embargo, the national truckers strike and the collapse of South Vietnam. With the federal government paralyzed, the states, particularly the governors, acted to fill the vacuum in the true spirit of federalism and in a manner that should have demonstrated once and for all the virtues of federalism as providing useful redundancy and fail-safe mechanisms, so that when one part of the political system cannot function, other parts can take over.

The states organized the distribution of limited oil and gas resources; governors settled the truckers strike, and state agencies came to the fore in the settlement of southeast Asian refugees. State officials discovered that they had powers of their own derived from the very existence of their states as states and did not need to wait for federal initiatives or permission — that the states were indeed polities. Moreover, states enjoyed exercising those powers and did so well (Hawkins 1982).

By 1975, as the United States was about to enter a new political generation, the second of the post-modern epoch, the states were off and running. The U.S. Supreme Court had entered into a period of rather diffuse retrenchment in the years following the Warren Court. State supreme courts began to pick up the slack through the development of a newly vibrant state constitutional law, building state constitutional foundations for public policy in everything from individual rights to relations among religion, state and society, to the fair distribution of public services. The constitutional legitimacy of these grounds was increasingly recognized by liberals and conservatives on the U.S. Supreme Court, each for their own reasons. State constitutional law became a field of academic and legal interest beyond the courts, a sure sign of its new importance (Kincaid 1988, Tarr 1988, Williams 1988).

We must demonstrate that the preservation of federalism and the rights of states are as important to the preservation of liberty as is the safeguarding of individual rights.

In the mid-1970s, the federal high court began to look more favorably upon state actions in fields previously subjected to pre-emptive decisions by the court's predecessors. For a while it seemed as if the 10th Amendment would be reinvigorated through decisions such as *Usery*. Even today the Court's decisions on federalism are distinctly mixed, with state prerogatives being preserved at least half of the time.

The states' innovative role continued to expand through the late 1970s, in part because of the relative paralysis of the Carter administration (which was not unsympathetic to fostering a greater state role in the federal system and whose relations with the states were generally good and constructive). The election of Ronald Reagan to the presidency clearly changed the thrust of federal government attitudes toward federalism, the states and localities. Reagan campaigned on a platform of states' rights and decentralization. He unashamedly revived use of "states' rights" terminology and reintroduced it into the American political lexicon. In this he was quite successful. For example, an editorial appeared in the *Washington Post* shortly after Reagan's election in November 1980 criticizing him for talking about state sovereignty, while endorsing his emphasis on states' rights.

Although his visible federalism initiatives had only modest success, and other political interests led him to backslide from time to time, President Reagan never wavered in his support for strengthening the states in the federal system.

He succeeded in persuading Congress to fold a large number of categorical grant programs into larger block grants and to eliminate federal revenue sharing, which had become an exclusively federal-local program. His administration significantly reduced the federal regulatory burden on states. He also substantially reduced direct federal-local relations, insisting that intergovernmental activities in which the federal government was a party be conducted through the state governments wherever possible.¹

Other Reagan administration actions had an even greater effect on stimulating the new state role. The huge federal deficit almost completely ended federal policy initiatives and reduced the federal role in existing programs, with the states picking up at least some of the slack. The transformed position of the United States in the world economy encouraged the states to expand their economic development activities worldwide. Governors and other state officials worked with firms and communities to promote foreign investment and trade. While this was done with Washington's blessing, states more than ever became independent actors on the world scene.

The governors especially showed a new assertiveness in responding to the Reagan administration, taking the lead in policy-making in many areas in which they had fought with the federal government for a modicum of managerial control. At the same time, state legislatures did not lag behind. They became more active as policy-making bodies and a new generation of state legislative leaders showed new breadth of concern and understanding on domestic issues facing their states and the country.

Congress also responded to the changed situation. It limited the impact of several Supreme Court decisions that had negatively affected the states in matters of regulation and public personnel administration. Perhaps the crowning achievement in the new congressional responsiveness was enactment of comprehensive welfare reform in 1988. The state-initiated act reflected state ideas of welfare reform and was negotiated by governors working through the National Governors' Association with congressional leaders. The result was hailed as marking a new phase in federal-state relations whereby the states as states had a voice in shaping federal legislation by working directly with Congress and not merely through the federal executive department (Rosner 1988).

The Liberation of States' Rights

What are we to make of all this? Charles Dickens wrote in *A Tale of Two Cities*: "It was the best of times. It was the worst of times." The states'

role in the federal system since 1974 is awesome testimony to state vitality, while the actions of the U.S. Supreme Court and, to some extent, the Congress offer vigorous testimony to the dangers that the states and the federal system face. Even the actions of the Reagan administration offer case studies in both directions, demonstrating once again the need for strong constitutional protections for federalism even where there is the best will in the world on the part of those actively engaged in the political arena to be good federalists. The founding fathers understood this need, which is why they wrote such protections into the Constitution.

In this 200th anniversary of the submission to the states of the Bill of Rights, it is well to remember that, beyond protecting individual rights, these 10 amendments were introduced to preserve the rights of the states within a functioning federal system, to overcome the lingering doubts of many states as to whether the original document was sufficient to do so (Elazar 1988). Those of us who are concerned with federalism need to make the commemoration of the Bill of Rights one that recognizes this fact. We must demonstrate that the preservation of federalism and the rights of states are as important to the preservation of liberty as is the safeguarding of individual rights. We need to call attention to the way in which the U.S. Supreme Court has turned the Constitution on its head, to endeavor to convince the court to change its interpretation so that the Constitution will rest again on its original federalist foundations.

This is now more possible than ever. Until the mid-1970s, states' rights were inevitably associated with arguments on behalf of slavery or racial segregation and discrimination against non-whites. However erroneous such arguments may have been in principle, in practice states' rights were used effectively as a shield for slavery and discrimination. That problem has been overcome as a constitutional issue. It is clear to one and all that the federal constitution and the vast majority of state constitutions are color-blind.

This is the constitutionally correct position in a civil society dedicated to the proposition that "all men are created equal and endowed by their Creator with certain inalienable rights." For the first time in history, believers in federalism can argue that protecting the rights of the states is important for the sake of liberty and is not entangled with slavery and discrimination. Let us go forth and do so.

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Federalism at the Crossroads: *Conflicting Trends, Competing Futures*

by Timothy J. Conlan

The future of federalism is impossible to predict. While states are viewed as stronger than ever, they also have lost valuable political, constitutional and fiscal ground in recent years. The uncertain factors shaping federalism mean that the future of states remains cloudy.

Over the past quarter century, the federal system has been buffeted by powerful and conflicting currents of centralization and decentralization. After nearly two decades of dramatic growth in federal aid and regulatory programs, the nation in 1980 elected a president committed to reversing the growth of domestic spending and responsibilities, restructuring Washington's relationships with the states and the private sector, and above all, rolling back the modern welfare state. Despite the boldness of this agenda, Ronald Reagan seems to have accomplished much of what he set out to do. Thanks in no small part to Reagan's policies, the federal system has swung from two decades of growth and activism at the national level to a surge of innovation at the state and local levels.

Has the system now found a balance that is likely to persist for the foreseeable future? The answer to that question depends to some extent on the policies of the Bush administration and on unpredictable events. But it also depends on the interplay between Reagan's legacy and evolving trends in intergovernmental relations. Viewing the new vitality in state and local government,

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many observers believe that the federal system may have reached a balance reminiscent of the "cooperative federalism" of the 1950s. Yet there are also signs that this vitality may be overshadowed by subtle pressures coming from the federal government which could lead instead to what might be termed "co-optive federalism."

State Renaissance?

Many contemporary analysts predict the emergence of a healthier and more dynamic federal system in the post-Reagan era, characterized by renewed vitality among state and local governments. In the view of some, the real story concerning federalism in recent years has been the system's adaptability and resilience despite repeated and abrupt changes in federal policy since 1960. This resilience is evident in the contemporary burst of state and local policy innovation, in the declining dependence of states and localities on federal assistance, and in the new era of "cooperative federalism" that characterizes the administration of federal aid programs.

Despite Reagan's intentions and policies to the contrary, the welfare state remains alive and well in states and localities throughout America. Governmental activism has flourished during the 1980s as state after state has aggressively addressed issues of educational reform, economic development and welfare dependency. For example, two education scholars recently noted that "the last two years have witnessed the greatest and most concentrated surge of educational reform in the nation's history. . . . The most surprising aspect of the 'tidal wave' of reform is that it

came from state governments. . . . State governments responded with new legislation, policy initiatives and funding (Doyle and Hartle Dec. 5, 1984:1)." The specific reforms are too numerous to list, but they range from enhanced funding and curriculum changes in states across the country, to the wholesale reform of educational systems in Mississippi and Arkansas, to bold innovations in personnel and enrollment systems in Tennessee and Minnesota.

Apart from education, states such as Massachusetts, New Jersey and California have taken the lead in work-related welfare reform, an approach that Congress recently duplicated. Midwestern states have far outstripped the federal government in the breadth of their policy responses to the 1980s' agricultural depression, adopting dozens of programs to expand agricultural markets and to provide social and financial counseling and support services. Health care, insurance reform and higher education innovations have been state priorities.

Nor is this burst of state activism considered to be a temporary response to Reagan administration policies. Looking over the broad range of state and local policy innovations in recent years, a seasoned observer of state and local governments concluded that this "new sense of independence from the federal government . . . promises to be both more profound and more permanent than most people have recognized (Herbers Oct. 1987:28)."

To some extent, this state rejuvenation is an outgrowth of earlier federal policies that stimulated the states to expand their political and institutional capacity to provide services. Subsequent federal aid cuts under Reagan prompted state and local governments to employ their renewed capacity with innovation and responsiveness. For example, most states moved aggressively to restore reductions in federal block grant funding, especially in areas of traditional state competence (Peterson 1986:13-16).

There is certainly no question that state and local governments are now less financially dependent on federal assistance. In a process some have hailed as "defacto New Federalism," federal aid has declined 32 percent since 1978 as a percentage of state and local revenues. During this same period, intergovernmental aid has dropped 33 percent as a proportion of the entire federal budget and as a percent of GNP. Federal grants for governmental service have been singled out, suffering among the deepest reductions of all major budget categories (see table 1). Direct federal aid to localities has been equally hard hit. With the elimination of General Revenue Sharing and the state-oriented restructuring of the Reagan block grants, many localities that once received direct federal funding now receive none at all.

