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U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

AUG - 3 1984

John G. Roberts
Associate Counsel to the President
The White House
Washington, D.C. 20500

Dear John:

Attached for your information is a copy of the San Antonio Metropolitan Transit Authority brief filed by the Solicitor General on July 30. The Solicitor General's office adopted many of our recommendations with regard to the Tenth Amendment argument.

Very truly yours,

Francis X. Lilly

Attachment

Nos. 82-1913 and 82-1951

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR

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INTRODUCTION AND SUMMARY OF ARGUMENT

This supplemental brief is filed in response to the Court's request that the parties address the question "[w]hether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered." We believe that some clarification of the test for intergovernmental immunity established in National League of Cities and subsequent cases is desirable, so as to lay to rest prevalent misconceptions about the rule established. But the key principle articulated in National League of Cities is sound and

enduring constitutional doctrine. That is, we agree that the federal commerce power may not be exercised directly to regulate state activity in a manner that would "hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" United Transportation Union v. Long Island R.R., 455 U.S. 678, 687 (1982) (quoting National League of Cities, 426 U.S. at 851). This modest limitation upon the commerce power is the necessary consequence of the federal structure of our constitutional system and fits comfortably within the context of this Court's decisions on other aspects of federal-state relations.

The prevailing test for assessing claims of state immunity from federal Commerce Clause legislation is, in our view, generally satisfactory. Several points, however, may profitably be clarified. First, the role of the courts in this area is inherently a limited one. Only when Congress ignores the values behind federalism and nullifies state prerogatives in performing core functions may its Acts be set aside. Second, the standard by which it is determined whether particular state activities are protected must be essentially an historical one. In reaching this conclusion, we do not envision a frozen list of protected state activities. Rather, the test must be whether, at the time the federal government first entered the field with regulatory legislation, the states had generally established themselves with fixed patterns of organization as providers of the particular service. Absent such a long-standing tradition of state activity in a field, federal regulation simply cannot be said impermissibly to trench upon state prerogatives.

These principles require reversal of the judgment of the district court. There can be no serious claim that the states had generally undertaken to provide public transit service before the enactment of federal legislation governing employment relations in transit or wages and hours in the labor market

generally, or even by the time the Fair Labor Standards Act was applied to public transit employees. The major shift to the public sector occurred instead in the wake of a program of massive federal financial assistance for public transit undertakings. It would therefore be a one-sided federalism indeed that would place employees of publicly-owned transit systems beyond the reach of nondiscriminatory federal wage and hour legislation.

ARGUMENT

I

1. Ours is a federal constitution and a federal system. The federal principle of division of authority between the national government and the states is imbued in both the constitutional text, which recognizes the states as enduring units of government, and in the overall structure of the national charter. The Tenth Amendment, which declares that 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," announces the principle directly. The national government, although supreme within its constitutional domain under the Supremacy Clause, is one of delegated (albeit broad and far-reaching) powers. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). The states, by contrast, are the presumptive holders of powers not otherwise allocated in the constitutional regime. The vitality of the states as functioning members of this partnership of governments is thus an essential feature of the scheme.

The Court said in Fry v. United States, 421 U.S. 542, 547 n.7 (1975), that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." The Tenth Amendment demonstrates that "our Federal Government is one of delegated

powers" (National League of Cities v. Usery, 426 U.S. at 861 n.4 (Brennan, J., dissenting)) and that the states must remain vital organs of general government. The principle of intergovernmental immunity, stripped to its essentials, is a means of preservation of that structure of federal-state coexistence. The Constitution, read as a whole, necessarily presupposes the existence of, and thus requires the protection of, some sphere of autonomy for the states in the conduct of their own core operations.

But the Tenth Amendment is only the most obvious textual manifestation of the federal principle and of the enduring role assigned to the states in our system of government. Others abound. As the Court said in Collector v. Day, 78 U.S. (11 Wall.) 113, 125 (1870), "in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized." The Eleventh Amendment, for instance, confirms a limitation upon the judicial power of the United States, exemplifying a broader principle of state sovereign immunity located in the Constitution. See Pennhurst State School & Hosp. v. Halderman, No. 81-2101 (Jan. 23, 1984), slip op. 7-8 & n.8. Article VII, prescribing the procedure for placing the new Constitution in operation, and Article V, governing ratification of subsequent amendments, reflect the states' role as delegator of authority under our constitutional system. Article IV, Section 3, establishes the territorial inviolability and indivisibility of the states, precluding their fragmentation or consolidation by Congress without the consent of the states concerned. Cf. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) (equal footing doctrine).

The intended role of the states as repositories of legitimate authority in the federal scheme is also demonstrated by the many responsibilities assigned to the states in the establishment of the legislative and executive branches of the federal

government. See Collector v. Day, 78 U.S. (11 Wall.) at 125. Representatives to the House of Representatives are "apportioned among the several States which may be included within this Union" (Art. I, § 2, Cl. 3; see also Amend. XIV, § 2). Senators are apportioned, two to each state (Art. I, § 3, Cl. 1). Of course, the Seventeenth Amendment substituted direct election for selection of senators by state legislatures. But a more fundamental recognition of the political permanence of the states, the legacy of the "Great Compromise" that made possible the success of the Constitutional Convention, remains: "no State, without its Consent [may] be deprived of its equal Suffrage in the Senate" (Art. V).

States were also assigned a key role in the mechanism for selection of the President. Both the composition of the electoral college, in which electors are allocated to the states in proportion to their overall representation in the House and Senate, and the method of selection of electors, which is left to the discretion of the individual states (Art. II, § 1, Cl. 2), reaffirm that the national government was meant to draw its authority from the states. And this point is underscored by the constitutional provision for selection of a President when no candidate garners a majority of the electoral college: a poll of the House of Representatives, the delegation of each state collectively exercising one vote, with "a majority of all of the states * * * necessary to a choice" (Amend. XII).

2. The decisions of this Court in a number of contexts that may otherwise seem unrelated reflect the protection afforded by the Constitution to core aspects of state sovereignty. More than a century ago, in Collector v. Day, supra, the Court recognized "[t]hat the existence of the States implies some restriction on the national taxing power" as applied to state instrumentalities. Massachusetts v. United States, 435 U.S. 444, 454 (1978)

(opinion of Brennan, J.). 1/ The partial immunity of state instrumentalities from federal taxation is "implied from the nature of our federal system and the relationship within it of state and national governments." United States v. California, 297 U.S. 175, 184 (1936). And that immunity is not limited to federal taxation that discriminates against states, but extends generally to taxation that "unduly interferes with the State's function of government." New York v. United States, 326 U.S. 572, 588 (1946) (Stone, C.J., concurring). See also Massachusetts v. United States, 435 U.S. at 456-460 (opinion of Brennan, J.).

