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Presidential Power Grab or Pure State Might? A Modern Debate Over Executive Interpretations on Federalism

I. INTRODUCTION

President William J. Clinton recently addressed prominent state and local officials as well as many foreign dignitaries at a conference on federalism. In his opening remarks, he observed, “I think it is quite an interesting thing that we have this impressive array of people to come to a conference on federalism, a topic that probably 10 or 20 years ago would have been viewed as a substitute for a sleeping pill.”¹

Yet President Clinton’s position on federalism has received sizable attention as of late. Federalism is a hot topic in the executive branch, as well as other branches of the government, with the Supreme Court hearing several cases dealing specifically with the limits of congressional power in its 1999-2000 term,² and Congress pushing federalism bills through the House and the Senate to codify federalism philosophy.³ It was President Clinton’s enactment of Executive Order 13,083 in 1998, however, that united, as well as enraged, state and local groups in an effort to return to federalism policy as set by President Ronald Reagan in 1987.

Over the course of the past year, President Clinton has issued not one, but three, executive orders delineating the executive branch’s policy on federalism. Executive Order 13,083 (“1998 Or-

1. President William J. Clinton, Address at the Forum of Federation Conference (Oct. 11, 1999), *available in* WESTLAW at 1999 WL 24361603.

2. See Joan Biskupic, *High Court to Tackle Key Social, Political Issues*, WASH. POST, Oct. 4, 1999, at A3 [hereinafter *High Court*]; Joan Biskupic, *National Court Support for State Power Evident in Arguments: Recent Decisions Erode Federalism*, NEW ORLEANS TIMES-PICAYUNE, Apr. 1, 1999, at A19 [hereinafter *National Court Support*]; David Jackson, *Federal Power Top Issue for High Court*, SALT LAKE TRIB., Oct. 4, 1999, at A5; Theodore B. Olson, *Rule of Law: Aaaaand They’re Off! The Justices Go to Work*, WALL ST. J., Oct. 4, 1999, at A43; Gaylord Shaw, *Key Issues Await High Court*, NEWSDAY (Long Island), Oct. 4, 1999, at A4.

3. See generally The Federalism Act of 1999, H.R. 2245, 106th Cong. (1999); The Federalism Accountability Act of 1999, S. 1214, 106th Cong. (1999); The Federalism Preservation Act of 1999, H.R. 2960, 106th Cong. (1999).

der”⁴ was the first and most provocative. Quietly issued in May, the 1998 Order changed, without consulting state and local officials, the executive branch federalism policy that had been in place since President Reagan’s Executive Order 12,612 (“Reagan Order”).⁵ It was originally scheduled to take effect on August 12, 1998;⁶ however, under a barrage of criticism from members of Congress and state and local interest groups,⁷ President Clinton issued Executive Order 13,095 (“Suspension Order”),⁸ indefinitely suspending the implementation of the 1998 Order. Opponents claimed that the 1998 Order was “wrongheaded and unacceptable,” a “serious step backward” from the previous Reagan Order signed in 1987, and demanded that the order be withdrawn.⁹ The Clinton camp responded by stating, “‘We thought there were no real substantive changes . . . but in retrospect, it wouldn’t have hurt’ to review the new language with the state and local officials.”¹⁰

The suspension of the 1998 Order allowed time for state and local governments to consult with the Clinton administration about federalism policy issues.¹¹ After over a year of negotiations between state leaders and the White House,¹² Executive Order 13,132 (“1999 Order”)¹³ was issued in August of last year. It has been touted as “strengthening the partnership with state and local gov-

4. Exec. Order No. 13,083, 63 Fed. Reg. 27,651(1998). For the text of this order, see Appendix A.

5. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987). For the text of this order, see Appendix A.

6. See David S. Broder, *White House to Rewrite Federalism Order, Now With State-Local Input*, WASH. POST, July 29, 1998, at A19.

7. See, e.g., David S. Broder, *Executive Order Urged Consulting, But Didn’t*, WASH. POST, July 16, 1998, at A15 [hereinafter *Executive Order*]; Broder, *supra* note 6, at A19; Fred Thompson, *Big-Government Power Grab*, WASH. POST, Aug. 17, 1998, at B5.

8. Exec. Order No. 13,095, 63 Fed. Reg. 42,565 (1998). For the text of this order, see Appendix A.

9. See Broder, *supra* note 6, at A19.

10. Broder, *Executive Order*, *supra* note 7, at A15 (quoting White House Spokesman Barry J. Toiv).

11. See Exec. Order No. 13,095, *supra* note 8 (stating that “in order to enable full and adequate consultation with State and local elected officials, their representative organizations, and other interested parties, it is hereby ordered that Executive Order 13083, entitled ‘Federalism,’ is suspended”).

12. See Clarence Anthony, *New Executive Order Protects Local Authority, Strengthens Federalism*, NATION’S CITIES WKLY., Aug. 16, 1999, at 2.

13. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (1999), reprinted in 5 U.S.C.S. § 601 (1999). For the text of this order, see Appendix A.

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ernment,”¹⁴ and “a very positive development” by state and local leaders.¹⁵ In a letter to President Clinton, Clarence Anthony, President of the National League of Cities, stated that state and local groups have been “encouraged by your commitment to crafting an enforceable executive order that seeks to balance the needs of federal, state, and local governments in order to achieve that true partnership among all levels of government envisioned by America’s founding fathers.”¹⁶ As it happened, however, the “balance” struck by the 1999 Order was actually a near-complete reinstatement of the Reagan Order. With few exceptions, every change attempted by the 1998 Order has been changed back to the original language of the Reagan Order, and much of the Reagan language has even been strengthened.

This Comment traces the evolution of the 1999 Order. Part II gives a brief history of the use of executive orders and describes how they are used today. Part III gives an introduction to the major ideological contents of the Reagan Order and the 1998 and 1999 Clinton Orders and describes the events surrounding their creation. Part IV compares the orders’ major substantive aspects, and demonstrates how state and local groups’ wishes have prevailed. It also argues that had the 1998 Order remained in place, the Order would have allowed the executive branch to regulate in areas traditionally outside its regulatory authority and wrongly impinged on state self-government. Part IV concludes that President Clinton’s attempt to broaden executive discretion in matters affecting state interests backfired, actually resulting in a strengthening of state and local control. Part V briefly compares what has happened in the executive branch with what is currently happening in the judicial and legislative branches. It concludes that, at least in the short-term, further attempts by the executive branch to enhance federal power vis-à-vis the states are unlikely to succeed. Regardless, the federalism debate is far from disappearing in both the legislature and the judiciary.

14. David S. Broder, *Federalism’s New Framework: Revised Order Satisfies State and Local Officials*, WASH. POST, Aug. 5, 1999, at A21 (quoting Mickey Ibarra, Assistant to the President for Intergovernmental Affairs).

15. Anthony, *supra* note 12.

16. Christine Becker, *White House Fixes Federalism Edict; Cities Land Move*, NATION’S CITIES WKLY., Aug. 9, 1999, at 1.

II. BACKGROUND

To date, there is very little law or scholarship on executive orders. In fact, there is no law or executive order that even defines “executive order.”¹⁷ “Essentially an Executive order or proclamation is a written document issued by the President and titled as such by him or at his direction. Because of this, a precise statement uniformly applicable to the contents of Executive orders and proclamations is impossible.”¹⁸ Nevertheless, examining the history, limitations, and scope of executive orders provides insight into their practical effect.