Table 1
Changes in Real Domestic Outlays, FY 1981-1987
(in billions of dollars and percent)

Budget Category	FY 1981	FY 1987	Percent Change 1981-87
Total Non-defense	\$555.2	\$609.5	9.9%
Payments to			
Individuals*	344.3	394.9	14.7
Total Grants in Aid	100.6	90.4	-10.1
To Governments	61.3	43.0	-29.8
To Individuals	39.3	47.4	20.6
All Other	106.0	84.7	-20.1
Net Interest	73.7	117.5	59.4

*Including grants to state and local governments for individuals.

Source: Calculated from U.S. Office of Management and Budget, *Historical Tables, Budget of the United States Government, Fiscal Year 1989*, (GPO 1988), table 6-1.

Despite real reductions in federal assistance, state and local expenditures have continued to increase during the 1980s as many jurisdictions have raised existing taxes, broadened their tax bases and adopted more innovative forms of financing. Nor are these trends toward greater fiscal independence expected to be short-lived. Real reductions in federal aid began under Jimmy Carter, not Ronald Reagan, and existing constraints on the federal budget promise to continue for many years.

The trend toward greater state initiative and independence has been complemented by changes in the way remaining federal programs are implemented. Recent studies of federal program administration have emphasized "when federalism works" rather than problems of complexity, duplication and conflict (Peterson, Rabe and Wong 1986; Levin and Ferman 1985). Just as the refinement of New Deal programs led to an intergovernmental era often dubbed "cooperative federalism," longitudinal analyses of more recent federal initiatives have stressed the ability of federal, state and local governments to work together to resolve administrative conflicts and improve program performance over time.

The renaissance of state and local governments indicates to many analysts that bold federalism reforms of the type proposed by Nixon and Reagan are a thing of the past. If ever they were appropriate, they are now clearly obsolete responses to intergovernmental problems that no longer exist. "No one expects a return to the days of overwhelming federal dominance," writes John Herbers. Instead, he implies, we can look forward to a dynamic state and local sector flourishing in a new age of cooperative federalism.

Or Co-optive Federalism?

A less cheerful scenario for the future of federalism could put reform back on the agenda. Though less fashionable today, this scenario draws attention to new and lingering challenges to the long-term vitality of state and local governments — challenges that may rekindle concern for the federal system. As David Walker (1986:344) has observed:

The systemic position of state and local governments, while operationally powerful, is weak constitutionally and politically . . . Reagan federalism . . . has done little to . . . place the American states on a par with their counterparts in . . . other federal systems.

Thanks in no small part to Reagan's policies, the federal system has swung from two decades of growth and activism at the national level to a surge of innovation at the state and local levels.

Although such weaknesses may not pose an immediate threat to the health of the federal system, problems may result from the "tyranny of small decisions," as Laurence Tribe (1978:302) has put it:

No one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing remains but a gutted shell.

Such a scenario rests, first, on the assumption that states and localities are legally vulnerable under contemporary judicial interpretations of the Constitution. Traditionally, the Supreme Court acted as the ultimate arbiter of federal and state roles in the federal system, using such provisions as the 10th Amendment and the commerce clause to carve out separate spheres of sovereignty for each level of government. Indeed, until the 1950s, most accepted definitions of federalism were premised on such a judicially policed system of "dual federalism."

The legal concept of dual federalism began to erode during the 20th century, especially after the New Deal. By 1942, the Court had proclaimed the 10th Amendment to be no more than a "truism," and it had established the legal framework for virtually unlimited federal intervention in state affairs through the spending power and commerce clause. In 1976, the Supreme Court made a brief attempt to resurrect the 10th Amendment as a limitation on Congress' jurisdiction under the commerce clause, but the complex test established in *National League of Cities*

vs. *Usery* to protect "integral" and "traditional" state functions from federal intrusion proved unworkable. Within a decade the Court had thrown up its collective hands and overturned the *Usery* decision, relying instead upon "the effectiveness of the federal political process in preserving the States' interests." Indeed, the Supreme Court majority in *Garcia vs. San Antonio Metropolitan Transit Authority, et. al.* stated emphatically that the court was abandoning its role of adjudicating disputes, pitting Congress' power to regulate interstate commerce against state sovereignty claims:

State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Political Weaknesses

Ironically, the Supreme Court may have abandoned state and local governments to the political fray at the very time that such governments' ability to defend their interests effectively in Washington had reached an historic low. The relative weakness of decentralized party organizations; the rise of nationally oriented mass media, electoral resources and interest groups, and congressional actions all raise questions about the Court's logic. "One wonders why," writes Martha Derthick (1986:32), "if the states' interests are so well protected by the political branches, the issue [decided in *Garcia*] reached the Supreme Court at all."

The basis for the Court's reasoning in the *Garcia* case extends back to arguments developed in the 1950s, when legal scholars and political scientists began to theorize that states and localities protect their interests in the federal system primarily through structural and political means. Legal experts argued that the structural features of the constitutional system — such as the electoral college and equal state representation in the Senate — ensure that state interests are represented and protected in the Congress and the executive branch.

Political scientists questioned the effectiveness of such structural features, noting that the presidency (since the 1930s) and the Senate (since the 1960s) most often have been the sources of extensions of federal authority. They pointed, instead, to the protections offered by the American political party system. "The parties," wrote Morton Grodzins (1966:254), "are responsible for both the existence and form of the considerable measure of decentralization that exists in the United States."

Since the 1950s and 1960s, however, the U.S. electoral system has been transformed. The locus

of innovation and leadership in political parties has shifted from local and state organizations, many of which are weaker than before, to the formerly episodic national parties. Although party modernization is taking place in many states and localities today, it is often the direct result of stimulation by the national party organizations (U.S. ACIR 1986).

At the same time, political parties as a whole have lost the near monopoly they once enjoyed over most elements of the electoral system, including candidate nominations, electoral communications, campaign resources and financing, and voter mobilization. In most cases, competing nationally oriented institutions now dominate these activities. State and local party leaders and activists no longer make independent judgments about presidential candidates at national party conventions, but rather ratify decisions made earlier by primary electorates and caucuses. Independent campaign consultants orchestrate congressional campaigns from coast to coast. Some congressional candidates are reluctant to solicit campaign funds from their constituents and, instead, focus fund-raising efforts on political action committees in Washington and money centers in Texas, California and New York. Meanwhile, candidate communications with the electorate occur primarily through the mass media — particularly television.

As a result, recent scholarship suggests that presidents and members of Congress have become far less dependent upon state and local politicians and elected officials for political success. "The development of national issue-oriented followings by presidential candidates seeking nomination," writes Leon Epstein (Fall 1982:100), "has largely replaced . . . state and local party leaders, acting through the old confederative structure."

Similarly in the legislative branch, Huckshorn and Bibby (1982:91-92) argue that "representatives and senators, once in office, feel little sense of obligation to their state and local parties."

To be sure, state and local influence in Washington is not felt solely through political parties and elections. During the past three decades, state and local governments have greatly increased the size and sophistication of their lobbying presence in the nation's capital. Over the years, this intergovernmental lobby has had its share of important victories, from enactment of General Revenue Sharing to securing and protecting funding for Medicaid. Yet, the need to develop such a presence, in part to compensate for the political changes described above, might well constitute a sign of weakness rather than strength. Given the doubling of interest groups in Washington since 1960, the state and local sector has, at best, only kept pace with its frequent competitors.

Thus, it may be no accident that General Revenue Sharing and the Comprehensive Employment Training Act (CETA) were virtually the only large programs that the Reagan administration successfully eliminated, or that grants-in-aid have suffered a disproportionate share of budget cuts over the past eight years, or that grants to governments were left relatively unprotected by Congress from across-the-board cuts under the Gramm-Rudman process. Even the exceptions to this pattern can be informative. Most, though not all, of the state and local income tax deduction was preserved during the bitter battle over tax reform. Yet, this victory was achieved only after great effort, on an issue supported by three-quarters of the American people, for which the principal beneficiaries are higher income taxpayers, thanks to a lobbying campaign organized and funded by New York real estate interests and organized labor.

The renaissance of state and local governments indicates to many analysts that bold federalism reforms of the type proposed by Nixon and Reagan are a thing of the past.

New Complexities

According to the pessimistic scenario, even the perception that intergovernmental interdependence has declined under contemporary federalism is illusory. In many ways, the levels of government are more intertwined than ever. To be sure, Reagan's New Federalism sought to reduce the complexity of existing intergovernmental arrangements and to move the federal system back in the direction of neatly separated functions reminiscent of 19th century "dual federalism" — though on its own strongly decentralizing terms. And federal aid as a percentage of state and local revenues will almost certainly continue to decline.

Nonetheless, state and local governments in many ways face a more complicated Washington environment which goes beyond the issues of federal aid. Although intergovernmental relations once revolved primarily around fiscal relationships, in recent years this federal aid dimension has been massively supplemented by new forms of federal regulatory and tax policy.

In the 1960s and especially the 1970s, the national government began to impose new and far more intrusive regulatory burdens on states and localities. By one count, there were 36 such regulations in force by 1980 (Beam 1981:8-18). Although the pace of new regulations slowed somewhat during Reagan's tenure, since 1981 the federal government has required states and localities to raise the minimum drinking age, to per-

mit larger and heavier trucks on their highways, and to take costly steps to monitor non-point water pollution and public drinking water.

Similarly, virtually every federal tax bill enacted since 1978 has contained provisions inhibiting state and local governments from generating revenue. The national government has increased its competition with the states for "tax room" by raising gasoline and excise taxes. It has relentlessly, and often successfully, attempted to restrict the use of tax-exempt municipal bonds. And it has eliminated federal income tax deductions for state excise, sales and personal property taxes.

Ironically, the Supreme Court may have abandoned state and local governments to the political fray at the very time that such governments' ability to defend their interests effectively in Washington had reached an historic low.

Thus, in addition to concern over the availability of federal funding and how to obtain or retain it, states must watch closely for intrusive federal regulations and seek to protect their remaining benefits in the federal tax code. "The intergovernmental agenda is getting so long it would take all my time just to keep up the list of issues," lamented one state government lobbyist. "We can't begin to respond to them all."