This Court has also employed the federalism principle as a pole star in defining the jurisdiction of the federal courts and delineating the proper exercise thereof. For example, the Court has discerned a sovereign immunity limitation upon the judicial power conferred on the United States by Article III, see Pennhurst State School & Hosp., slip op. 7-8, explaining that the Eleventh Amendment is "but an exemplification" of a more "fundamental rule." Ex parte New York, 256 U.S. 490, 497 (1921). Indeed, the Court has relied on notions on federalism to restrict the power of the federal courts even in cases properly within their jurisdiction. In Younger v. Harris, 401 U.S. 37 (1971), the Court held that, absent extraordinary circumstances, federal courts should not enjoin an ongoing state criminal proceeding, explaining that the ruling reflected (id. at 44)

> a proper respect of state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

1/ While the rule applied in Collector v. Day, -- i.e., that a state's intergovernmental immunity from federal taxation extends to its officers -- has since been overruled, see Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939), the doctrine of immunity survives as to state instrumentalities themselves.

The Court added (id. at 44-45) that the doctrine of "Our Federalism"

> does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Goverment and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

See also Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 431-432 (1982) (Younger applies to noncriminal state proceedings where "important state interests are involved"). Similar policies are reflected in the Burford abstention doctrine, which limits the role of federal courts where assumption of jurisdiction would disrupt establishment of coherent state policy in matters subject to state law (Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943); Colorado River Water Conservation District v. United States, 424 U.S. 800, 814-815 (1976)), and in the limitations upon the exercise of federal habeas corpus power to review state convictions, see Reed v. Ross, No. 83-218 (June 27, 1984), slip op. 8-9; Engle v. Isaac, 456 U.S. 107, 128-129 (1982). See also Rizzo v. Goode, 423 U.S. 362, 378-380 (1976).

3. The basic teaching of National League of Cities -- that "under most circumstances federal power to regulate commerce [may] not be exercised in such a manner as to undermine the role of the states in our federal system" (United Transportation Union v. Long Island R.R., 455 U.S. at 686) -- is in harmony with the fundamental principle of federalism embodied in the Constitution

and recognized in this Court's decisions in other contexts. 2/ Although the Court described the Tenth Amendment as "an express declaration" of the federalism limitation it recognized (426 U.S. at 842), the decision in National League of Cities manifests the "essential role of the States in our federal system of government" (id. at 844). The Court's holding, in the end, rests upon the conclusion that in the enactment before it "Congress ha[d] sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system'" (426 U.S. at 852, quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)), and would "allow 'the National Government [to] devour the essentials of state sovereignty'" (426 U.S. at 855, quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

While it is fair to argue -- as we do in this case -- that particular federal enactments that directly affect state activities nonetheless lack the drastic impact on the continuing vitality of state government that was branded as impermissible in National League of Cities, we have no quarrel with the underlying core principle. Few principles are more pervasively reflected in the text and overall structure of our Constitution; few are more fundamental to the Framers' conception of our system of government. We accordingly turn our attention to the test that has been abstracted from National League of Cities to assess claims of state immunity from federal Commerce Clause legislation.

II

In National League of Cities, 426 U.S. at 852, the Court held that 1974 amendments to the Fair Labor Standards Act that

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2/ Indeed, in National League of Cities itself we stated our view that "Congress may not employ the commerce power to destroy the sovereignty of the States guaranteed by the Constitution," Gov't Br. 38, underscoring (id. at 41) the affirmation in Maryland v. Wirtz, 392 U.S. at 196, that this "Court has ample power to prevent * * * 'the utter destruction of the State as a sovereign political entity.'" See also Gov't Br. on Reargument 6 n.1.

extended minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." In Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287-288 (1981), the Court summarized the rule of National League of Cities, stating it in the form of a test:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." Id. at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." Id. at 852.

Even where these three requirements are met, a claim that commerce power legislation enacted by Congress impermissibly infringes state sovereignty may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29. Subsequent decisions of this Court have generally adhered to and applied this formulation of the test for intergovernmental immunity. See Long Island R.R., 455 U.S. at 684 & n.9; EEOC v. Wyoming, No. 81-554 (Mar. 2, 1983), slip op. 9-10. 3/

We believe that some clarification of the Virginia Surface Mining test is appropriate and that clarification would reduce the volume of litigation in this area, which is attributable, at

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3/ Unlike other "Tenth Amendment" cases that followed National League of Cities, FERC v. Mississippi, 456 U.S. 742 (1982), addressed the constitutionality of federal legislation designed to foster use of state regulatory processes to advance federal policy goals, rather than the immunity of state instrumentalities from non-discriminatory, generally applicable, federal regulation. FERC accordingly does not, for the most part, rest upon application of the Virginia Surface Mining formulation. See 456 U.S. at 759. The Court recognized the validity of that test, however. Id. at 764 n.28.

least in part, to uncertainty as to the contours of the doctrine involved. But we do not favor any substantial alteration of the test, which, as we understand it, appears faithful to the fundamental constitutional insight that links National League of Cities to the broad mainstream of this Court's federalism jurisprudence.

1. Representatives of the States have periodically sought to dispense with the first requirement of the prevailing test for intergovernmental immunity -- i.e., the requirement that challenged federal commerce power legislation be shown directly to regulate the "States as States." See, e.g., Brief of Council of State Governments, Connecticut v. United States, No. 83-870 (October Term 1983). But this requirement, which sharply distinguishes federal commerce power legislation directly regulating private commerce from federal legislation that regulates state government itself, is firmly rooted in the "dual sovereignty of the government of the Nation and of the State[s]" (National League of Cities v. Usery, 426 U.S. at 845) and is required by this Court's countless decisions "attest[ing] to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with Federal law." Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 290. See also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534-535 (1941).

"It is elementary and well-settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." Missouri P. Ry. v. Stroud, 267 U.S. 404, 408 (1925). This rule of undivided authority is unequivocally stated in the Supremacy Clause (Art. VI, Cl. 2). Any other rule would impermissibly "impair a prime purpose of the Federal Government's establishment" (Case v. Bowles, 327 U.S. 92, 102 (1946)). Thus, stare decisis, fidelity to the unambiguous command of the Supremacy Clause, and

sensitivity to the very demands of constitutional structure that induced the Court in National League of Cities to recognize a protected realm of state sovereignty in the face of Congress's plenary Commerce Clause authority, combine to compel the conclusion that the doctrine of intergovernmental immunity can apply only when Congress legislates directly to regulate state government activity. See EEOC v. Wyoming, slip op. 10 n.10; Virginia Surface Mining, 452 U.S. at 286-290. See also Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 84 n.27 (1978).