A. History of Executive Orders

Executive orders have been used since the time of George Washington.¹⁹ The earliest executive orders provided for withdrawal of public land for Indian use, building lighthouses, and supplementing acts of Congress.²⁰ Executive orders were quite informal. Sometimes the president would simply write “I approve” or “Let it be done” on a cabinet member’s proposal.²¹

The Federal Register Act of 1935,²² however, required executive orders to be published in the Federal Register. During the early days of the New Deal, executive orders rose to new prominence; President Roosevelt issued 674 executive orders in fifteen months.²³ President Roosevelt subsequently issued Executive Order 7,298, prescribing the manner in which proposed executive orders were to be prepared.²⁴ Since that time, presidents have followed prescribed pro-

17. See HOUSE COMM. ON GOV'T OPERATIONS, 85TH CONG., 1ST SESS., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 n.1 (Comm. Print 1957) [hereinafter STUDY] (stating that Exec. Order No. 10,006, governing executive orders, does not define the term).

18. *Id.* at 1.

19. See Robert C. Cash, Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44, 44 (1963).

20. See *id.*

21. See *id.* at 46.

22. 14 U.S.C. § 1505 (1999).

23. See STUDY, *supra* note 17, at 2.

24. Executive Order 7298 was replaced by Executive Order 10,006, 13 Fed. Reg. 5927 (1948), and finally by Executive Order 11,030, 3 C.F.R. 610 (1959-1963), *reprinted in* 44 U.S.C. § 1505 (1995), which provided criteria executive orders should follow. Presidential orders or proclamations were to have a title, contain a citation of authority under which it was issued, and use proper punctuation, spelling and capitalization. All drafts were to be approved, and proposed orders were first to be submitted to the Director of the Bureau of the Budget

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cedures for issuing executive orders.

B. Source of Authority for, and Limitations on, Executive Orders

Scholars have long debated the scope of presidential powers²⁵ and have proposed three general theories. The most restrictive theory is that Article II, Section I of the Constitution contains an enumeration of executive powers by which the president must be able to justify his or her actions.²⁶ An intermediate theory is that the president is a steward of the people, and, as such, he has a duty to take action as needed unless it is specifically prohibited by either the laws of the United States or the Constitution.²⁷ Finally, the third theory is that the president has the discretion and the power to act for the public good without express legal authority, and even in direct conflict with laws that the president believes to be contrary to the common good.²⁸ Franklin D. Roosevelt once said, “In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.”²⁹ A president obviously acts with the clearest authority when he or she acts within one of the enumerated powers.³⁰ Yet the outer limits of this authority are not always clear.

Presidential power can also be delegated or limited by congressional declarations of public policy.³¹ The determination of public

accompanied by a signed letter from the authorized officer of the originating federal agency explaining the order and its relation to any current laws or other executive orders. If the Bureau of the Budget approved the document, it was to be sent to the Attorney General for his or her consideration as to both form and legality. Nothing in the order was to be construed to apply to treaties, conventions, protocols, or other international agreements, or proclamations of the president. *See* STUDY, *supra* note 17, at 2-3.

25. *See* William D. Neighbors, Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 108 (1964).

26. *See id.* The principal advocate of this view was United States President and Chief Justice of the Supreme Court William Howard Taft. *See id.* (citing WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 16 (1925 ed.)).

27. *See id.* The chief supporter of this theory was Theodore Roosevelt. *See id.* (citing EDWARD S. CORWIN, *THE PRESIDENT, OFFICE AND POWERS 1787-1984* at 152-53 (Randall W. Bland et al. eds., 5th ed. 1957)).

28. *See id.* This theory is based on a statement made by John Locke: “He that will look into the history of England will find that the prerogative was always largest in the hands of our wisest and best princes.” *See id.* (citing JOHN LOCKE, *TWO TREATIES OF GOVERNMENT* 160 (1698)).

29. STUDY, *supra* note 17, at 15 n.31.

30. *See* Neighbors, *supra* note 25, at 109 n.29 (“This theory has never been sanctioned by the courts nor has any President suggested he was not bound by the Constitution.”).

31. *See id.* at 108.

policy is the province of the legislative branch, and therefore, the executive branch may only apply the policy that Congress sets for the nation.³² The president may not contravene a statutory provision or exceed the bounds of the legislation that delegated the power to the executive.³³ Congress may thus overrule an executive order with legislation.³⁴

C. Scope of Executive Orders

Executive orders are presidential directives that are directed to, and govern actions of, officials and agencies of the executive branch.³⁵ As the director of the executive branch, the president possesses the power to issue instructions and orders to executive officers concerning the performance of their duties.³⁶ Usually, an executive order only affects individual citizens indirectly.³⁷ However, when an executive order establishes national policy regarding how an entire branch of the government should view the balance of state and national power, the entire nation may be affected. The Reagan Order was the first order to set policy on federalism for the executive branch. Yet the 1998 and 1999 Orders demonstrate that President Clinton has tried, and failed, to leave his mark on federalism as well. The following section briefly describes the Reagan Order and the Clinton Orders on federalism.

III. INTRODUCTION TO THE FEDERALISM ORDERS

A. The Reagan Order

The first executive order to establish the executive branch's policy on federalism was President Reagan's 1987 Order.³⁸ It was promulgated in light of the Reagan administration's political doc-

32. *See id.* at 115 (relying in part on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

33. *See id.*

34. *See id.*

35. *See id.*

36. The president may not, however, force department heads to either disregard federal statutes, *see Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 *passim* (1838), or contravene public policy as determined by Congress, *see Sawyer*, 343 U.S. at 588.

37. *See Cash, supra* note 19, at 44.

38. The full text of the Reagan and Clinton orders are set forth in Appendices I, II, and III of this Comment, respectively.

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trine of “new federalism,” or “a political doctrine that calls for radical downsizing of the federal government and the return of power to the states.”³⁹ The Reagan Order is marked by the belief that federalism is best protected by limiting the size and scope of the federal government,⁴⁰ and that all powers not expressly enumerated to the federal government are reserved to the states.⁴¹ It sets out clear tests for when national action is appropriate⁴² and grants the states the maximum administrative discretion possible.⁴³

The Reagan Order also sets forth guidelines for when federal preemption is appropriate,⁴⁴ requiring the statute preempting the state law to contain express language indicating that Congress intended to preempt that state law.⁴⁵ The burden of policing federalism concerns rests within the regulating executive agencies who are required to consult with state and local groups to avoid conflicts between state and federal laws.⁴⁶ Finally, a designated official in each executive department ensures the implementation of the order.⁴⁷ If that official determines that proposed policies have federalism implications, a Federalism Assessment is to be created that contains an analysis of implications and costs to states.⁴⁸ In general, the Reagan Order gives strong deference to the states and requires that great measures be taken before state authority is preempted. The 1998 Order, however, attempted major changes to the basic principles set forth in the Reagan Order.

B. The 1998 Order

President Clinton’s 1998 Order came as a surprise to almost everyone except the White House. On May 14, 1998, the Clinton administration issued the order from Birmingham, England. As a mat-

39. Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”*: *Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 112 (1996) (footnote omitted).