The list of issues is likely to keep getting longer. As the policy platforms of the 1988 presidential candidates made clear, modern politicians — and the people who elect them — still believe that their role is to "do something" about the endless and changing list of problems confronting contemporary society. Unable to devote substantial public funds to the pursuit of new priorities, policy-makers are apt to accelerate the pattern already established in recent years — imposing new regulatory burdens on states and localities while competing with them over tax sources. Martha Derthick (1986:32) has described the potential result:

In particular, there is a danger that Congress, in striving to close the gap between its desire to define large goals and its unwillingness to provide the administrative means to achieve them, will try to conscript the states. That is, it will give orders to them as if they were administrative agents of the national government, while expecting state officials and electorates to bear whatever costs ensue.

Given prevailing constitutional, political and fiscal trends, states and localities risk confronting the worst of all possible worlds. In the past, they enjoyed legal protections from excessive fed-

eral incursions, and federal influence came in the form of federal grants and subsidies. Now that states' political and legal defenses have eroded, even as federal budget constraints have grown, federal mandates and pre-emption might become the principal forms of intergovernmental interaction.

Even the new cooperative federalism described in recent studies might prove to be more akin to "co-optive" federalism. Evidence from these case studies suggests that the key factor promoting smoother intergovernmental administration has not been evenhanded bargaining between the levels of government but the co-optation of state and local decision-making processes by cadres of federally inspired interest groups and professionals (Peterson, Rabe and Wong 1986).

However harmonious such a process becomes, the upshot remains that state and local resources directed toward federal priorities are unavailable for alternative state and local priorities. And the fact that smaller, territorially organized constituencies generate different kinds of policy priorities is one of the basic rationales for a federal system in the first place. Moreover, the resulting administrative pattern of vertically organized, functionally fragmented spheres of authority recalls the very system of "picket-fence" federalism that frustrated governors and state legislators and prompted federalism reform efforts earlier.

Conclusion

The trends shaping our federal system are as complex and contradictory as intergovernmental relations. Neither of these two scenarios for the future is apt to triumph completely. In all probability, elements of these conflicting trends are likely to persist and interact. But should the trend toward co-optive federalism gain the upper hand, issues of federalism and intergovernmental relations are bound to regain center stage on the nation's policy agenda and prompt new calls for federalism reform.

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State Government News 1989 Calendar

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Now Available:

January — *America's Changing Face*. The changing face of immigration by Lydio F. Thomasi, New Americans weather and survive by Al Santoli, Dual cultures shape experiences by Janice Penkalski. Pro/Con on official English by Stanley Diamond and Ruben Bonilla Jr., America's Third World: Colonias by Solomon Ortiz, Diversity and its discontents by Arturo Madrid. Dual citizenship makes Indians a unique ethnic race by La Donna Harris.

February — *The Dialogue Begins*. A message from the president by George Bush, A message to the new administration by Deborah A. Gona, Who's who in Bush's cabinet, Open letter to the White House from the nation's governors, Washington Report: What states can expect in 1989 by Norman Beckman, Deficit attack could cost states by Charles A. Bowsler, State legislators advise Bush by Elaine Knapp.

March — *The Politics of Aging*. Calling a truce in the age wars by Ken Dychtwald and Joe Flower, Saying no to grandma: The political clout of the elderly by Linda Wagar, State agenda for the aged by Greg Merrill, New approaches aid elderly by Keon Chi, Medicaid by Betty Wiseman, Point/Counterpoint on retesting older drivers by Joan Claybrook, Michael Seaton and Patricia Powers, Long-term care by Claude Pepper, What states are doing to help elderly by Diane Justice, Ways to stretch care dollars by Janice Penkalski.

April — *Opening International Frontiers*. Educating for a global economy by Barbara Bundy, Canada: The next frontier by Teresa Taylor, Soviets: Opening the toughest markets by Carol Conway, Banking in yen by Michael Kurtz, The Mexican Connection by William P. Clements Jr., Point/Counterpoint on foreign students by Benjamin Hart and Donald Nelson, When West meets East by Michael G. Hayes, Human rights: More than talk by Betty Wiseman, Any language spoken here by Keon Chi, Capitol Conversation on lobbyists.

Coming Up

May — *Government and the Media*. Invisible States: How the networks ignore states by Doris Graber, Coping with Crisis by Linda Wagar, Negative campaigning by Roger Wilson, Political Cartoons: More than Laughs? by Kathy Tyson, Polishing Political Telfon by Michael Saint, Missing the Big Picture by Charles Wolfe, and Point/Counterpoint on the media and political polls by Mike Rueling and Kenneth Pins, Capitol Conversation on speech writing.

June — *Consumer Protection*. Point/Counterpoint on radical reform of auto insurance, A Look at California's Auto Insurance Revolution, Protecting the Traveling Public: Deceptive Airline Ads, Rental Car Agreements and Reselling Lemons, Problems in Regulating Public Utilities, The biggest frauds and settlements in the 50 states.

July — *Economic Development*. Military base closings, Economics of Gambling, What Japan sees in America, The S&L Mess.

August — *Education*. Tackling Illiteracy, Foxfire: Back to Basics that Work, Pros and Cons of Gifted Programs, Reform's Slow Road.

September — *Hi-tech Down on the Farm*. Innovations in Agriculture, Biotechnology, Producing for Export, Inside the Horse Industry.

October — *Crime and Punishment*. Prison Building Binge, Dealing with Drugs, Domestic Violence, Gun control.

November — *State-Local Relations*. Battling for the 10th, Paying for Mandates, Fiscal Helps and Hurts.

December — *Waste*. Radioactive Relief, Plastics That Stay, Medical Waste.



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Jails, Gangs, Jobs

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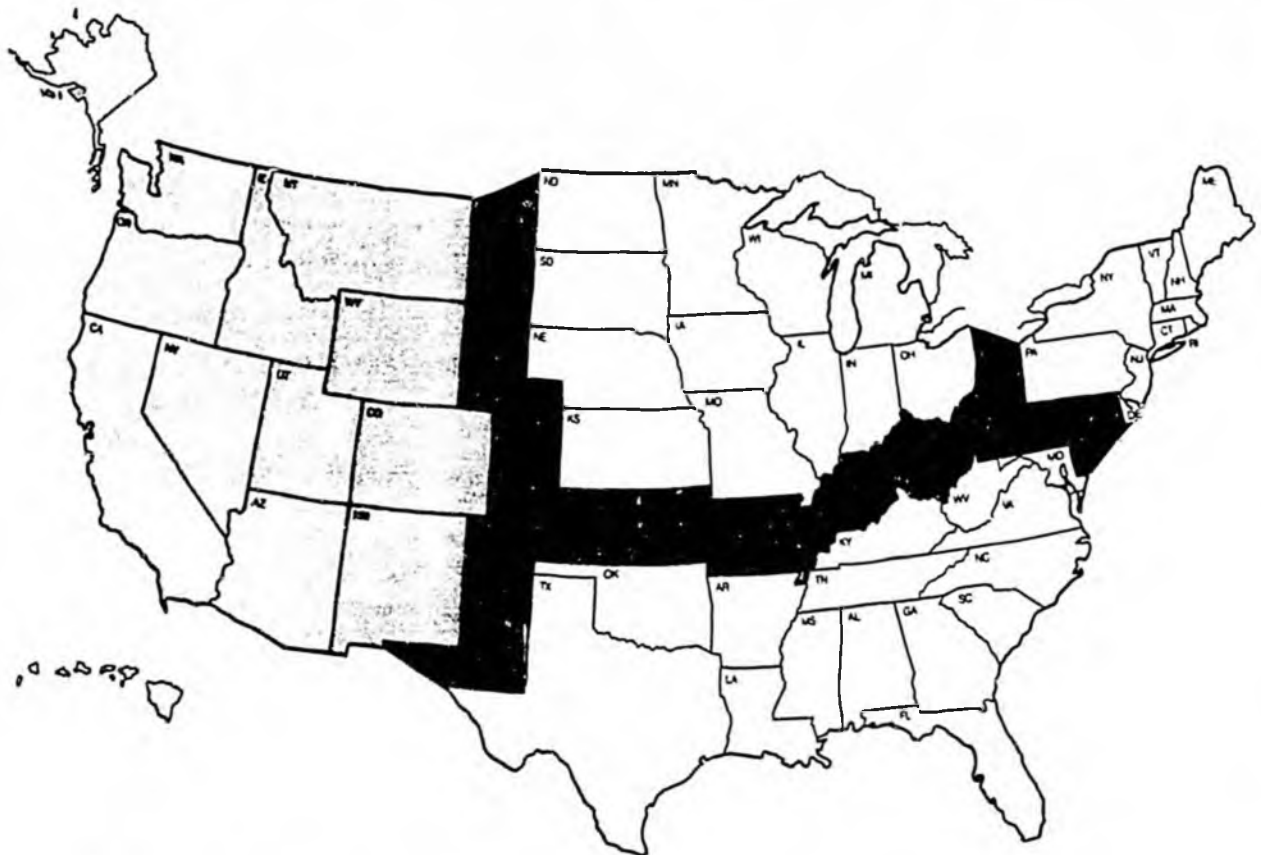
The
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State
Governments



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THE COUNCIL OF STATE GOVERNMENTS

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ARTICLE X.

Powers reserved to states or people. 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.¹⁸

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ARTICLE XI.

Restriction of judicial power. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.¹⁹

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ARTICLE XII.

Election of President and Vice President. The electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves: they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate: — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The

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18. Proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

19. Proposed by Congress on March 4, 1794, and declared ratified on January 8, 1798.

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to implementation by
Congress of the Tenth Amendment to the...
Sponsor: Senator Fahrenkamp
Requestor: Senate Judiciary

Affect Agency Legislative Affairs Agency
BRU: Legislative Council
Components Session Expenses

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

General Fund						
Federal Fund						
Other						
TOTAL	0	0	0	0	0	0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

No fiscal impact.

Prepared By: Pamela Stoops, Director
Division: Administrative Services

Pamela Stoops

Phone: 465-3850
Date: 4/14/89

Approved By: Warren Endicott, Executive Director
Agency: Legislative Affairs Agency

Warren Endicott

Date: 4/14/89

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Original sponsors: Fahrenkamp, Sturgulewski,
Eliason, et al.