2. The second prong of the Virginia Surface Mining formulation of the test for National League of Cities immunity -- that the federal statute address matters that indisputably are attributes of state sovereignty -- "poses significantly more difficulties," as the Court has remarked (EEOC v. Wyoming, slip op. 10). Cases subsequent to National League of Cities have not turned on this element of the test, and the Court has had "little occasion to amplify on * * * the concept" (EEOC v. Wyoming, slip op. 10 n.11). It appears to us that this requirement generally overlaps with the third prong of the test, which requires a showing of substantial impairment of state prerogatives regarding the organization of its instrumentalities (in traditional service areas). The second prong may accordingly safely be subsumed under the third, except perhaps, in one respect. By emphasizing that federal regulation may be held impermissible only if its disruptive impact on state sovereignty is indisputable, the second prong of the Virginia Surface Mining test highlights the limited scope of that doctrine and the limited role of the courts in enforcing it.

Because the doctrine of intergovernmental immunity is derived primarily from the structure of our constitutional system of dual sovereignties, it does not readily yield up clear rules for judicial application. Indeed, the Court has frankly

acknowledged that the "determination of whether a federal law [impermissibly] impairs a state's authority * * * may at times be a difficult one" (United Transportation Union v. Long Island R.R., 455 U.S. at 684). This problem has attracted considerable attention from the commentators. It has been argued that, because of its source in the structure of the federal constitutional system, the doctrine of intergovernmental immunity is one that, by its nature, should be enforced exclusively by the national political process. See Choper, The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review, 86 Yale L.J. 1552 (1977). Professor Wechsler has also emphasized the role of the political process (albeit without excluding entirely a role for the courts in enforcing federalism limitations upon Congress). See The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). On the other hand, it has been forcefully argued that protection of the structure of federalism is a task of surpassing importance for the courts. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81. And Professor Tribe has observed that the mode of "structural inference" underlying National League of Cities is not, in principle at least, distinguishable from that employed by the Court in defense of federal authority in McCulloch v. Maryland, and that, "[i]f states are to have any real meaning, Congress must * * * be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell." Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1068 n.17, 1071 (1977).

Of course, National League of Cities itself rejects the notion that enforcement of federalism restraints upon Congress's Commerce Clause authority is extra-judicial in nature. 426 U.S.

at 841-842 n.12. We do not propose that that conclusion be reconsidered. At the same time, we think it correct to acknowledge that the States play an influential part in the national political process (see pages 3 - 6, supra) and therefore can check the exercise of the federal commerce power if that power is employed in a manner that eviscerates state sovereignty. These political "checks" should be kept in mind in assessing the scope of state immunity from federal regulation. See Massachusetts v. United States, 435 U.S. at 456-457 n.13 (opinion of Brennan, J.). 4/

4/ The Court's rejection of the nonjusticiability argument in National League of Cities turned largely upon the idea that the structural guarantees of the Constitution ought not be waivable, and employed as an example cases in which an Act of Congress had been held to infringe the prerogatives of the Executive Branch notwithstanding the fact that it had been signed by the President. While we agree that such separation of powers disputes do not present a political question, see INS v. Chadha, No. 80-1832 (June 23, 1983), slip op. 21 & n.13, we do not think the analogy to the present situation wholly apt. Nor do we believe that recognition of the role played by the political branches in protecting federalism values depends upon embracing a doctrine of "waiver."

In a separation of powers dispute, Congress and the Executive come into direct conflict; if the rule of law is to prevail the Court is required to interpret the Constitution and resolve their dispute. Cf. Chadha, slip op. 21. A "Tenth Amendment" claim has a different dynamic. Although there is necessarily a direct conflict between the ideal of federal authority and that of state sovereignty in such a case, the issue is not presented to the political branches in those terms, but is instead treated as a question of substantive policy, to be decided, of course, against a background of constitutional limits. To resolve such a matter in accordance with the position advocated by the states simply does not require any negation of federal authority. Nor does Congress or the President have any institutional commitment to favor federal authority over state interests in every situation or at all costs. Indeed, there is every reason to believe that the Congress and the President will both take seriously the prerogatives of the states and are fully prepared to hear and attempt to address their concerns. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). Congress's failure to accede to the states' point of view with respect to a particular item of legislation cannot be taken as a rejection of this trust. The case for deference to Congress is especially strong when Congress has carefully examined the very claims of disruption and hardship put forward in litigation and has found them to be factually unfounded. Of course, that is precisely what happened when Congress applied the FLSA to publicly owned transit operations. See page 26, infra.

Thus, even in this context, as in ones more frequently confronted by the courts, Acts of Congress come before the Court cloaked with a strong presumption of constitutionality. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). The standard by which claims of intergovernmental immunity are measured should accordingly make clear that judicial intervention is the exception rather than the rule. It is only when Congress appears plainly to have forgotten or forsaken the "unique benefits of a federal system in which the States enjoy a 'separate and independent existence'" (EEOC v. Wyoming, slip op. 9 (quoting National League of Cities, 426 U.S. at 845)) that the judicial power should be exercised to override a congressional enactment. By requiring states that claim immunity from federal commerce power legislation to show that the challenged statute "indisputably" undercuts their sovereignty, the Virginia Surface Mining formulation properly emphasizes that neither marginal nor merely arguable impacts are judicially cognizable.

A second, related, reason for adopting this posture of judicial restraint is the "institutional limitations" that restrict courts' "ability to gather information about 'legislative facts'" (United States v. Leon, No. 82-1771 (July 5, 1984), slip op. 2 (Blackmun, J., concurring); see also Akron v. Akron Center for Reproductive Health, Inc., No. 81-746 (June 15, 1983), slip op. 5 n.4 (O'Connor, J., dissenting)). Yet as National League of Cities itself makes clear, intergovernmental immunity claims frequently present complex factual questions of impact. Compare 426 U.S. at 846-851 with id. at 873-874 & n.12, 878 (Brennan, J., dissenting). When a claim of intergovernmental immunity cannot be established by reference to the "direct and obvious" effect of the challenged federal legislation upon the viability of the federal system, judicial intervention is inappropriate. See EEOC v. Wyoming, slip op. 13. In such cases, the courts should defer to the political process as the arbiter of the competing claims of the States' and the Nation. See Cox,

The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 199, 229-230 (1971). 5/

3. The third prong of the prevailing test for state immunity from federal commerce power regulation requires that a complaining state demonstrate that the challenged federal statute "directly impair[s] [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 288 (quoting National League of Cities, 426 U.S. at 852). A recurring problem in the application of this standard is to define "traditional governmental functions." It is our view that this standard for assessing immunity of state and local government functions should be essentially, if not exclusively, an historical one. This approach is most faithful to the clear intent of National League of Cities, most consistent with the analogous intergovernmental tax immunity doctrine, and truest to the federalism principle that underlies both doctrines.