40. See Exec. Order No. 12,612, *supra* note 5, sec. 2(a).

41. See *id.* sec. 2(b).

42. See *id.* at 553, sec. (3)(b)(1)-(2).

43. See *id.* sec. (3)(c).

44. See *id.* sec. (4).

45. See *id.*

46. See *id.* sec. (4)(d).

47. See *id.* sec. (6)(a).

48. See *id.* at 554, sec. (6)(c)(1)-(3).

ter of practice, the Clinton administration had worked in partnership with state and local groups when proposed actions would affect their interests. Both the Reagan administration and the Clinton administration actively worked with a group of state and local government associations known as the "Big Seven"⁴⁹ to create Reagan's Order and a previous Clinton order entitled "Enhancing the Intergovernmental Partnership."⁵⁰

In light of past experience, state and local groups were understandably surprised and upset when President Clinton signed the 1998 Order without consulting them.⁵¹ In response, the Big Seven wrote a letter stating, "[n]o state and local government official was consulted in the draftin[g] of [executive order] 13,083. In contrast, this administration fully engaged state and local officials and their associations in the drafting of your [executive order] 12,875."⁵² Lack of consultation, coupled with the possible extreme influence the 1998 Order could have on state and local interests, inflamed state and local government groups and incited them to take action to prevent the Order from being implemented officially. In a letter dated July 17, 1998, representatives of each of the seven groups requested the new Order be withdrawn because no state or local government officials had been consulted before the Order went into effect.⁵³

The 1998 Order differed from the Reagan Order in many ways. For example, the language of the Order mentioned nothing about limiting the size of the federal government. Instead, it broadened the

49. The "Big Seven" consists of the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the U.S. Conference of Mayors, the National League of Cities, and the International City/County Management Association.

50. Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (1993). See *Clinton-Gore v. State and Local Governments: Hearing Before the Subcomm. on Nat'l. Econ. Growth, Natural Resources, and Regulatory Affairs of the Comm. on Gov't Reform and Oversight*, 105th Cong. 2 (1998) (statement of Edward Rendell, Mayor of Philadelphia, on behalf of the U.S. Conference of Mayors) [hereinafter *Hearing*].

51. See Daniel Meisler, *Clinton Postpones Executive Order*, THE BOND BUYER (New York), Sept. 23, 1998, at 4.

52. Letter from George V. Voinovich, Chairman, National Governors' Association, et al. to William J. Clinton, President of the United States 1 (July 17, 1998) [hereinafter *Voinovich Letter*]; see also *Hearing*, *supra* note 50, at 1-2 (statement of Dan Blue, N.C. House of Rep., on behalf of the National Conference of State Legislatures) (stating "we are 'mystified' and 'perplexed' by our exclusion from the process leading up to the promulgation of E.O. 13,083," and that "this is atypical of the way NCSL and state legislators have been dealt with by this administration").

53. See *Voinovich Letter*, *supra* note 52, at 1.

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scope of possible areas for regulation by adding a section that detailed areas where federal action could be justified.⁵⁴ Section 4 of the 1998 Order also seemed to broaden the federal government's regulatory authority by removing any restrictions on regulations that had federalism implications or imposed direct costs on states.⁵⁵

In addition, the 1998 Order did not address when preemption was appropriate.⁵⁶ Although the 1998 Order created a waiver procedure whereby states could apply for waiver of a regulatory requirement,⁵⁷ this appears to have been a post-preemption remedy instead of a protection of the balance between the states and the federal government. In sum, the 1998 Order left the door open to an expansion of federal regulatory power that was not present under the Reagan Order.

As a result, state and local groups revolted. On August 5, 1998, President Clinton suspended the 1998 Order and the administration agreed to put off drafting a new executive order indefinitely to allow for consultation with state and local interest groups.⁵⁸ In light of the impeachment proceedings against the President in the House and the resulting Senate trial, all official executive action on the 1998 Order was temporarily put aside. Eventually, however, the Clinton administration drafted a new order.

C. The 1999 Order

After months of negotiations with state and local leaders, President Clinton issued the August 1999 Order superceding the 1998 Order, the Suspension Order, and the Reagan Order.⁵⁹ Although the 1999 Order was meant to be "a compromise interpretation of the state-federal roles outlined in the U.S. Constitution,"⁶⁰ the new Order appears suspiciously like the original Reagan Order.

The 1999 Order returns to most of the language found in the

54. See Exec. Order No. 13,083, *supra* note 4, sec. (3)(d)(1)-(9) (prescribing nine broad new areas that may warrant federal action).

55. See *id.* at 27,652-53, sec. (4)(b)(1)-(2).

56. Cf. Exec. Order 12,612, *supra* note 5, sec. (4)(a) (setting forth specific guidelines as to when preemption is appropriate).

57. See Exec. Order No. 13,083, *supra* note 4, sec. (5)(a).

58. See Exec. Order No. 13,095, *supra* note 8.

59. See Exec. Order No. 13,132, *supra* note 13, sec. (10)(a)-(b).

60. Judy Fahys, *Clinton Cuts Deal With Governors*, SALT LAKE TRIB., Aug. 9, 1999, at A1.

Reagan Order concerning fundamental principles of federalism, focusing on the competence of the states to meet the needs of the people,⁶¹ and disfavoring national policies.⁶² While it makes some changes from the Reagan Order, the overwhelming majority of the 1999 Order is a strict return to President Reagan's principles.

IV. DIRECT COMPARISON OF THE FEDERALISM ORDERS

The following is a comparison of the key issues raised by the Reagan Order and 1998 and 1999 Clinton Orders on federalism. For ease of reference, the full text of the orders appear in Appendix A. In addition, a table containing a point-by-point comparison of the exact language of each executive order is found in Appendix B. The discussion below is divided into two categories: procedural requirements and substantive requirements.

A. Procedural Requirements

The Reagan Order's procedural requirements concern four broad areas: (1) the duty of federal agencies proposing regulations to foresee federalism implications and consult with state officials; (2) the duty of federal agencies to appoint an official in charge of monitoring federalism concerns and making a Federalism Assessment; (3) the role of the Office of Management and Budget (OMB); and (4) the introduction of a new waiver procedure permitting states to be free from compliance with federal regulations under certain circumstances. The 1998 Order attempted to delete the first three requirements, shifting the entire duty of monitoring federalism from the federal government to the states. After conferencing with state and local leaders, however, Clinton issued the 1999 Order, which not only retained the state waiver provisions, but reinstated the Reagan procedures as well.

1. The duty to foresee and consult

The Reagan Order required that when executive agencies or departments were formulating and implementing policies that may have federalism implications, the agencies were to take the following steps: first, "[e]ncourage States to develop their own policies to

61. See Exec. Order No. 13,132, *supra* note 13, sec. (2)(c).

62. See *id.* at 43,256, sec. (2)(f).

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achieve program objectives”; second, “[r]efrain . . . from establishing uniform, national standards” when possible; and finally, “[w]hen national standards are required, consult with the appropriate officials and organizations representing the States.”⁶³ All of these requirements were aimed at allowing states the first crack at finding solutions to problems—even problems with a national scope.

The 1998 Order did not impose these same requirements on the executive branch. The Order stated only that “[e]ach agency shall have an effective process to permit elected officials and other representatives of State and local governments to provide meaningful and timely input in the development of regulatory policies that have federalism implications.”⁶⁴ Although this requirement gave lip service to consultation, it merely “permit[ed]” executive representatives to make suggestions instead of placing a priority on allowing states to first seek their own solutions. There was also no requirement in the 1998 Order that agencies refrain from the creation of national standards, although national standards, by definition, prevent states from finding creative individual solutions to meet their specific needs.

The burden that was once on the executive branch to foresee federalism concerns and consult with the states in the Reagan Order shifted to the states in the 1998 Order. The 1998 Order did not specify whether an agency must approach an affected state, or whether it must only have a procedure whereby states may voice their concerns upon their own initiative. The permissive language suggested the latter. In fact, upon close inspection, the language of the 1998 Order did not even require that there be actual consultation, only that there be a process whereby states may give input in the development of federal policies.⁶⁵

The 1999 Order clearly returns the duty to consult with the states to the executive branch. It states that “[w]hen undertaking to formulate and implement policies that have federalism implications, agencies *shall* . . . consult with appropriate State and local officials.”⁶⁶

63. Exec. Order No. 12,612, *supra* note 5, sec. 3(d)(1)-(3).

64. Exec. Order No. 13,083, *supra* note 4, sec. 4(a).

65. *See id.* (“Each agency shall have an effective process to permit elected officials and other representatives of State and local governments to provide meaningful and timely input in the development of regulatory policies that have federalism implications.”).