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 HOUSE CS FOR SENATE JOINT RESOLUTION NO. 43 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 Relating to implementation by the Con-
6 gress of the Tenth Amendment to the
7 Constitution of the United States.

8 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 WHEREAS the Tenth Amendment of the United States Constitution, a part
10 of the Bill of Rights, provides that "The powers not delegated to the
11 United States by the Constitution, nor prohibited by it to the states, are
12 reserved to the states respectively, or to the people."; and

13 WHEREAS the limits under the Tenth Amendment on the authority of Con-
14 gress to overrule the laws of the states have recently been reviewed by the
15 United States Supreme Court in Garcia v. San Antonio Metropolitan Transit
16 Authority, 469 U.S. 528 (1965) and South Carolina v. Baker, 485 U.S. ___,
17 99 L.Ed.2d 592 (1988); and

18 WHEREAS the opinions hold that the states must find protection from
19 efforts by the Congress to overrule state legislation through the political
20 process rather than from constitutionally defined protection in the Consti-
21 tution itself; and

22 WHEREAS the opinions offered no protection to state legislation and
23 invite further preemption by the Congress of the authority of the states;
24 and

25 WHEREAS the Alaska State Legislature believes that the Tenth Amendment
26 to the Constitution of the United States is and has been of operational
27 force governing and balancing the respective powers of the United States
28 and the states; and

29 WHEREAS the Alaska State Legislature believes that the Tenth Amendment

1 is a substantive limit on the power of the Congress and should be applied
2 by courts of the United States and of the several states as a substantive
3 limit on national power in cases coming before them when a question of the
4 authority of the states is raised;

5 BE IT RESOLVED that the President and the Congress are urged to carry
6 out their constitutional responsibilities to protect and strengthen the
7 position of the states in the federal union, to avoid intrusion upon the
8 prerogatives of the states, and afford protection to the proper governing
9 authorities of the states.

10 COPIES of this resolution shall be sent to the Honorable George Bush,
11 President of the United States; to the Honorable Dan Quayle, Vice-President
12 of the United States and President of the U.S. Senate; the Honorable Jim
13 Wright, Speaker of the U.S. House of Representatives; and to the Honorable
14 Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the
15 Honorable Don Young, U.S. Representative, members of the Alaska delegation
16 in Congress.

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SJR

44

HOUSE COMMITTEE REPORT

(7)

Date Referred: April 21, 1989

FURTHER REFERRALS: RESOURCES

Date of Committee Action: 5/1/89

The JUDICIARY Committee considered:

SJR 44

SENATE JOINT RESOLUTION NO. 44

[TAIWAN INTERCEPTION OF ALASKA SALMON]

Relating to economic sanctions against Taiwan for high seas interception of Alaska salmon and steelhead.

RECOMMENDATIONS:

- [] be replaced with _____ [] the same title
[] have attached amendment(s) [] a new title
[] do pass
[] do not pass
[] no recommendation
[] individual recommendations
[] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- [] fiscal impact _____
[] zero fiscal note _____
[] zero with analysis _____

- [] fiscal note(s) _____
[] zero fiscal note(s) 4/17/89 - Senate Resources Committee
[] zero fn/analysis _____

SIGNING DO PASS:

Peter J. ...
...
...
...
...
...
...
...
...
...

SIGNING:

(Check approp. column)

	Do Not Pass	No Rec	Amend

... Peter J. ...
Chairman's Signature

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE 4/13/89
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035

4/11/89

DATE TURNED INTO OFFICE 4/17/89

Mr. President:

RESOURCES

Committee considered SJR 44

economic sanctions against Taiwan for high seas interception of Alaska salmon and steelhead

and recommended:

replace with CS _____ same title
 attached amendment(s) and new title

_____ letter of intent adopted

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

FISCAL NOTE(S) attached zero fiscal impact
 appropriation no FN attached Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

Reik Halgord
McElroy
Kathleen
Julius J. S. ...
...
...

OTHER RECOMMENDATIONS

Dwayne Johnson
Chair signature and recommendation

Committee backup attached

ALASKA STATE LEGISLATURE

While in Ketchikan
352 Front Street
Ketchikan, AK 99901
907-225-9675



While in Juneau
P.O. Box V
Juneau, AK 99811
907-465-3743

Senator Lloyd Jones

MEMORANDUM

TO: Representative Peter Goll, Co-Chair
Representative Max Gruenberg, Co-Chair
House Judiciary Committee

FROM: Senator Lloyd Jones *LJ*

DATE: May 1, 1989

SUBJECT: SJR 44

Thank you for hearing Senate Joint Resolution 44, which asks the President of the United States to invoke the full extent of Pelly amendment sanctions against the country of Taiwan.

Pelly amendment sanctions will restrict the importation of fish and aquatic products from Taiwan into the United States. This is currently estimated at approximately \$445,000,000 annually. This type of direct economic pressure is necessary at this time to force Taiwan into a negotiating position with the U.S. No agreement regarding high seas salmon fishing by the Taiwanese currently exists. Because of a lack of substantive measures again against Taiwan, little incentive for the Taiwanese to enter such an agreement exists.

Both the Washington State legislature and the Washington State Congressional delegation have introduced similar resolutions. In addition, this resolution is supported by SEACOPS, Southeast Seiner's Association, United Fishermen of Alaska, and the Alaska Troller's Association.

I urge you to vote favorably on this resolution.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SJR 44
PUBLISH DATE: 4/17/89

FISCAL NOTE

REQUEST: _____

REVISION DATE: _____
TITLE: Taiwan Interception of Alaska
Salmon

AGENCY: _____
BRU: _____

SPONSOR: Senator Jones
REQUESTOR: _____

COMPONENTS: _____

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
OPERATING						
PERS. SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND/BUILD.						
GRANTS/CLAIMS						
MISCELLANEOUS						
TOTAL	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS:

SJR 44 requests that the Pelly Amendment provision, which would prohibit importation of Taiwanese fish and aquatic products, be strictly adhered to and immediately invoked. SJR 44 has no state fiscal impact.

PREPARED BY: Nancy Petersen, Staff, Senate Resources Committee

DATE: 4-17-89
PHONE NO.: 465-3872

April 11, 1989

SENATE JOURNAL

p. 1179

SJR 44

SENATE JOINT RESOLUTION NO. 44 by Senators Jones, Binkley, Eliason, Coghill, Fischer, Zharoff, Sturgulewski and Kelly,

Relating to economic sanctions against Taiwan for high seas interception of Alaska salmon and steelhead.

was read the first time and referred to the Resources Committee.

April 18, 1989

SENATE JOURNAL

p. 1287

SJR 44

The Resources Committee considered SENATE JOINT RESOLUTION NO. 44 (Relating to economic sanctions against Taiwan for high seas interception of Alaska salmon and steelhead) and recommended do pass. The report was signed by Senator Fahrenkamp, Chair, and concurred in by Senators Halford, Eliason, Kerttula, Sturgulewski, Zharoff and Frank.

Zero fiscal note published today from Senate Resources Committee.

SENATE JOINT RESOLUTION NO. 44 was referred to the Rules Committee.



SEACOPS

700 Water Street—Upper
Ketchikan, Alaska 99901
Telephone (907) 225-9004

SEACOPS News Release - January 6, 1989

SEACOPS and Sitka-SEACOPS have released a stinging report on Taiwan's high seas driftnet fishery. SEACOPS is the Ketchikan-based coalition of sport and commercial fishermen opposed to high seas interception of North American salmon and steelhead.

According to the SEACOPS report, in 1977 Taiwan's high seas squid fishery consisted of only six squid jigging vessels. These fishermen caught squid by the traditional method of hook and line jigging. The squid jigging fleet expanded slowly over the next few years but by 1980 the vessels were being displaced by the more profitable driftnet operations.

By 1987 there were 94 Taiwanese high seas driftnet vessels. In 1988 the number jumped to 163. Most of the boats are 150 to 200 feet long but some of the newest are more than 300 feet in length. Additional vessels for the fishery are currently under construction. Each vessel on average fishes 25-35 miles of monofilament nylon net per day for six or more months. Because monofilament net is "practically invisible," its use is outlawed in almost all United States and Canadian waters.

The Taiwanese reported a 1987 high seas driftnet catch of 18,578 tons of squid. Bycatch for 1987 included: 2,566 tons of tuna, 467 tons of billfish (sailfish, swordfish, marlin), 226 tons of bonito and 46 miscellaneous tons. Pat Wood, chairman of Sitka-SEACOPS, states that this official Taiwanese squid catch data reflects the amount of fishing effort dedicated to high seas salmon piracy.

According to Wood, "During the 1987 season, the Taiwanese fishermen caught approximately 200 tons of squid per boat. At the same time the Japanese fishermen averaged over 435 tons of squid per boat - the Japanese catch rate was twice that of the Taiwanese. What in the hell were the Taiwanese doing while they claimed to be fishing for squid? Whatever they were fishing for was so profitable that they added 70 more boats to their fleet in 1988!"

Wood adds, "It's not coincidence that the flood of immature salmon entering the world's markets the last two years has occurred during the expansion of Taiwanese driftnet efforts on the high seas." Wood also announced that SEACOPS' largest chapter, Sitka-SEACOPS, has increased its membership to over 100.

SEACOPS Chairman Mike Holman plans to share the new information with SEACOPS members in Vancouver, B.C. later this month. "SEACOPS is gearing up for a Spring offensive in both Ottawa and Washington," he said. "The health of our salmon and steelhead resources cannot wait for the normal political processes to take their course."

Holman stated, "We are strongly urging that our members continue to write and phone their representatives in Congress and the Canadian Parliament to express their outrage. Over 370 strong with Chapters in 15 communities, the rapid growth of SEACOPS is attributable to the frustration of having spent 20 years rebuilding our salmon stocks only to have them stolen from us by a completely unregulated Asian fishery

REPORT
of the November 1988
U.S.-Taiwan
Bilateral Meeting
on
Assessment of North Pacific
Fisheries Resources

November 5-7, 1988

Held at
Institute of Oceanography
National Taiwan University
Taipei, Taiwan

Report of the November 1988 U.S.-Taiwan Bilateral Meeting
on Assessment of North Pacific Fisheries Resources

November 5-7, 1988
Taipei, Taiwan

INTRODUCTION

Bilateral meetings between U.S. and Taiwanese scientists to discuss research on fishery resources in the North Pacific have taken place periodically since 1977. These meetings were called for by the Governing International Fishery Agreements (GIFAs) between the two countries or by mutual arrangements. They provide an essential forum to coordinate research and exchange views and data on fishery resources that are of mutual concern in the North Pacific.