In its opinion in National League of Cities, the Court pointedly characterized as "traditional" the governmental services that were held to be exempt from enforcement of the Fair Labor Standards Act. The Court stated that the impact of the challenged Fair Labor Standards Act amendments upon states' control of employment relations affecting "fire prevention, police protection, sanitation, public health, and parks and recreation" services was impermissible because "it is functions

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5/ We do not agree that this consideration can be dismissed simply because an adjudication involves a clash between federal authority and state or local prerogatives. Cf. EEOC v. Wyoming, slip op. 13 n.8 (Burger, C.J., dissenting). We note, for instance, that in determining whether a state statute denies due process of law -- a federal standard imposed upon the states by the Fourteenth Amendment -- the Court has looked to the political judgments of the states generally that are embodied in their laws. Statutes that follow an approach adopted by many states are more readily held to meet the federal standard of due process than idiosyncratic ones. Compare Schall v. Martin, No. 82-1248 (June 4, 1984), slip op. 13 n.16, with Addington v. Texas, 441 U.S. 418 (1979); see also Jones v. United States, No. 81-5195 (June 29, 1983), slip op. 15-16 & n.20.

such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens" (426 U.S. at 851; emphasis added). The Court added that its listing of exempt services was not "exhaustive," intimating that other services "well within the area of traditional operations of state and local governments" might qualify for similar treatment. 426 U.S. at 851 n.16 (emphasis added). And in overruling Maryland v. Wirtz, supra, the Court emphasized that the public schools and hospitals that were covered by the 1966 FLSA amendments that had been upheld in that case represent "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (426 U.S. at 855; emphasis added).

"Traditionally" simply is not synonymous with "generally" or "typically." If the repeated use of the qualifiers "traditional" and "traditionally" does not import a historical standard, it is difficult to assign any meaning at all to these key terms. Our reading of National League of Cities is corroborated, moreover, by the Court's explanation that the holding of United States v. California, supra, remained good law because states historically have not regarded operation of a railroad as a governmental activity. 426 U.S. at 854 n.18.

Tracing National League of Cities to its doctrinal and precedential roots makes clear both that the Court intended to establish an essentially historical test and that such a test is a sound and workable one. The analysis employed in National League of Cities is largely derived from Justice Rehnquist's dissent in Fry v. United States, supra. Justice Rehnquist's opinion employs an essentially historical standard in delineating exempt state functions, distinguishing United States v. California, supra, from Maryland v. Wirtz (421 U.S. at 557-558; emphasis added):

> I would hold the activity of the State of California in operating a railroad was so unlike the traditional governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act. But the operation of schools, hospitals, and like facilities involved in Maryland v. Wirtz is an activity sufficiently closely allied with traditional state functions that the wages paid by the state to employees of such facilities should be beyond Congress' commerce authority.

Justice Rehnquist acknowledged that "[s]uch a distinction would undoubtedly present gray areas to be marked out on a case-by-case basis," and remarked that "[t]he distinction suggested in New York v. United States, 326 U.S. 572 (1946), between activities traditionally undertaken by the State and other activities" would be useful in resolving such cases (421 U.S. at 558 & n.2).

Both National League of Cities and Justice Rehnquist's dissent in Fry rely heavily upon the doctrine of partial state immunity from federal taxation. See 426 U.S. at 842-843, 854; 421 U.S. at 552-556. As noted above (page 6, supra), that doctrine, like the National League of Cities doctrine, rests ultimately upon the federal structure of our constitutional system. But the tax immunity of the states has not been extended to "revenue-generating activities of the States that are of the same nature as those traditionally engaged in by private persons." Massachusetts v. United States, 435 U.S. at 457 (opinion of Brennan, J.). See, e.g., New York v. United States, supra; Allen v. Regents, 304 U.S. 439 (1938); Helvering v. Powers, 293 U.S. 214 (1934); Ohio v. Helvering, 292 U.S. 360 (1934); South Carolina v. United States, 199 U.S. 437 (1905). 6/ In New York v. United States, Chief Justice Stone espoused an historical standard that would prevent the states from acquiring expanded

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6/ As Justice Brennan observed in Massachusetts v. United States, 435 U.S. at 457 & nn.14-15, cases prior to New York v. United States relied, at least in part, upon a distinction between governmental and proprietary functions, but that distinction was rejected by all Members of the Court in New York v. United States, whereas the historical standard appeared to represent the consensus of the Court.

tax immunity, and thus eroding the federal taxing power and tax base, by taking over activities formerly performed by the private sector (326 U.S. at 588-589; citations omitted):

> [I]mmunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax * * * gives merely an accustomed and reasonable scope to the federal taxing power. * * * The nature of the tax immunity requires that it be so construed so as to allow to each government reasonable scope for its taxing power[.] The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it. [7/]

Accordingly, an interpretation of the states' partial immunity from federal commerce power regulation that precludes the states from expanding that immunity and curtailing the effective reach of federal authority by assuming functions previously performed by the private sector is consistent with both the tax immunity doctrine and the principle of balanced federalism that links it to the National League of Cities doctrine. This Court's opinion in Long Island R.R. makes our point (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

As explained in our opening brief (at 41-42), because the Constitution does not treat the states and the Nation as co-equal sovereigns as to matters within federal authority, see FERC v. Mississippi, 456 U.S. at 761; Sanitary District v. United States, 266 U.S. 405, 425 (1925), this principle properly extends to all

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7/ Although Chief Justice Stone wrote for only four Members of the Court, the separate opinion of Justice Frankfurter, joined by Justice Rutledge, took a more restrictive view of state tax immunity. Only Justices Douglas and Black, in dissent, espoused a more expansive view of that immunity. See Massachusetts v. United States, 435 U.S. at 457-458 n.15.

cases where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area. Where state activities and patterns of operation are not entrenched prior to the enactment of federal legislation, federal requirements cannot be said to displace state decisions or disrupt settled patterns of organization, and do not imperil the vitality of the states. 8/

We recognize that, in Long Island R.R., 455 U.S. at 686, the Court stated that its emphasis on "traditional governmental functions and traditional aspects of state sovereignty" was not intended to "impose a static historical view of state functions generally immune from federal regulation." At the same time, the Court's holding that "federal regulation of a state-owned railroad simply does not impair a state's ability to function as a state" was predicated directly upon "the historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments" (455 U.S. at 686; emphasis added)). Thus we take the message of Long Island R.R. to be that a focus on the historic scope of state activity is ordinarily proper, not because of a mechanical preoccupation with the past, but because such an inquiry is best calculated to discover "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" (455 U.S. at 686-687 (citation omitted)).