66. Exec. Order No. 13,132, *supra* note 13, sec. 3(d) (emphasis added). Similarly, section 4(d) of the Reagan Order states,

As soon as an Executive department or agency foresees the possibility of a conflict

The 1999 Order, then, reverts back to the Reagan Order's language and requires consultation before any action limiting the policymaking authority of the states is taken.⁶⁷ Thus, the 1999 Order reenacts the consultation provisions of the Reagan Order, including the duty to consult with appropriate state representatives "in determining whether to establish uniform national standards," trying to identify alternatives to uniform standards, and developing such standards when required.⁶⁸ This once again vests executive agencies with the duty to consult when attempting to regulate within the states' realm, and implicitly requires that executive agencies be mindful of federalism concerns when attempting to regulate. In the 1998 Order, the White House attempted to broaden their ability to set national standards without consulting states and providing the states the opportunity to meet the federal objective in their own narrowly-tailored way. The states countered this attack and regained those procedural safeguards in the 1999 Order.

2. An official in charge of monitoring federalism concerns and the Federalism Assessment

The Reagan Order provided that the head of each executive department was to designate an official in that department who was to ensure the implementation of the order's federalism assessment procedures.⁶⁹ Under section 6(b), this federalism official was to determine whether a proposed policy had sufficient federalism implications to warrant preparation of a "Federalism Assessment," which would analyze the burdens any regulation would impose on state or local government.⁷⁰ The assessment was to be used in all decisions regarding promulgating or implementing any policy and was to be submitted to the OMB along with a report listing any inconsistencies with the executive order, or any additional costs or burdens that

between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

Exec. Order No. 12,612, *supra* note 5, sec. (4)(d).

67. See Exec. Order No. 13,132, *supra* note 13, sec. 3(a).

68. *Id.* sec. 3(d)(1)-(4).

69. See Exec. Order No. 12,612, *supra* note 5, sec. 6(a).

70. See *id.* sec. 6(b).

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might be placed on the affected states.⁷¹ The Federalism Assessment requirement acted to protect state sovereignty.

In contrast, the closest the 1998 Order came to requiring a Federalism Assessment was to state that regulations passed pursuant to such an assessment are not prohibited.⁷² The Order provided, among other things, that regulations were not prohibited where (1) funds can be “provided by the Federal Government,” and (2) “the agency . . . provides to the Director of the Office of Management and Budget a description of the extent of the agency’s prior consultation with representatives of affected States,” the reasoning for the regulation, and “any written communications submitted to the agency by States or local governments.”⁷³

These exceptions have no analogue in the Reagan Order. While the 1998 Order’s requirements could be roughly characterized as a Federalism Assessment equivalent, the 1998 Order did not directly require that agencies designate an official to specifically monitor federalism concerns or conduct an assessment of the federalism implications of their proposed regulations as the Reagan Order had done. As a result, many believe that the 1998 Order “‘stripped the most basic protection accorded the states, the preparation of a Federalism Assessment,’ which required agencies to analyze the burdens any new regulation imposed on state and local governments.”⁷⁴ In his testimony before the Senate Committee on Government Affairs, Ernest Gellhorn suggested that such a requirement be placed in a Senate bill codifying policy on federalism.⁷⁵ He reasoned that “forcing such an assessment by agencies can make agencies sensitive to federalism concerns and lead to more rational and reasonable rules.”⁷⁶

The 1999 Order reinstates some of the safeguards that were deleted by the 1998 Order. Section 6(a) of the 1999 Order requires that “the head of each agency shall designate an official with princi-

71. *See id.* at 554, sec. 6(c)(1)-(4).

72. *See* Exec. Order No. 13,083, *supra* note 4, sec. 4(b)(1), (2)(a)-(b).

73. *Id.* at 27,653.

74. Broder, *supra* note 6, at A15 (quoting Rep. David M. McIntosh, a subcommittee chairman on the House Committee on Government Reform and Oversight).

75. *See Regulation of Federal Preemption of State Laws: Hearings on S. 1214 Before the Senate Comm. on Gov’t Affairs*, 106th Cong. (1999), available in WESTLAW at 1999 WL 503733 (statement of Ernest Gellhorn, Professor of Law, George Mason University).

76. *Id.*

pal responsibility for the agency's implementation of this order."⁷⁷ In section 6(b)(2)(B), in a separately identified portion of the preamble to the regulation as it is to be issued, an agency must create a "federalism summary impact statement, which consists of a description of prior consultation with State and local officials, a summary of the nature of their concerns" as well as the agency's reasons for wanting to regulate, "and a statement of the extent to which the concerns of State and local officials have been met."⁷⁸ In section 6(b)(2)(C), the order again stresses that no agency shall promulgate any regulation that has federalism implications and that preempts state law, unless the agency has first consulted with the states in developing the proposed regulation, made the federalism summary impact statement, and reported to the OMB all communications from state agencies.⁷⁹

3. *The OMB's role*

Another requirement contained in the Reagan Order but omitted in the Clinton 1998 Order concerns the role of the OMB.⁸⁰ The OMB was put in charge of "central clearance" over program development by the executive agencies," as well as preparation and submission of the executive budget to Congress.⁸¹ Under the Reagan Order, the OMB was required to take affirmative action to assure that the policies of executive agencies and departments were consistent with the principles and requirements of the executive order.⁸²

The 1998 Order did not specifically state that it would continue to require this of the OMB. Therefore, if policy had formally been set pursuant to the 1998 Order, there would have been no oversight by the OMB, thus effectively shifting the entire burden to monitor federalism concerns to the states. This lack of protection would have left state and local governments extremely vulnerable, rendering it impossible for any state or local organization to practically track all executive action on its own. Thus, executive agencies would have been free to regulate as they pleased.

77. Exec. Order No. 13,132, *supra* note 13, sec. 6(a).

78. *Id.* at 43,258, sec. 6(b)(1)(B).

79. *See id.*

80. *See* Exec. Order No. 12,612, *supra* note 5, sec. 7(a).

81. RAYMOND TATALOVICH & BYRON W. DAYNES, PRESIDENTIAL POWER IN THE UNITED STATES 231 (1984).

82. *See* Exec. Order No. 12,612, *supra* note 5, sec. 7(a).

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The 1999 Order, however, explicitly reinstates the OMB's role in policing federalism concerns. Section 8(a) of the 1999 Order requires that each agency submit to the OMB drafts of any final regulation that has federalism implications.⁸³ Before doing so, the agency official in charge of federalism concerns is to first certify that the requirements of the 1999 Order have been followed.⁸⁴ In addition, the 1999 Order requires the OMB to confer with the Assistant to the President for Intergovernmental Affairs to ensure that the 1999 Order is being implemented.⁸⁵ Thus, the role of the OMB has been clarified and even strengthened in the new Order. Agencies must be responsible for their own policing of federalism concerns, but the OMB acts as a gatekeeper, requiring certification from government officials before any further action may be taken.