This scientific meeting was organized to discuss research, observer coverage, and status of knowledge on squid-salmon-ocean temperature interactions in the central North Pacific ocean. The meeting was held at the Institute of Oceanography, National Taiwan University in Taipei.

LIST OF PARTICIPANTS

The following individuals participated in the meetings chaired by Dr. Yeh Shean-Ya:

Taiwan Participants

Dr. Yeh Shean-Ya	Head, Marine Biology and Fisheries Division, Institute of Oceanography National Taiwan University
Mr. Tung Ih-Hsiu	Senior Specialist Institute of Fishery Biology National Taiwan University
Dr. Kuo Chin-Lau	Director, Department of Fishery Biology Taiwan Fisheries Research Institute
Mr. Liao Shyue-Geng	Director, Department of Marine Fisheries Taiwan Fisheries Research Institute
Mr. Chen Tsai-Fa	Chief, Marine Fisheries Division, Department of Fisheries Council of Agriculture
Mr. Kwoh Chung-Hai	Senior Specialist Department of Fisheries Council of Agriculture

U.S. Participants

Dr. William Aron	Science and Research Director, Alaska Region, NOAA Fisheries, Seattle, Washington
Dr. Richard Marasco	Director, Resource Ecology and Fisheries Management Division (REFM), NOAA Fisheries, Seattle
Dr. Loh-Lee Low	Deputy Director, REFM Division, NOAA Fisheries, Seattle
Mr. Steve Ignell	Mathematical Statistician, Auke Bay Laboratory, NOAA Fisheries, Juneau, Alaska
Dr. Douglas Eggers	Chief Fisheries Scientist, Alaska Department of Fish and Game (ADF&G), Juneau, Alaska
Mr. David Benton	Special Assistant to the Commissioner, ADF&G, Juneau, Alaska

Agenda

Saturday Nov. 5	AM	Introductions Review status of high-seas driftnet fisheries Discuss squid-salmon-ocean temperature interactions
Monday Nov. 7	AM	Discuss results of R/V <u>Hai Kung</u> cruises Plan cooperative squid research cruise Discuss observer coverage for scientific sampling of high-seas driftnet fisheries
	PM	Review and complete bilateral report

DOCUMENTS

Documents exchanged for discussions at the meeting were:

Documents Submitted by Taiwan

1. Summary of 1987 Taiwanese squid driftnet fisheries in the North Pacific Ocean.

2. Cruise report of R/V Hai Kung, HK-1987: Squid survey of the North Pacific Ocean
3. Cruise report of R/V Hai Kung, HK-1988: Squid survey of the North Pacific Ocean

Documents Submitted By the U. S.

1. Summaries of provisional foreign and joint venture groundfish catches in the Northeast Pacific Ocean and Bering Sea, 1987.
2. Condition of groundfish resources of the eastern Bering Sea and Aleutian Islands Region in 1988.
3. Condition of groundfish resources of the Gulf of Alaska region as assessed in 1988.
4. Distribution and incidental take of marine mammals in the area of the high seas squid driftnet fishery.

NATURE OF TAIWANESE SQUID FISHERY

In 1977 Taiwan had 6 squid vessels that operated in international waters in the North Pacific. In 1980, due to a world oil crisis, gillnetters soon began to replace jigging vessels to harvest squid on account of their lower energy consumption. The number of vessels increased to 153 peak in 1984, then decreased gradually to 97 in 1987, but increased dramatically to 166 in 1988 as shown below:

Vessel Type	1983	1984	1985	1986	1987	1988
Jig	6	5	-	-	3	1
Jig & Gillnet Combination	28	2	-	-	-	-
Gillnet	101	146	124	110	87	163
Gillnet & Dipnet Combination	-	-	-	4	7	1
Gillnet & Longline Combination	-	-	-	-	-	1
TOTAL	135	153	124	114	97	166

The large increase in vessels from 1987 to 1988 was due to conversion of tuna longline vessels into large-mesh gillnet operations. The vessels, however, may also carry smaller size mesh gillnets to fish squid as well. The longline to gillnet conversion was stimulated by a lack of manpower to staff longline vessels. In recent years (1986-87), a new type of combination vessel, the saury dipnet-squid gillnet vessel was also introduced. The smallest vessels are generally 100-200 GRT. Most of the vessels are in the 200-300 GRT or 300-400 GRT class. Larger vessels (above 400 GRT) were introduced mostly in 1984.

The latest introduction was 700-plus GRT vessels in 1986-87.

Each skate (tan) of gillnet gear used is 500 mesh in width and 100 mesh in height. The number of skates vary according to size of vessels and preference of fishermen. A squid fishing vessel generally carries 1.5 to 2 times (300 to 500 skates) the amount of gear fished per day, the extra to be used as spares.

Mesh sizes vary from 80 to 220 mm. Number of vessels using various mesh sizes were as follows:

Mesh Size (mm)	1983	1984	1985	1986	1987
80 - 120	96	144	120	104	64
120 - 160	5	2	4	4	0
196 - 220	0	0	0	2	3
TOTAL	101	146	124	110	87

The smallest mesh size categories target on squid. Larger mesh size gear target on albacore and marlin.

Four major squid species are encountered by the fishery. The dominant catches are flying squid (Ommastrephes bartramii). The other three species are Onychoteuthis borealijaponica, Moroteuthis robusta, and Gonatopsis borealis.

Total catch of squid by Taiwan in the North Pacific were:

1983	14,258 t
1984	27,554 t
1985	21,807 t
1986	13,887 t
1987	18,578 t

Peak catches in 1987 were taken in August and September, somewhat later than in earlier years. Prior to 1987, two-thirds of the annual catch came from the area between 40 degrees N and 44 degrees N latitude, west of 170 degrees E longitude. The total catch and percentage contribution in this area have decreased dramatically since 1986 when current squid regulations were implemented. Since access to the traditional fishing ground (north of 39 degrees N latitude and west of 170 degrees E longitude) was prohibited by regulation, there were diversified changes to the mesh sizes, number of nets deployed, fishing methods, and grounds fished. In 1987, the catch between 165 degrees W and 175 degrees W longitude increased substantially from earlier years as the fleet shifted more of the operations eastwards.

Squid catches were classified and packed in three categories: large (20 pieces or less per case, 500 gm average weight), medium (21-35 pieces per case, 285-500 gm average weight), and small (more than 36 pieces per case, less than 285 gm average weight). Most of the catch (92 percent or more) were large squid.

Catch of other marine resources from the Taiwanese driftnet fleet in 1987 were:

Tunas	2,566 t
Billfishes	467 t
Sonitos	226 t
Others	46 t

SQUID-SALMON-SEA SURFACE TEMPERATURE RELATIONSHIPS

The Taiwanese side reported on the results of the 1988 squid research cruise by the R/V Hai Kung. The vessel sampled 96 CTD stations and set gillnet operations at 30 stations. Salmon were caught at only 4 stations. All were chum salmon. These salmon were caught at stations where sea surface temperatures (SSTs) were less than 12 degrees C. In 1986, some salmon were caught at a station where SST was 14.6 degrees C.

Summarizing the results of 3 years of surveys, the Taiwanese side noted that salmon were seldom encountered at SST above 13 degrees C. Therefore, the Taiwanese side commented that the 13 degree C isotherm is a better guideline for delineating the squid fishery area than the long-term 15 degree C isotherm used by Japan to delineate its squid regulatory area. The Taiwanese side stated, based on the results of 3 years of research cruises by the Hai Kung, that it would be reasonable for its domestic fishery agency to adopt the management regime currently enforced in the squid fishery area east of 170 degrees E longitude for the area west of this longitude.

The U.S. side noted that management guidelines similar to those used by the Japanese squid driftnet fishery offer variable protection for salmon harvest in the northern portion (northernmost 1/2 degree latitude) of the fishing region. The U.S. suggested that the geographical differences in salmonid incidences were probably related to geographical differences in water mass structure. Finer scale sampling will be necessary to determine oceanographic factors responsible for species distribution in the NPTZ. Any management regime established for high-seas squid driftnet fisheries should be provisional due to limited knowledge regarding the dynamics of marine species, particularly marine mammals and seabirds, which are impacted by these fisheries.

COOPERATIVE SQUID CRUISE IN 1988

The U.S. side expressed satisfaction in the results of the cooperative research cruise on flying squid conducted by the Taiwanese R/V Hai Kung in 1988. In addition, the U.S. commended the Taiwanese side for the excellence of the cooperative research since its inception in 1986. These cruises have provided an important contribution to the growing knowledge on marine resources in this region. In particular, the Taiwanese cruise data, when combined with other available research data, provides key insight into factors affecting the spatial dynamics of pelagic species in the North Pacific Ocean.

The U.S. side expressed a strong interest in continuing cooperative research studies on the flying squid resource in the North Pacific Ocean. The NOAA Fisheries Honolulu Laboratory is planning to deploy the Townsend Cromwell for a pelagic resource survey of the North Pacific Transition Zone and the Subarctic Frontal Zone in 1989. Researchers from other countries will be invited to join the cruise. The cruise plan will be circulated in advance of the survey to maximize opportunities for coordination of other studies in the squid fishing area.

The U.S. indicated some of its research objectives for cooperative research in the North Pacific Transition Zone (NPTZ) as follows:

1. Obtain information on the high seas driftnet fisheries, including target and incidental catches, drop-out rates, fishing methods and the distribution of fishing effort over time and area.
2. Examine the association between large and small scale oceanographic features and the ecology and dynamics of marine resources in the NPTZ.
3. Examine trends in abundances of selected marine resources impacted by squid driftnet fisheries and probable causes of the trends.

The Taiwanese side indicated that the decision to participate in the Townsend Cromwell cruise will be made later.

SQUID OBSERVER PROGRAM

The U.S. side stressed the importance for making replicate observations from different squid vessels to develop statistical confidence in the data. They noted that the squid driftnet fishery in the central north Pacific ocean involves over 700 vessels from Japan, Taiwan and Korea. Because of the size of this fishery, information on the incidental harvest of non-target species is needed to determine impacts on the marine resources of the North Pacific. Reliable bycatch estimates are best achieved

through an observer program on commercial vessels.