The standard we have proposed does not, in fact, adopt a "static historical view of state functions" or freeze the states

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8/ Of course, even when state activities are expanded prior to the onset of federal regulation, other factors -- such as substantial federal financial or planning assistance in the enlargement of the states' roles -- may demonstrate that state sovereignty is not threatened by federal regulatory legislation.

in time so that only those activities performed when the Nation was founded qualify for protection under the intergovernmental immunity doctrine. Nor does it adopt any rigid across-the-board cutoff date for activities that are to be considered "traditional." Rather, the standard we espouse entails a more sensitive inquiry, one that turns upon whether the states had, prior to the initial enactment of federal regulatory legislation applicable to a particular field of service or activity, generally established themselves, with settled patterns of organization, as providers of the service. This standard allows the states ample latitude for experimentation with, and expansion of, their services, while it precludes erosion of federal authority and provides a workable and objective standard capable of ready application by the courts. It thus strikes a balance essential for the preservation of our system of constitutional federalism.

This standard also accords proper deference to Congress which, in enacting legislation, must be presumed to be sensitive to the prerogatives of state and local government and to the federal structure of our constitutional system. As explained above (pages 12-15, supra), although we do not suggest that "Tenth Amendment" claims are nonjusticiable, we believe that the operation of the national political process affords substantial protection for state interests, and that as a result judicial restraint is appropriate in this area. As indicated in our initial brief (at 49-51) respect for Congress militates especially strongly against adoption of a rule that would permit shifting patterns of state activity to undermine the constitutionality of federal statutes that were valid when enacted. In other words, the constitutionality of federal Commerce Clause legislation must be adjudged in terms of the state activities that were traditional at the time when the legislation was enacted.

Congress is the best equipped of the three branches of government to engage in the necessary kind of factfinding concerning patterns of political, social and economic organization, and the bearing that these have upon the provision of governmental services. The rule we suggest enables Congress to discharge its constitutional responsibility at the time it enacts legislation, free of the threat that its legislative product will, for reasons beyond its control, drift into a status of unconstitutionality at some unascertainable future time. Moreover, such a rule would entrust to Congress the task of periodically reviewing the corpus of enacted law to ascertain whether shifting patterns of state activity warrant any statutory change. Congress, unlike the courts, possesses not only the requisite capabilities for the task, but also, by its nature, the political sensitivity to "'accommodat[e] the competing demands' in this area" (United States v. New Mexico, 455 U.S. 720, 737-738 (1982), quoting Massachusetts v. United States, 435 U.S. at 456 (opinion of Brennan, J.)).

Judicial deference to Congress in this setting is not inconsistent with fundamental federalism principles. National League of Cities has two salient features. First, building upon earlier precedent, the Court announced the general principle that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary power to tax or to regulate commerce" (426 U.S. at 842). Second, the Court identified certain core functions that the federal government may not disrupt in the exercise of its Commerce Clause authority. Neither of the Court's holdings need be or should be disturbed. Within the constitutional framework established, however, the application of these principles to state government activities not explicitly addressed in National League of Cities will turn largely upon historical considerations, factual assessments and a careful weighing of competing state and federal

objectives. See pages 22-23, infra. These determinations will likely involve the kinds of fine-tuning and interest balancing that Congress -- composed of representatives of the States -- is particularly well-equipped to undertake. Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, No. 82-1005 (June 25, 1984), slip op. 27. 9/

4. The final element of the Virginia Surface Mining formulation for assessing claims of Tenth Amendment immunity is the "balancing test," which recognizes that, notwithstanding any intrusion upon state prerogatives, the nature of the federal interest underlying an Act of Congress that applies to state activities may override the states' sovereignty claim. We believe that the "safety valve" built into the intergovernmental immunity doctrine by the "balancing test" is essential to its validity. As Justice Blackmun observed in his concurring opinion in National League of Cities, 426 U.S. at 856, a balancing approach preserves paramount federal authority vis-a-vis the states "in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." In other words, where attainment of a statutory goal within the reach of Congress's commerce power requires a uniform legislative scheme, applicable to all who enter the regulated field of activity, vindication of Congress's plenary power to regulate commerce dictates that states, like others who enter the field, be bound by the federal enactment. The balancing test thus ensures that the intergovernmental immunity doctrine does not

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9/ Particularly when a fundamental constitutional principle has been elucidated by this Court, and Congress thereafter enacts legislation reflecting its assessment of the competing interests and pertinent legislative facts, special deference is due to these congressional judgments from courts that are called upon to apply the constitutional standard to the specific situation or circumstances addressed by Congress. See Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

serve to "impair a prime purpose of the Federal Government's establishment" (Case v. Bowles, 327 U.S. at 102).

Moreover, in assessing the nature of the federal interest, substantial deference is due to Congress's judgment that a uniform legislative scheme is necessary to secure the statutory objective. The railroad cases illustrate the principle. In Long Island R.R. the Court observed that "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system" (455 U.S. at 688). The Court concluded that, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system" (id. at 689; emphasis added). See also California v. Taylor, 353 U.S. 553, 567 & n.15 (1957). The Court has properly declined to second-guess these congressional determinations.

III

In our opening and reply briefs filed last Term we have explained why neither the doctrine nor the holding of National League of Cities controls this case; we do not undertake to repeat that discussion here. We think it useful, however, to highlight briefly the relevance of the foregoing general discussion to the relatively narrow question that must be decided in this case.