4. *Waiver provision*

Finally, the Clinton 1998 Order tried to create a new procedure that had no analogue in the Reagan Order, whereby an affected state could obtain a waiver from federal regulations provided that the state's own regulations satisfy federal policy or objectives. Section 5 of the 1998 Order instructed agencies to review and streamline their waiver processes, and "to the extent practicable and permitted by law," review all applications for waiver and render a timely decision and explanation of that decision.⁸⁶

The process of obtaining waiver was intended to allow national objectives to be met while still tending to the unique needs of the individual states.⁸⁷ Both state and local officials recognized the benefit of having a waiver provision:

Our federal systems will always need fine-tuning to keep them responsive to the people. As each Congress enacts new laws, it must also protect the vitality of state and local governments to deliver effective services. The multiple programs for similar activities in education, training, welfare, health care, and the environment can-

83. See Exec. Order No. 13,132, *supra* note 13, sec. 8(a).

84. See *id.* sec. 8(b).

85. See *id.* at 43,259, sec. 8(c).

86. Exec. Order No. 13,083, *supra* note 4, sec. 5(b)-(c).

87. See *Streamlining Federal Grant Waivers to States: Hearing on H.R. 2376 Before the House Committee on Gov't Reform*, 106th Cong. (1999), available in WESTLAW at 1999 WL 27595152 [hereinafter *Streamlining*] (statement of Raymond C. Sheppach, on behalf of the National Governors' Association).

not be properly coordinated without an effective waiver process. Waivers are always needed not only to meet the unique needs of each state, but are key to stimulating new innovations at the state and local levels.⁸⁸

Yet because the duty to foresee, consult, and allow states to find their own solutions was so weak in the 1998 Order,⁸⁹ waiver might have permitted federal agencies to sidestep actual consultation with the states, undermining potential state benefits.

The 1999 Order contains waiver provisions identical to the 1998 Order. However, the 1999 Order's requirement that agencies consult states before drafting regulations permits states to use the waiver process as an additional means of avoiding national standards rather than merely a post-implementation form of relief.

5. Procedural conclusions

The Reagan Order contained procedural safeguards that insured that the federal government did not encroach on state authority. The Clinton 1998 Order would have shifted the burden of policing federalism concerns to state and local governments by removing the procedural safeguards in the Reagan Order. With the enactment of the 1999 Order, however, the responsibility of monitoring federalism concerns returns to executive agencies that may be trying to limit state power through federal regulation.

B. Substantive Requirements

The three federalism orders also vary in their substantive requirements. The key substantive issues addressed by the orders are: (1) the scope of federal and local sovereignty preemption, (2) what constitutes issues of national scope, and (3) costs to the taxpayer.

1. Shift from the focus on state sovereignty

a. Presumption of state sovereignty. The hallmark of the Reagan Order was its repeated emphasis on the idea that, in the absence of a clear constitutional or statutory provision delegating authority to the federal government, sovereignty was presumed to rest with the individual states, and any uncertainties were to be resolved against regu-

88. *Id.*

89. *See supra* Part III.B.

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lation at the national level.⁹⁰ Although the Clinton 1998 Order acknowledged some deference to the states and their power to govern locally on a range of issues,⁹¹ the emphasis on state sovereignty was not as prevalent as in the Reagan Order.

With the enactment of the 1999 Order, however, most of the language of the Reagan Order was restored, if not strengthened. For example, section 3(c) of the Reagan Order stated that the national government “should grant the states the maximum administrative discretion possible,”⁹² while the 1999 Order states that the national government “shall” grant the States discretion.⁹³ Small semantic changes throughout the 1999 Order such as this reaffirm the presumption of state power.

b. Fundamental principle of federalism. The Reagan Order’s statement of federalism philosophy reads: “Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.”⁹⁴ In contrast, the 1998 Order stated as its first premise: “The structure of government established by the Constitution is premised upon a system of checks and balances.”⁹⁵ While the first fundamental principle of the Reagan Order spoke directly to the size and scope of the federal government,⁹⁶ the 1998 Order spoke to a system of checks and balances, with no mention of size.⁹⁷ The 1999 Order changes the focus yet again by mandating that all questions not national in scope be left to

90. See Exec. Order No. 12,612, *supra* note 5, sec. 2(i).

91. For example, Section 2(b) of Executive Order 12,612 states,

The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

Id. sec. (2)(b). The executive order demonstrates a clear deference to the States and their power to govern locally. For specific examples, see Executive Order 13,083 at section 2(g) (stating that “[p]olicies of the Federal Government should recognize the responsibility of” and should encourage opportunities for “States” to achieve the necessary objectives through a cooperative effort) and section 3(a) (stating that the necessity for Federal action that would limit the policy making discretion of States and local governments should be carefully assessed).

92. Exec. Order No. 12,612, *supra* note 5, sec. 3(c).

93. See Exec. Order No. 13,132, *supra* note 13, sec. 3(c).

94. Exec. Order No. 12,612, *supra* note 5, sec. 2(a).

95. Exec. Order No. 13,083, *supra* note 4, sec. 2(a).

96. See Exec. Order No. 12,612, *supra* note 5, sec. 2(a).

97. See Exec. Order No. 13,083, *supra* note 4, sec. 2(a).

the state and local governments.⁹⁸

While the 1998 Order did not specifically state that it attempted to enlarge the size or scope of regulatory powers granted to executive departments and agencies, a change in attitude was apparent in light of the removal of most of the Reagan Order's procedural requirements discussed above that acted as a check on the authority of executive agencies.⁹⁹ While most of the procedural requirements are returned in the 1999 Order, the 1999 Order contains no language limiting the size and scope of the national government similar to section 2(a) of the Reagan Order. This is one of the few concessions the Clinton camp seems to have won.

2. Preemption

The doctrine of preemption is that "if a properly adopted federal law conflicts with a state law, then under the Supremacy Clause, federal law trumps state law."¹⁰⁰ Many view federal preemption as "the number one assault on the powers and authority returned by the states and local governments throughout the Constitution."¹⁰¹ The Reagan Order gave executive agencies guidance on when preemption is appropriate, but the 1998 Order did not.

The Reagan Order included a section specifically devoted to preemption that established when federal law could take the place of a state or local government's judgment.¹⁰² It required executive agencies to construe,

in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.¹⁰³

98. See Exec. Order No. 13,132, *supra* note 13, sec. 2(a).

99. See *supra* Part IV.A.

100. *Regulation of Federal Preemption of State Laws: Hearing on S. 1214 Before the Senate Gov't. Affairs Comm.*, 106th Cong. (1999), available in WESTLAW at 1999 WL 503738 (statement of Rep. John Dorso, Majority Leader N.D. House of Rep.) [hereinafter *Federal Preemption*].

101. See *id.* (statement of Daniel M. Sprague, Executive Director and on behalf of the Council of State Governments).

102. See Exec. Order No. 12,612, *supra* note 5, sec. 4.

103. *Id.* sec. 4(a).

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Otherwise, there must have been firm and palpable evidence that Congress intended to delegate to the department or agency the authority to issue regulations preempting state law, and agencies were required to consult with the appropriate state officials and make the regulation as narrow as possible.¹⁰⁴

The 1998 Order contained no guidance on preemption issues, making it unclear when executive regulation should preempt state law.¹⁰⁵ The abandonment of the clear limitations on preemption that did exist would have enlarged the range of federal regulation under the 1998 Order merely because there was no guidance to tell agencies they could not preempt.

The 1999 Order returns preemption guidance with a slightly weakened standard. Section 4(a) of the Reagan Order provided that preemption was only available when there was a clear statutory “preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law.”¹⁰⁶ The 1999 Order provides for preemption only “where . . . there is some other clear evidence that the Congress intended preemption of State law.”¹⁰⁷ Although this appears to weaken the standard, the 1999 Order at least gives guidance on when preemption is appropriate, whereas the 1998 Order gave none.