Differences in the spatial and temporal distribution of marine resources in this region are poorly understood. The U.S. proposed a two stage approach for providing bycatch estimates. First, a pilot observer program would seek to provide information on how and where the fishery operates, data on bycatches, data on distribution and abundance, and factors affecting the variability of bycatch rates. A second stage would be considered based upon results from the pilot program.

Based upon the size of the 1987 Taiwanese squid driftnet fleet, the U.S. suggested a joint pilot program, consisting of four Taiwanese and four U.S. scientific observers be placed aboard eight Taiwanese commercial squid driftnet vessels in 1989. Two observers would be deployed during May and June, four observers during July and August (two of the four would be placed on vessels fishing east of 180 degrees longitude) and two observers during September and October. Observers would remain aboard the host vessels for approximately 30 days and be transported to and from port via cargo/supply vessels.

The U.S. noted that a U.S. scientific observer successfully completed an observer trip on a Korean commercial squid driftnet vessel this summer. Cargo vessels were used to transport the observer to and from the fishing grounds, suggesting that an observer program such as that proposed by the U.S. is feasible.

Since there is no governmental bilateral fisheries agreement or multi-lateral fisheries agreement concerning the Taiwanese squid fishery in the North Pacific, the Taiwanese side indicated that it is impossible for the Taiwanese fisheries administrative sector to implement the observer program suggested by the U.S. side. Further, the Taiwanese side indicated there are also considerable difficulties for implementing any at-sea sampling program on Taiwanese squid vessels. The reasons are as follow:

1. Taiwan does not have a salmon fishery. Therefore the fishermen have no particular obligation for collecting salmon data.

2. The Taiwanese squid fishermen are not permitted to fish in waters north of 39 degrees N latitude and west of 170 degrees E longitude (the traditional fishing ground), and therefore have to fish farther eastward where conditions are harsher. Therefore the fishermen find it harder to cooperate on data collection program.

3. As a result of U.S. requests, the Taiwanese Government has imposed difficult regulations on Taiwanese squid fishermen. Therefore, it is impractical to impose more difficulties, such as data collection responsibilities on the fishermen.

Due to the above three issues, the Taiwanese side indicated that the environment is not conducive to implement an at-sea sampling program. When condition improve, the matter may be discussed again.

OTHER RESEARCH ACTIVITIES

The U.S. thanked Taiwan for the additional information they provided during these talks on their commercial squid fishery and expressed an interest in furthering its understanding of this fishery. To facilitate this understanding, a listing of the type of information of primary interest to the U.S. was presented to Taiwan along with a request for any Taiwanese publications, reports or data that would be helpful in furthering this understanding.

The U.S. side also expressed an interest in collecting data on marine mammals and sea birds encountered in high seas squid driftnet fisheries. The types of data required from commercial squid vessels are (1) incidental catch of albacore, skipjack tuna, billfishes, sea turtles, marine mammals and sea-birds by species, (2) date and geographical position of vessel, (3) sea surface temperature at time of incidental catch, and (4) fishing effort. From research vessels, the U.S. would like to obtain additional data. These include collection of tissue samples for electrophoretic studies, and stomachs samples for food habits studies, biological measurements (such as sex and size), and biological samples (such as teeth and reproductive organs).

While the Taiwanese side understands the scientific interest of the U.S. in collecting information on marine mammals and sea birds, the scientists explained that it is very difficult to collect such information from their fishermen at present. They are willing to provide the information or samples if the data are available in the future. The Taiwanese side will help U.S. scientists collect the required data on board its research vessel if the cruise is conducted.

FUTURE BILATERAL MEETINGS

Both sides agreed that bilateral meetings between scientists have been useful in promoting better research coordination and understanding of fishery resources that are of mutual concern in the North Pacific. With this common view they agreed that regular bilateral meetings between the scientists would be useful. The U.S. side invited the Taiwanese side to the U.S. for next year's bilateral meeting.

Lawmakers seek sanctions for fishing violators

The Associated Press

WASHINGTON — House members from Washington and Oregon urged President Bush on Tuesday to take trade action against nations refusing to regulate fishing fleets which use huge nets in the North Pacific.

U.S. fishermen claim the so-called driftnets are used to illegally snare millions of salmon, while environmentalists contend the nets are responsible for killing thousands of porpoises, seals, seabirds and other marine life every year.

The nets, which can stretch up to 35 miles, have been used since the early 1980s by about 700 vessels from Japan, South Korea

and Taiwan to catch squid.

Rep. Jolene Unsoeld, D-Wash., introduced a non-binding resolution, backed by her House colleagues in the Washington delegation and Oregon's three Democrats in the House, urging Bush to impose trade sanctions if nations with such fleets refuse to "enter into and implement adequate driftnet monitoring and enforcement agreements."

"This has been called 'biological strip-mining of the sea' and that's exactly what it is," Unsoeld said at a news conference. "The driftnet fleet can lay 30,000 miles of net on any given day, catching and suffocating virtually every porpoise, seal,

fish or bird that comes into contact with it.

"That's not fishing; that's indiscriminate slaughter."

Unsoeld said the resolution "sends an unmistakable message that we want these pirates put out of business." She said driftnet fleets are "stealing" an estimated 10,000 metric tons of salmon worth an estimated \$21 million annually.

American fishermen say the illegal salmon netting has already hurt fish runs in Washington state, Oregon and Alaska.

By international agreement, driftnet fishing is limited to certain areas that are supposed to be well away from salmon grounds, but

Unsoeld said the regulations are ignored.

Talks with the Japanese aimed at reaching an agreement to monitor the driftnet fleet and enforce various regulations broke down over the weekend.

The secretary of commerce, under a 1987 law, has until June 29 to notify the president of any country failing to enter into such an agreement. Bush could then impose trade restrictions on imports of fish products from those countries.

Unsoeld said that if Bush fails to act, she and other lawmakers were prepared to introduce legislation that would require trade sanctions.

RUBENS: Regulators say sell

Dealers in New York had been saying the Rubens — a medium-size portrait of a warrior titled "Mars" — was worth far less than the \$12 million, plus a \$1.2 million buyer's fee, Centrust paid

King added that GPA with real estate and hotels, Royal Jordanian, Air Jamaica, Pan Am, Midway Airlines include Brant and leases them to 64 airlines in 32 countries.

Clients include Brant and leases them to 64 airlines in 32 countries.

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Continued from Page D-1

McKinzie, 39, engineer, financing and buying airplanes. The airline industry will see a greater separation between ownership and operation, as we have seen with real estate and hotels." King added that GPA

slowly... work... rate... the... job... wor... are... nor... for... not

Similar measure has been introduced but not yet acted on in the Senate.

Gasoline prices up again

NEW YORK — The May contract for West Texas Intermediate, the benchmark grade of U.S. crude, closed 4 cents higher at \$20.63 a barrel Tuesday. The price for Alaska North Slope crude delivered to Gulf of Mexico refineries closed down 1 cent at \$19.54 a barrel.

Date	Price
April 10	\$19.55
April 7	\$18.90
April 6	\$18.70

North Slope crude at Gulf of Mexico refineries

Wed. AP. 12-1-87
Aster. Daily News.



Ann

ANDERSON

SENATOR 42ND DISTRICT

Majority Whip

APR 03 1989

March 20, 1989

Lloyd Jones
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Dear Senator Jones: *Lloyd*

Thank you for keeping me informed about the Alaskan Senate resolution regarding illegal high seas interception of salmon. As you pointed out, this issue impacts all of the Western United States.

I am pleased to report that here in Washington State we have formulated our own Senate Joint Memorial No. 8001 which deals with this problem. I have enclosed a copy of this document for your review. Washington State does indeed have a substantial fishing industry which we are striving to preserve and manage responsibly.

Thank you for your assistance in this matter.

Sincerely,

Ann

Ann Anderson
Senator, 42nd District

AA:sd1

Enclosure

Committees: Agriculture, Vice Chair ■ Economic Development & Labor, Vice Chair ■ Education ■ Rules

Olympia:
205 Institutions Building
Olympia, WA 98504
(206) 786-7682

District Office:
2718 McLeod Road
Bellingham, WA 98225
(206) 647-1532

SUBSTITUTE SENATE JOINT MEMORIAL NO. 8001

State of Washington 51st Legislature 1989 Regular Session

by Committee on Environment and Natural Resources (originally
sponsored by Senators Metcalf, Rasmussen, DeJarnatt, Sutherland,
Amondson and McMullen)

Read first time 1/24/89.

1 TO THE HONORABLE GEORGE BUSH, PRESIDENT OF THE UNITED STATES, AND
2 TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF
3 REPRESENTATIVES, AND TO THE SENATE AND HOUSE OF REPRESENTATIVES OF
4 THE UNITED STATES, IN CONGRESS ASSEMBLED, AND TO THE UNITED STATES
5 SECRETARY OF STATE, THE UNITED STATES SECRETARY OF COMMERCE, AND THE
6 UNITED STATES SECRETARY OF DEFENSE:

7 We, your Memorialists, the Senate and House of Representatives of
8 the State of Washington, in legislative session assembled,
9 respectfully represent and petition as follows:

10 WHEREAS, The salmon and steelhead resource of the state of
11 Washington is important to the commercial fishing industry and to the
12 recreational fishing public; and

13 WHEREAS, Juvenile and adult salmon and steelhead feed in the open
14 areas of the Pacific Ocean before returning to their home rivers to
15 spawn; and

16 WHEREAS, Foreign high seas fisheries which ostensibly fish for
17 squid with gill nets are actually targeting on juvenile and adult
18 salmon and steelhead which originate in North American streams; and

19 WHEREAS, The foreign high seas fisheries are causing a
20 significant depletion of salmon and steelhead runs and are having a
21 serious economic and conservational impact on Washington state salmon

12 and steelhead resources; and

13 WHEREAS, The United States Coast Guard and the National Marine
14 Fisheries Service are empowered to enforce fishery regulations within
15 the fisheries conservation zone;

16 NOW, THEREFORE, Your Memorialists respectfully pray that:

17 (1) The Senate and House of Representatives of the United States,
18 in Congress assembled, instruct the secretary of state to pursue
19 vigorous sanctions upon foreign fishing nations who are harvesting
20 Washington state salmon and steelhead on the high seas and to take

Oriental nets concern federal fisheries officials

By Greg Johnston
Staff Reporter

The interception of Washington-origin salmon and steelhead by Taiwanese and Korean drift netters on the high seas is having a serious effect on sport fisheries here, says the top federal fisheries official for the Northwest.