As we have previously detailed (Gov't Opening Br. 16-18), operation of transit services is not, by any measure, an established municipal service of long standing. Rather, it is the product of a dramatic shift within the last 20 years from provision of transit services almost exclusively by private enterprise to a mixed industry. That shift occurred only in the wake of establishment of a federal program providing massive

financial assistance to localities that took over private transit operations. That program was established by Congress in response to the urgent appeals of state and local officials who claimed that, without substantial federal aid, they would simply be unable to operate transit services. Congress agreed, finding that "[m]ass transportation needs have outstripped the present resources of the cities and the States; * * * that a nationwide program can substantially assist in solving transportation problems" (H.R. Rep. 204, 88th Cong., 1st Sess. 4 (1963)), and that without significant federal aid adequate mass transportation could not or would not be provided by the states and municipalities on their own (S. Rep. 82, 88th Cong., 1st Sess. 4-5 (1963)). See Gov't Opening Br. 26-32. In light of the traditional dominance of the local transit industry by the private sector, the recent entry of local government into the industry, and the critical role played by federal aid in establishing and maintaining the public sector, it seems beyond question that mass transit is not a traditional governmental function that must be exempted from non-discriminatory federal Commerce Clause legislation lest we jeopardize the vitality of the states.

It can scarcely be claimed, moreover, that the states generally had undertaken to provide mass transit services and had established settled patterns of organization in the field even by 1961 when the Fair Labor Standards Act was applied to the local transit industry, much less at an earlier time when the federal government began its regulation of employment in this area. Appellees have -- understandably -- never even suggested that the Fair Labor Standards Act Amendments that extended coverage to public transit employees were unconstitutional under the standards applied in National League of Cities when they were enacted in 1966. Thus, their argument depends entirely upon recognition of a rule of creeping unconstitutionality -- i.e.,

that political and economic developments subsequent to enactment of the challenged provisions rendered them no longer constitutional as of some unspecified date.

Appellees' argument highlights the unworkability of an ahistorical approach to claims of intergovernmental immunity. The rule proposed allows for no settled determinations by the courts, and permits no confidence on Congress's part that action within the "accustomed and reasonable scope [of] federal * * * power" (New York v. United States, 326 U.S. at 589 (Stone, C.J., concurring)) will be upheld as proper. Rather, questions of constitutionality of federal legislation affecting the states would be open to continual judicial reexamination, and the doctrine of intergovernmental immunity would function as a crude form of constitutional "sunset" legislation. We urge rejection of a constitutional rule founded on such shifting sands, with its attendant burdens upon the legislative and judicial branches.

For reasons discussed above, this is precisely the kind of case where deference to Congress's judgment is appropriate. Congress determined that the minimum wage and overtime provisions of the FLSA should be extended to public transit systems to prevent unfair competition. H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. 1487, 89th Cong., 2d Sess. 8 (1966). Appellees now claim that that determination is outmoded because of changed conditions in the transit industry. 10/ Absent the most unusual circumstances, such arguments should be addressed to Congress. And deference to Congress's judgment is particularly appropriate here, because, by all accounts, programs established by Congress played a vital role in making feasible widespread public sector participation in the local transit industry. Congress also carefully assessed the claims -- advanced here by

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10/ We note with interest the plans of the British government to reestablish local bus service as a private sector function. The Freedom Road, The Economist, July 14, 1984, at 58.

appellees -- that the overtime requirements of the FLSA create special hardships for transit operators. Congress concluded, based upon review of collective bargaining agreements in the transit industry, which almost uniformly required payment of overtime after 40 hours in a work week, that "the 'problems' of the 40-hour workweek pointed to by some segments of the industry have and are already being met and resolved by a substantial majority of the industry" (H.R. Rep. 93-913, 93d Cong., 2d Sess. 31 (1974)). 11/ Appellees have offered no reason for overriding Congress's considered determination on this matter. See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973).

11/ Appellees note that premium rates are frequently paid in the transit industry because of its scheduling practices (APTA Br. 21; NLC Br. 9-10). But contrary to the perhaps deliberately vague predictions of appellees (APTA Br. 21, NLC Br. 10), the requirements of the FLSA would not simply be superimposed upon any existing premium pay arrangements. The FLSA generally requires that an employee be paid 1-1/2 times his "regular rate" of pay for all hours worked in excess of 40 in a week. See 29 U.S.C. 207(a)(1). However, FLSA expressly provides for exclusion of various forms of "extra compensation" in establishing an employee's regular rate of pay. See, e.g., 29 U.S.C. 207(e)(5), (7), and such extra compensation is creditable towards the overtime pay required by the Act. 29 U.S.C. 207(h). Contrary to appellees' implication, it has never been determined in this case, or in any other forum, that existing premium pay arrangements must be treated as part of the "regular rate" to which overtime is applied. See Advisory Commission on Intergovernmental Relations, Mass Transit and the Tenth Amendment, Intergovernmental Perspective Fall 1983, at 17, 23. Indeed, it is safe to assume that appellees would resist any such ruling.

In any event, even if it were determined that existing premium pay arrangements in some cities are structured so as to be considered part of the "regular rate," the FLSA would not, as a practical matter, require that overtime be paid on the basis of such premium rates in the future. Because of the relatively high wage standards that are said to prevail in the transit industry generally (see NLC Br. 8) -- well in excess of the statutory minimum wage (see Gov't Opening Br. 8 n.12) -- it remains open to management and labor to renegotiate existing premium pay arrangements in light of the requirements of the FLSA to assure that aggregate compensation is not increased. Thus, the FLSA does not require transit operators to pay overtime in any different manner or amount than other employers are required to pay.

For the foregoing reasons, and the reasons set forth in our opening and reply briefs, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JULY 1984

Garcia v. San Antonio Metropolitan Transit Authority

The Supreme Court today decided the above-referenced case in favor of the United States, agreeing with the Solicitor General that the Tenth Amendment did not preclude Congress from extending the minimum wage and overtime provisions of the Fair Labor Standards Act to public transit employees. The decision was something of a Pyrrhic victory, however, since the Court in reaching its conclusion overruled National League of Cities v. Usery, 426 U.S. 833 (1976). In Garcia, the United States argued, unsuccessfully, that it was not necessary to overturn this landmark decision that gave "teeth" to the Tenth Amendment and thereby promoted the values of Federalism.

The Tenth Amendment provides that "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." Until National League of Cities, the Tenth Amendment was generally regarded as a truism without independent legal significance. That decision, however, ruled that the Amendment operated as an independent restriction on Congressional power to legislate with respect to the States and local government. The San Antonio Metropolitan Transit Authority (SAMTA) relied upon National League of Cities in arguing that Congress could not regulate the wages it paid its employees. The United States, represented by the Department of Justice, disagreed, arguing that such congressional regulation did not interfere with the proper role of the States in the Federal system, a role protected by the Tenth Amendment.