3. The problem of national scope

The Reagan Order stated: “Federal action limiting the policy-making discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope.”¹⁰⁸ It then set forth the following three-prong test for determining whether the authority is clear and certain: (1) “authority for the action may be found in a specific provision of the Constitution, (2) there is no provision in the Constitution prohibiting Federal action, and (3) the action does not encroach upon authority reserved to the States.”¹⁰⁹

104. *See id.* sec. 4(b)-(e).

105. Preemption is addressed in Section 4 of the Reagan Order. *See* Appendix A.

106. Exec. Order No. 12,612, *supra* note 5, sec. 4(a).

107. Exec. Order No. 13,132, *supra* note 13, sec. 4(a).

108. Exec. Order No. 12,612, *supra* note 5, sec. 3(b).

109. *Id.* sec. 3(b)(2).

In comparison, the Clinton 1998 Order read, "Agencies may limit the policymaking discretion of States and local governments only after determining that there is constitutional and legal authority for the action."¹¹⁰ No clear and certain showing of authority was required, no standard was given, and the impression was that agencies could freely limit state and local policymaking. This implication is perhaps the 1998 Order's most dangerous change from the Reagan Order. The line between matters of national scope, or multistate scope, would have been blurred. Although what is a matter of national scope is admittedly an area of ongoing and intense debate, the Reagan Order at least provided a standard and some guidelines for agencies to follow as limitations on the executive agencies' power.

In addition to weakening the standard, the 1998 Order tried to identify nine new areas the executive branch deemed national in scope. Without a national scope standard, these nine categories possibly would have opened the door to unexpected regulations. Those nine instances include:

- (1) When the matter to be addressed by Federal action occurs interstate as opposed to being contained within one State's boundaries.
- (2) When the source of the matter to be addressed occurs in a State different from the State (or States) where a significant amount of the harm occurs.
- (3) When there is a need for uniform national standards.
- (4) When decentralization increases the costs of government thus imposing additional burdens on the taxpayer.
- (5) When States have not adequately protected individual rights and liberties.
- (6) When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States.
- (7) When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands

110. Exec. Order No. 13,083, *supra* note 4, sec. 3(b).

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for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities.

(8) When the matter relates to Federally owned or managed property or natural resources, trust obligations, or intentional obligations.

(9) When the matter to be regulated significantly or uniquely affects Indian tribal governments.¹¹¹

Use of presidential power such as this presents problems when there is no clear constitutional or congressional base for a particular order.¹¹² A closer examination of these nine categories provides helpful insight into what power the president might have been attempting to gain through this new provision in the 1998 Order.

a. Matters of multistate scope. Subparts one and two both specified that it is important to recognize the distinction between matters of national or multistate scope that may justify federal action and matters that are merely common to the states.¹¹³ Subparts one and two of the 1998 Order dealt with when the matter to be addressed occurs interstate (as opposed to intrastate), and when the source of the matter to be addressed occurs in a state (or states) different from the state where a significant amount of the harm occurs.¹¹⁴ The 1998 Order attempted to make a distinction between matters that are merely common to states,¹¹⁵ but it contained no standard to identify when a matter is common to the states or when the matter is of national scope. There was no standard to guide when these two situations set forth are genuine issues of multistate scope. The 1998 Order created a looser analysis for matters of multistate scope, where

111. *Id.* sec. 3(d).

112. Ronald Turner notes,

A baseless and unauthorized order provides a means for the President to subvert the system of checks and balances, for she can make laws free from congressional involvement or agreement and is “able to make sweeping policy value choices without any check by either the federal courts or by a majority of Congress.”

Ronald Turner, *Banning the Permanent Replacement of Strikers by Executive Order: The Conflict Between Executive Order 12,954 and the NLRA*, 12 J.L. & Pol. 1, 5-6 (1996) (quoting Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 71 (1995)).

113. See Exec. Order No. 13,083, *supra* note 4, sec. 3(d); Exec. Order No. 12,612, *supra* note 5, sec. 3(b)(1).

114. See Exec. Order No. 13,083, *supra* note 4, sec. 3(d)(1-2).

115. See *id.*

the Reagan Order tried to craft the smallest exception possible, and had a distinct bias against national regulations. In essence, the 1998 Order could have broadened the jurisdiction of executive agencies to permit legislation in areas that had, until then, been considered the province of the states.

b. Matters burdening states with costs. Subparts four, six, and seven of the Clinton 1998 Order all dealt with situations in which additional costs would be placed on the taxpayer. These circumstances included: (1) when decentralization placed extra financial burdens on the taxpayers,¹¹⁶ (2) when states chose to forego necessary regulations for fear of losing business to other states,¹¹⁷ and (3) when giving regulatory authority to state or local government “undermine[d] regulatory goals because high costs . . . for specialized expertise . . . effectively place[d] the regulatory matter beyond the resources of State authorities.”¹¹⁸ In all of these situations, cost was the determining factor instead of genuine federalism concerns. A cost-benefit analysis should no doubt be one factor in determining what should be a legitimate issue of multistate scope. Yet, as a matter of public policy, Congress should be the branch of government that decides which issues should be addressed by national instead of state governments.

Justice Harlan once said, “‘That Congress cannot delegate legislative power to the President’ . . . ‘is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.’”¹¹⁹ Congress may indeed delegate authority to execute an act of Congress to the executive branch if it deems a certain function more properly suited to that branch of government. However, without that specific grant of authority, the executive branch could begin to legislate and destroy the balance between local issues and matters of national scope when it is the body that decides what matters are of national scope. It is the president’s job to carry out the laws passed by Congress,¹²⁰ not the other way around.

116. *See id.* sec. 3(d)(4).

117. *See id.* sec. 3(d)(5).

118. *Id.* sec. 3(d)(7).

119. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 146 (Randall W. Bland et al. eds., 5th ed. 1984) (quoting Justice Harlan).

120. *See* MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 239 (1977).

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In addition, many of the areas the 1998 Order identified as being of national scope bordered on areas of traditional state or legislative functions.¹²¹ For example, business regulation is a traditional state function, yet the 1998 Order would have allowed agencies to regulate quite broadly in this area.¹²² The executive agency would have dictated regulations “necessary . . . because of fears that regulated business activity will relocate to other States.”¹²³

Furthermore, the meaning of the language of the 1998 Order allowing federal regulation “[w]hen States have not adequately protected individual rights and liberties” is unclear.¹²⁴ One plausible interpretation is that this language was intended to broaden the scope of federal power in areas such as health care, education, welfare, traditional family life and values, and many other areas traditionally governed by individual states. Such an interpretation, if accurate, would have drastically changed the balance of power between state and federal governments.

However, the question of what the 1998 Order’s nine categories would have meant for federalism policy is now moot because the White House’s attempt to broaden the concept of a “problem of national scope” failed. In the 1999 Order, the nine categories are eliminated in favor of broad directives that encourage the states to work with agencies to develop their own policies, deferring to states to establish their own standards, and consulting before and after national policy is set.¹²⁵

c. Matters requiring national standards. Finally, there is a direct conflict between the Reagan Order and section 3(d)(3) of the 1998 Order. The Reagan Order states in section 3(d)(2) that executive departments and agencies should “[r]efrain . . . from establishing uniform, national standards for programs and, when possible, [should] defer to the States to establish standards.”¹²⁶ Section 3(d)(3) of the 1998 Order would allow for preemption “when there is a need for uniform national standards.”¹²⁷ Section 3(d)(2) of the Reagan Order does not forbid the establishing of national standards,

121. See Exec. Order No. 12,612, *supra* note 5, sec. 3(b)(1).

122. See *generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

123. Exec. Order No. 13,083, *supra* note 4, sec. 3(d)(6).

124. *Id.* sec. 3(d)(5).