"I see ending this interception as the single most important thing we can do now to benefit the sport fisheries," said Rolland Schmitt, regional chief of the National Marine Fisheries Service. "To bring about the resolution of this will give our fishing industry the largest relief we can provide right now."

Concern has grown recently over Taiwanese, Korean, and, to a lesser extent, Japanese squid fishermen who string miles of drift nets together in international waters of the Pacific Ocean. Not only do the nets catch squid, but also immature salmon and steelhead — mostly 2 to 4 pounds — from the U.S., Canada, Soviet Union and Japan. Birds and some marine mammals also get tangled in the nets.

Schmitt returned last week from several days of meetings in Washington D.C. with other U.S. and Soviet fisheries officials. He said one plan being discussed is the formation of a new international body of the major salmon-producing nations on the Pacific Rim — Japan, the Soviet Union, Canada and the U.S.

"With that body we could try to bring about regulatory measures and through the Law of the Sea be able to enforce them," he said. "We have many attorneys from both countries looking at the options, and that's one."

Schmitt said U.S. officials have documented that between 20 million and 30 million pounds of mostly salmon and some steelhead were taken last year by foreign fishermen on the high seas.

"And I personally believe that is a conservative figure," he said. "It's based on our undercover investigations, the industry's documentation of high seas sales, our enforcement actions where we seized fish and observations on the European market of this type of fish for sale."

At the meeting last week, Soviet officials reported that they seized an additional 10 million pounds last year, he said.

Outdoors

The proposal is aimed at reducing overcrowding on the top steelhead streams in B.C. and boosting its guiding industry. It specifically targets "non-Canadian anglers."

The plan would classify all B.C. steelhead streams, with the best being class 1. To fish a class 1 stream, non-Canadian anglers would have to pay \$150 for a license good for only seven days and good only on one stream. Non-Canadian anglers could only buy four such licenses per year.

Similar conditions would apply for class 2 streams, but the license would cost \$75.

Stan Young of Seattle, steelhead committee chairman for the Washington Chapter of the Federation of Fly Fishers, said the plan would make it difficult to fish such streams. Not only would it cost more, but if the stream the license was purchased for happened to be running high and unfishable, the license fee would be wasted.

"Any steelhead fisherman knows that often you go to the rivers and they're out, or the fish aren't there," he said. "You need to be able to jump around from river to river to find the fish and this completely takes that away."

He also said that the plan

could eventually turn the sport fisheries into commercial fisheries by turning them over to guides.

"In time, even the B.C. residents are going to lose those streams to the guides, like in other places in the world," he said.

However, Bob Hooton, regional biologist at Smithers for the Fisheries branch of the B.C. Ministry of Environment, said the province had no intention of turning over the streams to the guides.

While the plan is designed to boost the guiding industry, several streams have been designated as ones where guiding is not allowed. And Hooton said only a handful would be designated class 1.

Hooton said that if steps aren't taken now, the qualities that make certain rivers in B.C. special — uncrowded wilderness, wild steelhead — will be lost.

Hooton declined to specify which rivers might be designated class 1 or 2, but said the focus of the proposal is the Skeena watershed. The Skeena and its tributaries, like the Kispiox, Babine and Bulkley, are famed for trophy steelhead and have attracted Washington anglers since the end of World War II.

The Environment Ministry is taking public comments on the plan until Feb. 20. Write Ministry of Environment: Recreational Fisheries Branch, 750 Blanshard Street, Victoria, B.C. V8V1X5.

"BIG MONDAY"

BIG EAST
Syracuse vs Georgetown
4:30PM

BIG TEN
Ohio State vs Iowa
8:30PM

BIG WEST
Utah State vs Cal.-Santa Barbara
9:00PM

SOUTHEASTERN ALASKA
SEINE BOAT OWNERS & OPERATORS

P.O. BOX 9579
KETCHIKAN, ALASKA
99901
mailing address

907-225-5156

728 WATER STREET
KETCHIKAN, ALASKA
99901

3/23/89

Senator Lloyd Jones

As we discussed on March 14th, I am sending a draft resolution calling for the Pelly Amendment against Taiwan. Both SEACOPS and Southeast Seiners are making the request of you to introduce and support this resolution.

Again, the reasons are that the hard, direct message to the biggest salmon interception culprit is lost in the overall High Seas Resolution. Please call Dave Benton, Special Assistant on International Fisheries (465-4100) for technical review of this resolution.

Please call if you have questions.

Sincerely
Kate Troll
Executive Director

FACT SHEET ON SALMON INTERCEPTION

Japanese Salmon Gillnet Fleet

Two salmon gillnet fleets operate in the Bering Sea and the North Pacific ocean. The mothership fleet, which in 1988 consisted of one mothership and 43 catcher vessels, fishes in the international waters of the Bering Sea (the "donut hole"), within the U.S. 200 mile Exclusive Economic Zone (EEZ) off the Aleutians, and just south of the EEZ in the North Pacific.

The landbased salmon fleet (approximately 157 vessels) fishes in the international waters of the North Pacific west of 175 degrees east longitude. Both fleets are subject to regulation by the International North Pacific Fisheries Convention (INPFC), consisting of the U.S., Canada, and Japan, and the Japanese/Soviet fisheries agreement. INPFC regulates seasons, areas, and effort; the Japanese/Soviet agreement regulates numbers of fish taken.

Japanese Squid Gillnet Fleet

The Japanese squid gillnet fleet operates in the international waters of the North Pacific from June to December in an area south of 46 degrees north latitude and west of 145 degrees west longitude. This fishery is also subject to INPFC jurisdiction, as well as Japanese domestic laws and regulations.

Republic of Korea Squid Gillnet Fleet

The Korean fleet operates in approximately the same area as the Japanese fleet and consists of 148 vessels. It is not subject to INPFC jurisdiction but is subject to Korean laws and regulations.

Taiwan Squid Gillnet Fleet

The Taiwanese fleet consists of 73 to 94 vessels and operates in the same areas as the other two fleets. It is not subject to INPFC but is subject to Taiwanese regulations. Taiwan alleges that retention of salmon is strictly prohibited but recent reports indicate that the government may allow its vessels a 10% incidental catch of salmon.

Legal Regime

Under INPFC, the U.S. can board vessels of participating nations, inspect their catch and records, and - if violations are found - hold the vessels until that nation's enforcement authorities arrive. Japan is the only nation fishing on the high seas that is a member of INPFC.

Under the Magnuson Fishery Conservation and Management Act (MFCMA), the U.S. exerts authority over U.S.-origin salmon throughout its range. This jurisdictional claim is formally recognized by Japan and Korea; it is not recognized by Taiwan.

Under general principles of international law, the U.S. can board vessels in international waters only with the consent of the vessel's master or government. Unless an international agreement is in effect, the U.S. cannot seize a vessel in international waters.

As a result, the U.S. can board a Japanese vessel without first obtaining consent, and can hold that vessel if violations are discovered. The U.S. cannot board a Korean vessel unless consent is obtained, but could seize the vessel if it had salmon on board which could be proven to be U.S.-origin. The U.S. cannot board a Taiwanese vessel without consent and seizure of the vessel, even if U.S.-origin salmon is proven to be on board, would be open to legal challenge.

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

P.O. BOX 3-2000
JUNEAU, ALASKA 99802-2000
PHONE: (907) 485-4100

March 9, 1989

Governor's High Seas
Advisory Group

Dear Members:

Quite a lot has occurred since our meeting on January 15. This letter will present brief summaries on the US/USSR meeting, INPFC talks, driftnet negotiations with the Taiwanese, status reports from our committees, and other items.

1. US/USSR

The first meeting of the North Pacific and Bering Sea Fisheries Advisory Body was held on January 16 in Anchorage. This is the advisory group established by the USSR GIFA legislation to advise the State Department on US/USSR fisheries matters. A list of the advisors is enclosed (enclosure 1).

The major topics of discussion were the Bering Sea donut issue and high seas salmon issues. It was noted that delegates from the US government and the USSR met in Moscow on October 19-20 to discuss these issues, and that the next round of talks would build on those meetings.

The US and the USSR agreed at the Moscow meetings that the donut trawl fisheries are having a detrimental effect on Bering Sea pollock, that these unregulated fisheries should cease, and that immediate measures need to be taken to conserve Bering Sea pollock. The Advisory Body discussed the need for an immediate moratorium on fishing in the donut until better scientific data are available. However, there is some disagreement about the need for calling for an outright ban, or taking a more flexible approach because of the possible desire of some US fishermen to fish in the donut.

The Advisory Body went on to discuss high seas salmon issues. The Soviets have expressed an interest in working with the US on the conservation of anadromous species in the North Pacific and Bering Sea. The USSR also has a stated goal of ending high seas salmon fishing by 1992. The advisors discussed the need to explore a number of topics with the Soviets, including joint enforcement and other conservation measures. There seemed to be more of a consensus among the members on salmon issues.

March 9, 1989

The first meeting of the US/USSR Intergovernmental Consultative Committee on Fisheries was held in Washington, DC February 6 - 10. A copy of the minutes is enclosed (enclosure 2). Two items of particular importance surfaced at the meeting:

First, the Soviets indicated that the Japanese salmon quota would remain at approximately the same level as last year (app. 2000 mt.) for the area south of the US EEZ. Last year the Japanese quota was approximately 2600 mt. (see enclosure 3). The Soviets also reiterated their intention to phase out the Japanese high seas fishery by 1992.

Second, the Soviets floated a proposed multi-lateral salmon agreement. This agreement would mirror the NASCO agreement, establishing an umbrella Council for the North Pacific and two Commissions--one for the North American side (US and Canada) and one for the Asian side (Japan, USSR, China).