The Supreme Court requested reargument on the specific question whether National League of Cities should be overruled. The Government argued that it should not be, and that it was not necessary to do so in order to rule against SAMTA. The Supreme Court, by the narrowest of margins (5-4), disagreed. The majority, in explicitly overruling National League of Cities, reasoned that the proper role of the States is guaranteed not by external limits on Congress such as the Tenth Amendment, but by the political structure of the Federal government itself. This reasoning will be regarded as a setback by those who had been cheered by the Court's effort in National League of Cities to implement the values of Federalism underlying the Tenth Amendment.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C 20503

MEMORANDUM July 8, 1985

To: Domestic Policy Council

From: Michael Horowitz
Chairman, DPC Working Group on Federalism

Subject: Administration Position in the Aftermath of Garcia

I. THE WORKING GROUP: In light of July 25 Senate Labor Subcommittee hearings regarding application of the Fair Labor Standards Act (FLSA) to state and local governments, this report was prepared by an ad hoc committee of representatives of Labor, Justice, OMB, and the White House Intergovernmental Affairs office.

II. BACKGROUND: In Garcia v. San Antonio Mass Transit Authority, decided on February 19, 1985, the Supreme Court by a bare majority overruled its earlier Tenth Amendment holding barring application of the FLSA to "traditional functions" of state and local governments. The Court made clear that regulation of state and local governments by the federal government pursuant to the Commerce Clause was to be the exclusive province of the political process, subject to virtually no Constitutional limitations.

The Court's decision in Garcia must of course be honored whatever the Administration's views of its constitutional soundness. Accordingly, 1974 amendments to the Act covering such state and local employees as police and fire officers are in effect.

The Act is enforced by Department of Labor and private actions (including class actions) and can result in judgments for back pay, "liquidated" damages equal to back pay and attorneys' fees.

III. QUESTIONS

1. What remedies, if any, should the Administration support?

2. What position should the Administration take at the July 25 hearings, and who should testify?

IV. IMPACT OF THE FLSA ON STATE AND LOCAL GOVERNMENT SERVICES: If left alone, the Garcia decision is likely to substantially increase costs and to reduce management flexibility in a number of important areas of state and local government operations. The following concerns illustrate, but by no means exhaust the problems:

1. Compensatory time. The courts have made clear that in almost all instances the FLSA bars employers from giving compensatory time off in lieu of cash for overtime. Thus, Garcia will bar such popular employee practices as exchanging straight-time cash for volunteered replacement of absentees, and use of "comp time" to supplement vacations or to build up time for second jobs. In addition, it makes unlawful (or considerably more expensive) many collectively bargained "comp time" provisions. While the windfall potential of extra payment for current duties may prove irresistible to many police, fire and other public employee groups, many recognize that the likely outcome of a "comp time" bar will be a sharp reduction in overtime assignments -- thus reducing state and local management flexibility without providing an offsetting increase in cash compensation.

2. Training. Application of the Act to require payment at the standard rate plus time-and-one-half for overtime during periods of required training and related study time could have a significant impact on certain existing programs. For example, California suggests that the application of Garcia will cause severe curtailment, if not elimination, of its (youth employment) Conservation Corps program, which requires enrollment in uncompensated evening training sessions. Of greater moment are large numbers of 50-60 hour per week police, paramedic and firefighter training courses -- often of 20 week duration -- which will pose difficult choices between higher costs and lesser training for many state and local governments.

3. Maximum hours. Many public sector employees must, by the nature of their jobs, work irregular hours. These include paramedics and other rescue personnel, fish and game wardens and, of course, police and fire officers. While the 1974 FLSA amendments authorize special maximum hour

arrangements for police and firefighters, enforcement of the FLSA will still result in the payment of overtime for work schedules (often collectively bargained) now in effect for many police and firefighters.

4. Puerto Rico. The first year cost to Puerto Rico of Garcia, affecting the minimum wages of over 50,000 employees, is estimated at $150 million. Instead of incurring these costs Puerto Rico may reduce work hours -- rather than engage in layoffs, which, it is claimed, would raise Commonwealth unemployment 2.5 percent, to 22.5 percent.

5. Senior citizen and other community service employees. Many senior citizens work as crossing guards or like jobs at annual wages below the Social Security limit. Should they be subject to minimum wage laws, their jobs and the services they currently provide may be discontinued.

6. Joint employment. In many small cities and counties, firefighters are often employed between fire calls as police officers or in other capacities. Because the 1974 amendments permit extended continuous duty tours by firefighters beyond those permitted for other categories of employees, questions exist as to whether overtime pay will be required for firefighters doing, e.g., police traffic work or municipal vehicle repairs.

7. Volunteers. The voluntary performance by career employees of like duties in their own or neighboring jurisdictions is effectively prohibited by FLSA overtime requirements. This ban will severely impede the use of volunteer fire companies by rural communities who enter into "mutual aid" agreements and other forms of emergency assistance with fire companies of adjoining jurisdictions.

8. Collective bargaining agreements. Current agreements, which many state and local jurisdictions may not be able to modify, are likely to be thrown into uncertain status by the Act's coverage.

Accurate cost estimates are difficult to achieve due to the lack of FLSA expertise at the state and local level, the variety of employee lawsuits and complaints that may arise and the uncertainty of how each jurisdiction will choose to comply. Current asserted first year cost increases range, e.g., from $100 million for Los Angeles (and $1 billion for all California jurisdictions), to $10 million for Maine state police functions, to $6.2 million for all major Missouri state operations.

The above estimates, and like ones, are only for payroll costs; they do not include other legal liabilities, court costs and attorneys fees, contractual renegotiation expenses or necessary administrative and procedural costs. Of course, many jurisdictions have not even completed their rough estimates.

An apt historical analogy may be provided by the experience of the Postal Service. It initially expected that it would experience minimal impact on its operations, pay scales and route structures if covered by the FLSA, and chose not even to object to such coverage. In fact, the change resulted in court settlements costing over $470 million in suits for back wages and overtime. Costly personnel hiring and administrative changes were also required.

V. THE OPTIONS

1. Await/work for the formation of a state/local consensus, and signal clear readiness to follow that lead:

To date, the reaction of state and local governments has been mixed and, notwithstanding letters from various jurisdictions and formally enacted resolutions of the National Conference of State Legislatures, the National Association of Counties and the National League of Cities, largely irresolute. No real consensus exists on their part as to the form of legislation which will be sought or, indeed, whether any serious effort is to be made to seek legislative reform. In part, this appears to be the result of a failure to determine the full extent of problems likely to flow from coverage under the highly complex provisions of the FLSA. (E.g., many jurisdictions believe, perhaps incorrectly, that they largely will be unaffected by it while others believe, erroneously, that the Department of Labor largely will be able to neutralize the impact of coverage through regulatory and other administrative changes.) In addition, however, inaction and lack of leadership on the part of state and local groups may reflect the hope of paternalistic federal government investment of its political capital to solve state and local problems. Given the Administration's commitment to federalism -- strongly and repeatedly expressed by the President -- many may feel it unnecessary to "take on" employee interest groups before Congress if the Administration will be doing so on its own.