125. See *id.* sec. 3(d)(1)-(4).

126. Exec. Order No. 12,612, *supra* note 5, sec. 3(d)(2).

127. Exec. Order No. 13,083, *supra* note 4, sec. 3(d)(3).

but it strongly advises against it and requires executive agencies to defer to the states whenever possible. In contrast, section 3(d)(3) of the 1998 Order does not require deference to the states when establishing national standards but merely states a preference to defer to states “where possible.”¹²⁸

The 1999 Order is different than the Reagan Order in that it lacks the Reagan Order’s language requiring that federal agencies “[r]efrain, to the maximum extent possible, from establishing uniform, national standards,”¹²⁹ and it does not apply the three-part test for determining when there is a problem of national scope.¹³⁰ However, the 1999 Order does provide that when there is a question as to whether an issue is of national scope, agencies “shall consult with appropriate State and local officials to determine whether Federal objectives can be obtained by other means.”¹³¹ This is perhaps an even more favorable outcome for state officials than what the Reagan Order provided, in that it again mandates consultation. With greater interaction between agencies and state and local officials, matters of national scope will become easier to identify, or at least compromises can be made as to what level of government should handle certain issues.

4. Regulations imposing additional costs on taxpayers

Sections in both the 1998 and 1999 Clinton Orders potentially broaden executive regulatory power based on costs as well. Both sections are substantially the same:

To the extent practicable and permitted by law, no agency shall promulgate any regulation that is not required by statute, that has federalism implications, and that imposes substantial direct compliance costs on States and local governments, *unless*:

- (1) funds necessary to pay the direct costs incurred by the State or local government in complying with the regulation are provided by the Federal Government; or
- (2) the agency, prior to the formal promulgation of the regula-

128. See Exec. Order No. 13,132, *supra* note 13, sec. 3(d)(2).

129. Exec. Order No. 12,612, *supra* note 5, sec. (3)(d)(2).

130. See *id.* sec. 3(b)(1)-(2).

131. Exec. Order No. 13,132, *supra* note 13, sec. 3(b).

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tion,

(A) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected States and local governments, a summary of the nature of their concerns, and the agency's position supporting the need to issue the regulation; and

(B) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by States or local governments.¹³²

Potentially, the federal government paying for the states' costs in implementing the federal regulation would have made regulations possible that would have otherwise been unacceptable. The Reagan Order made no mention of condoning regulation that might otherwise overstep the states' right to self-government simply by picking up the tab. In the past, the struggle between the federal government and state and local groups has been over the issuance of unfunded mandates.¹³³ But this type of exception, found in both the 1998 and 1999 Orders, could allow for regulation that deeply threatens the separation of powers under the guise of a funded mandate. It is also unclear whether this exception's purpose is to protect the states financially, or only to broaden the scope of potential federal regulation. Consequently, it is unclear what this provision will mean in the future to executive agencies or to the states.

5. Substantive conclusions

The 1998 Order would have made significant substantive changes to Reagan's federalism policy. Specifically, the 1998 Order lacked the Reagan Order's dedication to principles of state sovereignty and some of the clear guidelines that once governed executive regulations, such as Federalism Assessments. Yet the 1999 Order repairs what harm was done and, in some cases, strengthens the states' position.

132. *Id.* sec. 6(b)(1)-(2); Exec. Order No. 13,083, *supra* note 4, sec. 4(b)(1-2) (emphasis altered).

133. *See generally* Steinzor, *supra* note 39.

V. FEDERALISM IN THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL
BRANCHES*A. Executive Branch*

The events of the past year have proven that federalism is indeed not “a substitute for a sleeping pill,”¹³⁴ but rather a matter of vital interest in every branch of federal government. The clear conclusion that can be drawn from the above comparison of the Reagan Order and the Clinton 1998 and 1999 Orders is that at this time, the states have the upper hand over the executive branch on federalism policy. The Clinton administration attempted to greatly broaden its regulatory power in the 1998 Order, but the states prevailed in the 1999 Order by restoring—and even strengthening—the federalism principles set forth in the Reagan Order.

Ironically, before the introduction of the 1998 Order, the Reagan Order had been largely ignored. L. Nye Stevens testified before the Senate Committee on Government Reform “that Executive Order 12,612 had not been implemented to any significant extent by the Reagan Administration ‘or its successors.’”¹³⁵ In addition, the OMB had taken little action to ensure that the principles of federalism outlined by the 1987 Order were actually implemented.¹³⁶ Consequently, it seems strange that an older order, so little used, would garner such passionate support.

Perhaps the current burgeoning interest in federalism stems from a growing feeling among state and local interest groups that there has been a substantial “power shift,” resulting in the diminished authority of state legislatures. In a statement made before the Senate Governmental Affairs Committee, John Dorso testified on behalf of the National Conference of State Legislatures regarding the proposed Federalism Accountability Act of 1999. He claimed “that the frequency and intrusiveness of federal preemption has increased dramatically.”¹³⁷ Dorso continued,

As we all know, if a properly adopted federal law conflicts with a

134. See Clinton, *supra*, note 1 and accompanying text.

135. *Federal Preemption*, *supra* note 100 (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues, General Government Division).

136. See *id.*

137. *Id.* (statement of Rep. John Dorso, Majority Leader N.D. House of Rep.).

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state law, then under the Supremacy Clause, federal law trumps state law. Through most of the history of our republic, the federal government used its preemption power sparingly. Congress and federal agencies showed respect for the American tradition that government should be kept close to the people and that most public policy decisions should be made locally. This is no longer the case.

The Problem Generally: An Advisory Commission on Intergovernmental Relations study of a few years ago documented that most of the federal preemption of state law through the history of the republic has taken place since 1970. In the 1990s, the pace of preemption has quickened, and the impact of preemption is not merely trivial or incidental. As a result of preemption, states have been barred in the 1990s from legislating in policy areas of great importance.

I call it the great power shift. The authority of America's state legislatures is shrinking. This is bad not only for state legislatures but also for the American people, who are increasingly deprived of effective local self-government.¹³⁸

Whatever the reasons for this current resurgence, it is clear that federalism is an important issue to most state and national officials. Whether the federalism debate will have an impact on daily practice or remain a matter of purely academic, ideological concern remains to be seen. It is clear, however, that at this point the states have control over the executive branch's handling of federalism concerns.

The commotion instigated by the 1998 Clinton Order demonstrated that setting policy on federalism in the executive branch was a topic worthy of national debate, even though the scope of the executive orders is relatively small. The 1999 Clinton Order governs only the executive branch and cannot dictate this view to other branches of the government. Therefore, it is also worthwhile to look briefly at what is happening on other fronts.

B. Legislative Branch

Clarence Anthony, President of the National League of Cities, in a letter to President Clinton, remarked, "It is only by addressing federalism concerns with all branches of government that a true federal,

138. *Id.*

state, and local partnership can be achieved.”¹³⁹ In addition to the wrangling in the executive branch over the executive orders on federalism, both Congress and the Supreme Court are addressing this issue as well.