The agreement would be based on the principle of no high seas salmon fishing beyond the 200-mile zone of the parties. The Commissions would oversee fishing within the respective 200-mile zones, and the Council would be a coordinating mechanism for the two Commissions. A number of issues would need to be resolved, especially the powers of each commission respective to fisheries in the zones of member parties of the other commission. In other words, could the USSR or Japan exert control through the agreement on any of the fisheries in our zone? This would be unacceptable.

However, the overall basis and concepts found in the USSR proposal are very close to a rough draft multi-lateral agreement which surfaced at the US section meeting early in the week. This was drafted by representatives from the state and industry, but unfortunately could not be floated to the Soviets by the State Department at the meeting. The US draft (enclosure 4) would eliminate high seas salmon fishing as well as the sale, purchase, or transport of illegally harvested salmon. The US draft also sets up a single commission and establishes mechanisms to cooperate in scientific research on anadromous species.

A Memorandum of Understanding on salmon enforcement was also signed at the meeting and is included with the joint press statement (enclosure 5). It represents a good first step toward cooperative enforcement with the Soviets on salmon enforcement.

2. INPFC

Representatives of the governments of Japan, Canada, and the US met in Sidney, BC from February 27 - March 1 on INPFC matters. The main topics included the Japanese desire for access back into the US EEZ, the Japanese mothership

March 9, 1989

conversion proposal, and the squid driftnet issue. The three governments had met in Washington, DC on these same issues and these talks were a follow-up to those meetings.

The Japanese discussed their views regarding the INPFC and the exclusion from the US zone. They laid out a set of alternatives:

1. They wanted back in the US EEZ with the converted fleet. They maintained that the conversion proposal was not linked to their exclusion from our zone. They stated that they would have come forth with the conversion proposal even if they were still fishing in the US EEZ.
2. If they cannot get access back into the zone then, in their view, they should be allowed back into the areas they were fishing in prior to the 1986 annex. They would seek permission to do this under INPFC.
3. If option 2 were foreclosed on them, then they would move unilaterally to fish either the pre-86 areas or in the alternative areas they proposed in April 1988.

The US government's response to this was that:

1. The State Department is drafting legislation to allow the Japanese back into the zone, and pledged to push hard for this legislation in the Congress. They emphasized the desire of the Bush administration to resolve this issue. The State Department noted that in order to be successful, they need help from the Japanese. Cooperation on the squid driftnet problem was identified as one possibility.
2. The State Department noted that option 3 would be unacceptable and would be viewed by the US as an announcement of intent to withdraw from INPFC.

Technical discussions on the respective positions of the three nations regarding the conversion proposal also occurred. These discussions were performed as a follow-up to similar discussions in Washington, DC this past December.

The discussions on the squid driftnet issue brought about some movement. The Department of Commerce pressed for a response from the Japanese on the monitoring and enforcement package previously passed over to the Japanese. They also surfaced a proposal for a cooperative pilot program to place a number of automatic, real-time satellite communication/position location devices on squid vessels. The Japanese did not respond favorably to the proposal, but

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said they would give it further consideration. A follow-up meeting on squid is tentatively set for March 20 in Tokyo.

3. Taiwan Driftnet Talks

Representatives from the US met with Taiwanese officials on February 1 - 3 for negotiations under the Driftnet Act of 1987. The talks covered three issue areas: 1) an observer program; 2) an enforcement agreement; and 3) detailed information on the nature, extent, and effects of Taiwanese driftnet fisheries on marine resources of the concern to the US.

Taiwan's response was that they could not accept US observers on their commercial vessels. They proposed the creation of a multinational organization to collect data, and emphasized that under such an arrangement each participating country would only deploy its own nationals on its vessels.

The Taiwanese have little to no enforcement on the high seas squid fleet. The US pressed the Taiwanese to implement an enforcement regime which includes aircraft surveillance, enforcement vessels, a cooperative enforcement agreement with the US to allow boardings by US enforcement personnel, and installation of automatic, real-time satellite monitoring equipment on each driftnet vessel.

The US also presented Taiwan with a set of questions regarding the operation of the fleet. These questions and a summary of Taiwan's response is in enclosure 6.

4. Committee Reports

ENFORCEMENT COMMITTEE

Pat Wood was responsible for investigating the development of a list of manufacturers/products for use in high seas monitoring. Pat contacted several parties and discovered that it would cost roughly \$10,000 to do a thorough job. Pat will report on his progress at our next meeting. Pat also forwarded a copy of correspondence regarding SEACOPS' effort to work with Boeing on a pilot satellite monitoring project (enclosure 7). I have also enclosed a memo from Pat Martin (enclosure 8) on satellite surveillance. Pat has clearly laid out the differences in the various options, and I think this will be a real help to us as we continue our efforts to get meaningful surveillance on the driftnet fleets.

Pursuant to our discussions at the last meeting, the Governor sent a letter (enclosure 9) to Admiral Yost outlining some of the key questions regarding cooperative enforcement with the USSR. A briefing was held with the Coast Guard and the Department of Defense (DOD) during the

March 9, 1989

US/USSR talks in Washington, DC as a result of the Governor's letter. The Coast Guard and DOD indicated that limited sharing of enforcement information and evidence were acceptable activities, but that any extension of enforcement action beyond our 200-mile zone will be limited to those nations with which we have boarding agreements. They also raised strong objections to coordinating enforcement cruises or direct contacts between US and USSR enforcement vessels. DOD also raised numerous national security issues regarding the sharing of classified surveillance information with the Coast Guard for enforcement purposes; and they ruled out taking enforcement action unilaterally against vessels from nations with whom we do not have boarding agreements.

INTERNATIONAL ISSUES COMMITTEE

The committee indicated a need to participate in the upcoming Taiwan driftnet talks, US/USSR meeting, and INPFC meetings. These have been reported on previously in this letter.

The state, in response to the group's request, pursued the enforcement issue and helped to draft the joint enforcement MOU with the USSR, the US draft multilateral salmon agreement, and are in the process of developing a series of maps showing the relationship between the squid fleets, the directed-salmon fleets, the various regulatory areas, etc.

PUBLIC EDUCATION COMMITTEE

Molly McCammon has provided a copy of the committee report (enclosure 10).

CONGRESSIONAL COMMITTEE

A copy of the committee report is enclosed (enclosure 11). The committee made numerous requests and recommendations. These will be addressed in detail at our next meeting. However, some can be mentioned here:

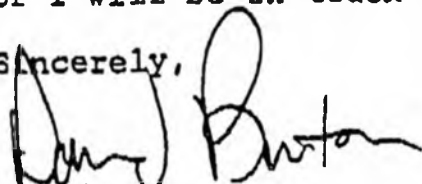
1. Magnuson Act Reauthorization. The state has instituted a process to develop proposed amendments and a draft will be presented to the Governor's High Seas Advisory Group for discussion when it is prepared. Hearings will probably occur in April.
2. Pelly Amendment. The Secretary of Commerce has responded to the Governor's letter regarding trade goods subject to Pelly sanction (enclosure 12). We have also discussed this issue with the Department of Commerce.
3. Territorial sea. The 12-mile limit issue is being researched presently by the Attorney General's Office.

March 9, 1989

Enclosed for your information is a memo on this subject from NOAA (enclosure 13).

I have also enclosed a copy of a news article about the group (enclosure 14). We will schedule another face-to-face meeting around the next North Pacific Fishery Management Council meeting in April. However, I believe that we should have a conference call before that time. Either John White or I will be in touch with you about this shortly.

Sincerely,



David Benton
Director
Office of External and
Int'l Fisheries Affairs

Enclosures

SJR

63

HOUSE COMMITTEE REPORT

(7)
Date Referred: May 6, 1990

FURTHER REFERRALS:

Date of Committee Action: 5-7-90

The Judiciary Committee considered:

CSSJR 63(Fin)

CS SJR NO. 63 (Finance)

LIMIT REGULAR SESSIONS TO 90 DAYS

Proposing amendments to the Constitution of the State of Alaska relating to the duration of a regular session.

RECOMMENDATIONS:

-] be replaced with _____] the same title
-] have attached amendment(s)] a new title
-] do pass
-] do not pass
-] no recommendation
-] individual recommendations
-] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

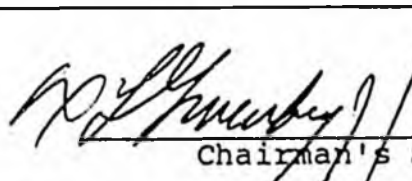
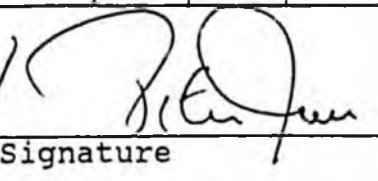
-] fiscal impact _____
-] zero fiscal note _____
-] zero with analysis _____

-] fiscal note(s) Leg. Affairs 4/26/90
-] zero fiscal note(s) _____
-] zero fn/analysis _____

SIGNING DO PASS:

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend
<u>Peter J...</u>		✓	
<u>Rep. ...</u>		✓	
<u>J. Ellis</u>		✓	
<u>Ch. ...</u>		✓	



 Chairman's Signature

FISCAL NOTE

REQUEST:

Revision Date: _____ Affected Agency: Legislative Affairs Agency
 Title: Proposing an amendment... BRU: Legislative Council
 ... duration of a regular session. _____
 Sponsor: Senator Frank Components Session Expenses, Legal Services
 Requestor: Senate State Affairs Admin. Serv., Public Serv., Leg. Salaries & Allow

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY91	FY92	FY93	FY94	FY95	FY96
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>
TOTAL OPERATING	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

General Fund	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>
Federal Fund	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>	<1,000.0>

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

CSSJR 63 (State Affairs) reduces the length of the legislative session from 120 days to 100 days. The estimated daily cost of the session is \$50,000 a day. If the session is reduced by 20 days a savings of \$1,000,000 is calculated.

Prepared By: Pamela A. Stoops, Director Phone: 465-3850
 Division: Administrative Services Date: 4/11/90

Approved By: Warren Endicott, Executive Director
 Agency: Legislative Affairs Agency Date: 4/11/90

DISTRIBUTION (B) Changes in CSSJR 63(Fin) REQUESTOR
 LEGISLATIVE FIN: have no fiscal impact. OFFICE OF MANAGEMENT & BUDGET
 LEGISLATIVE SPO This fiscal note is AGENCY (IES)
 appropriate. 4/26/90 ml