In sum, this option calls for enforcement of the Act subject only to technical rulings by Labor's Wage and Hour Administration (e.g., through orders and opinion letters) to relieve state and local governments from unreasonable coverage. At the same time, this option would rule out any major administrative or statutory initiative on the Administration's part unless it is the product of intensive bargaining with state and local government representatives over the character of a joint initiative.

A special virtue of this approach is that the Administration may be unable to achieve substantial change on its own. On the other hand, it calls for a largely passive approach to problems which the Administration is and should be actively committed and obligated to deal with.

2. Immediately take all regulatory-administrative actions available to the Department of Labor:

In addition to the technical clarifications which the Department can issue in the ordinary course of business, there are some administrative changes of real significance which appear to be open to the Department -- largely (but not exclusively) through formal Administrative Procedure Act proceedings. Changes in this category include:

- Amending the extended duty hour regulation to permit the exclusion of sleep and meal time from compensable hours for tours of 24 hours or less.

- Defining training time to exclude from coverage certain activities undertaken primarily for the benefit of employees.

- More fully treating firefighters as such for purposes of maximum hour coverage when engaged in dual or joint employment.

- Redefining stand-by and on-call time.

- Raising the ceiling for "nominal" compensation for volunteers.

- Including city parks and amusement facilities (swimming pools, etc.) in the exemption from maximum hours.

It should be emphasized that of the above examples the truly substantive action would be allowing employers to exclude meal and sleep time from the working hours of police and firefighters' tours of duty of 24 hours or less. (Under current regulations public safety employers can deduct such time only for tours in excess of 24 hours, while private employers are permitted deductions for lesser tours.) This change could be controversial, and is likely to be subject to legal challenge. It is also likely, however, to be of important value to a large number of public employers.

Pro: This option might be deemed by many state and local governments as an act of substantial good faith on the part of the Administration and could thus have the effect of galvanizing many to engage in further, though less than fundamental, efforts at legislative reform. It may also represent the Administration's minimal obligation in this area, i.e. to deal with problems posed by Garcia on its own initiative to the extent possible. As noted, it would also have major ameliorative effects for some jurisdictions.

Con: This option could, however, have the effect of taking attention away from legislative reform, fundamental or otherwise, that will be necessary to restore state and local governments to a close approximation of their pre-Garcia situations. It could detract from efforts at legislative reform, both because of its partially ameliorative effects and because it might, per the discussion of Option 1, lead state and local governments to believe that the federal government will assume the major responsibility for dealing with the issue. It could also have the effect, notwithstanding the Administration's principled federalism position, of implying Administration acceptance of state and local government coverage under FLSA.

3. Immediate support of legislation:

At the hearing of July 25, the Administration could indicate support, if not for actual bills recently introduced, then for one or a number of general approaches taken by these bills. In rough form, the legislative solutions under discussion are:

- o Delay the implementation dates of FLSA. This would reduce retroactivity problems and, even in its mildest form, allow state and local governments to change existing practices on a phased basis to achieve maximum avoidance of overtime costs.

- o Repeal the "comp time" ban and provide special relief for Puerto Rico. In concert with amending the less-than 24 hour work tour regulations, this would largely reduce the known, major liability exposure of most public employers.

- o Repeal public employee coverage amendments. This could range from the "pure federalism" approach of voiding the 1974 FLSA coverage of all state and local employees (or even repealing 1966 and 1972 amendments covering certain public hospital and school employees); to retaining the pre-Garcia exemption of "traditional" employees; to repealing the 1974 coverage of the maximum hour (but not the minimum wage) provisions of the Act.

Clearly, some legislative action will be necessary even if the policy objective is to limit immediate and unbudgeted liability on the part of state and local governments.

The potential costs and gains of this option are in part set forth in the discussions of Options 1 and 2. Depending on the judgment and perspective employed, this option might -- but might not -- trigger more serious state and local government action on the Hill in their own behalves. (The absence of an aggressive state and local presence on the Hill on this issue is striking.) The issue posed by this option is not whether support for legislative change from current FLSA coverage of state and local governments is consistent with Administration principles; it clearly is, and the Administration is likely to wish at some point to support some form of corrective legislation. The issue is the effect of any such support at the July 25 hearing in the absence of a joint program and strategy.

If some support is deemed proper, guidance is needed as to the character of the legislation to be endorsed.

Support of a general character -- in favor of an undefined set of FLSA amendments -- would maximize flexibility at the risk of appearing hortatory rather than real. If the Administration gives explicit support for one of the three above legislative approaches, risks exist as to each if a position is taken without full consultation/bargaining with state and local governments. The delayed implementation approach is subject to the criticism that it offers inadequate protection and deviates from principled federalism commitments of the Administration. Various repeal approaches, from partial to complete, may range from being inadequate or unprincipled on the one hand to unrealistic and infeasible on the other. In addition, concerns have been raised that endorsement of legislation to revise/repeal the 1974 amendments without the fully coordinated support of state and local governments could invite other FLSA amendments such as a minimum wage increase. Clearly, such a development could compromise any prospect for reform legislation.

VI. THE JULY 25 HEARING: The Council should consider the agencies (and representatives) to testify at the hearing. The major question is whether the Department of Justice should appear. In light of its constitutional commitment to first principles of federalism, appearance by Justice is likely to signal Administration support for a more generic legal/constitutional approach, where the views and concerns of labor groups will be of lesser significance to the issue. In addition, some consideration should be given to the seniority level of the Administration witnesses, given its effect on perceptions of the priority placed by the Administration on the issue.

VII. DECISIONS

A. Option 1 (Indicate at the July 25 hearing that the Administration is sympathetic to the concerns of state and local governments but awaits/will work for formulation of a joint action package.)

Yes _____

No _____

B. Option 2 (Indicate at the July 25 hearing that the Department of Labor will take maximum feasible regulatory-administrative action open to it.)

Yes _____

No _____

C. Option 3 (Indicate at the July 25 hearing that the Administration will support legislation.)

Yes _____

No _____

D. If Option 3 is endorsed:

Indicate general support for legislative reform only _____

Indicate support for delay/phase-in legislation _____

Indicate support for "comp time" repeal, special relief for Puerto Rico _____

Indicate support for general coverage repeal _____

E. At the July 25 hearing, testimony should be given by:

Labor only _____

Labor and Justice _____