In the 106th Congress, the Federalism Act of 1999 in the House (“H.R. 2245”), and the Federalism Accountability Act of 1999 in the Senate (“S. 1214”), would make many of the same requirements that the 1999 Order makes mandatory on the executive branch and its agencies binding on the legislature as well as the executive branch. It has thus been suggested that policy in the executive branch has only been temporarily settled with the issuance of the 1999 Order.¹⁴⁰ In support of the Senate bill, Daniel M. Sprague testified,

Passage of S. 1214 is essential to State and Local Governments for the 21st Century

-This bill will protect the principles of federalism and promote intergovernmental partnerships, which are they key to successful governance in the United States; -This bill places the same requirements on both the Administrative and Legislative branches of federal government and requires that state and local governments be consulted in advance of passage of legislation or issuance of regulations that would preempt state or local government authority; -This bill codifies existing federal Executive Orders that would require federalism assessments to identify preemptions and the extent of preemptions by both Administrative agencies and the Congress when proposing regulation or bills¹⁴¹

One reason for codifying federalism provisions is to make them judicially enforceable. Because executive orders are not laws, they create no rights and are not judicially enforceable. Testifying on behalf of the National League of Cities, Alexander G. Fekete stated, “In sum, from a public policy perspective, an executive order supporting federalism is helpful in providing guidance on the issue, but it simply does not carry the same weight as legislation.”¹⁴² Professor

139. Becker, *supra* note 16, at 6.

140. *See Hearing, supra* note 50, at 109-23 (statement of Daniel T. Blue, N.C. House of Rep.).

141. *Federal Preemption, supra* note 100 (statement of Daniel M. Sprague, Executive Director and on behalf of the Council of State Governments).

142. *Id.* (statement of Alexander G. Fekete, Mayor of Pembroke Pines, Florida, on behalf of the National League of Cities).

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Ernest Gellhorn, professor of law at George Mason University, testified to the Senate Committee on Governmental Affairs, “where such policies are not enforced by judicial review, as illustrated by Executive Order 12,612 (on federalism) . . . which [was] uniformly ignored by the agencies, agency compliance is problematical and probably unlikely.”¹⁴³ An act of Congress, which could be judicially enforced, would strengthen the effect of the principles of separation of power in a way that the 1999 Order cannot, since the Order is only binding on agencies within the executive branch.

The same parties who negotiated the 1999 Order with the White House are now focusing on these bills before Congress.¹⁴⁴ In the words of Raymond Sheppach on behalf of the National Governors’ Association, “[t]he Governors are committed to a revitalized and strong partnership with Congress and the administration to bring a new balance to federalism.”¹⁴⁵

C. Judicial Branch

During 1999, the United States Supreme Court issued three decisions dealing with federalism, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,¹⁴⁶ *Alden v. Maine*,¹⁴⁷ and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.¹⁴⁸ In these cases, the Court held that states cannot be sued in state or federal court for violations of federal law unless the state waives its sovereign immunity.¹⁴⁹ Thus, a national spotlight has turned to focus on the Supreme Court’s current approach to federalism issues—an approach that appears to favor state sovereignty.

During the present 1999-2000 Term, the Supreme Court is

143. *Id.* (statement of Ernest Gellhorn, Professor of Law, George Mason University) (pointing out that the S. 1214 would create full judicial review under the Administrative Procedures Act but supporting more limited judicial review).

144. *See Federal Preemption*, *supra* note 100 (statement of Daniel T. Blue, N.C. House of Rep. on behalf of the National Conference of State Legislatures) (stating that representative of the National Conference of State Legislators, now testifying on behalf of H.R. 2245, testified last year in regard to the 1998 Order).

145. *See Streamlining*, *supra* note 87 (statement of Raymond C. Sheppach, on behalf of the National Governors’ Association).

146. 119 S. Ct. 2199 (1999).

147. 119 S. Ct. 2240 (1999).

148. 119 S. Ct. 2219 (1999).

149. *See Florida Prepaid*, 119 S. Ct. at 2202; *College Savings*, 119 S. Ct. at 2233; *Alden*, 119 S. Ct. at 2246.

slated to hear additional cases with federalism overtones.¹⁵⁰ Many Supreme Court observers have noted that one of the Rehnquist Court's leading contributions to constitutional jurisprudence "has been a series of decisions reining in federal intrusion on state authority."¹⁵¹ One columnist recently stated,

The Supreme Court is controlled today by justices who avoid bold strokes and resist rulings that would dramatically reinterpret the nation's laws. But one area remains an exception: the boundary between the powers of federal government and the states.

A resolute five-justice majority in recent years has been shoring up the authority of the states at the expense of Congress. And during oral arguments Wednesday in an important test on where the proper balance lies, this majority appeared poised to deepen its imprint in favor of states' rights over federal authority.¹⁵²

The Court has already handed down two decisions in January of 2000 dealing directly with the disputed boundary between state and national control. The first, *Kimel v. Florida Board of Regents*,¹⁵³ held that, although the Age Discrimination in Employment Act of 1967 does contain a clear statement of Congress' intent to abrogate the States' immunity to suits by private individuals claiming age discrimination, that abrogation exceeded Congress's authority under Section 5 of the Fourteenth Amendment. The Court held that the Constitution permits states to draw lines on the basis of age if they have a rational basis for doing so at a class-based level.¹⁵⁴

In the second federalism decision, *Reno v. Condon*,¹⁵⁵ the Court held that in enacting the Driver's Privacy Protection Act of 1994, which regulates the disclosure of personal information contained in the records of state motor vehicle departments, Congress did not run

150. See Shaw, *supra* note 2, at A4.

151. Olson, *supra* note 2, at A43; see also Biskupic, *High Court*, *supra* note 2, at A3 ("To date, the Rehnquist court's legacy has been to curb Congress's authority to pass laws that address traditionally local concerns, such as gun control, and to protect states from lawsuits based on federal rights, as in the case of a ruling last term that prevented state employees from suing the states for overtime wages they were entitled to under federal labor law.").

152. Biskupic, *National Court Support*, *supra* note 2, at A19; see also Biskupic, *High Court*, *supra* note 2, at A3.

153. 120 S. Ct. 631 (2000).

154. See *id.* at 648.

155. 120 S. Ct. 666 (2000).

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afoul of the federalism principles enunciated in *Printz*.¹⁵⁶ First, the regulation was made pursuant to the Commerce Clause, and second, the Act does not require the states in their sovereign capacity to regulate their own citizens but regulates the States as the owners of the databases.¹⁵⁷ Although upholding the regulation, the Court specifically clarified:

[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. . . . It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.¹⁵⁸

Still remaining this term is whether Congress exceeded its authority with the 1994 Violence Against Women Act, which allows women who have been raped, stalked, or otherwise assaulted to sue their attackers.¹⁵⁹ Thus, as cases continue to follow the framework set out in *Florida Prepaid*, *College Savings*, and *Alden*, the states are receiving another federalism boon. So while the debate over federalism in the executive branch has been temporarily settled, it is far from disappearing in both the legislature and the judiciary. In fact, the months to come hold great potential for fine-tuning.

VI. CONCLUSION

The separation of powers between federal, state, and local governments has traditionally been an area of great controversy. Where the division of power is to be drawn, as a practical matter, has the potential to change with every new president or new Congress. Before the promulgation of the 1999 Order, when the broad 1998 Order was to be implemented, some doomsayers argued that if Y2K were to cause crucial computers to crash and precipitate a national emergency, President Clinton would “be ready [with his 1998 Order on federalism] to assume emergency dictatorial powers that no American president has ever had before.”¹⁶⁰ Senator Robert Bennett, from Utah, asked the United States military to be ready to respond if

156. *Printz v. United States*, 521 U.S. 898 (1997)

157. *See Condon*, 120 S. Ct. at 671-72.

158. *Id.* at 672.

159. *See Biskupic, High Court, supra* note 2, at A3.

160. Phyllis Schlafly, *Grabbing Vast New Powers via Executive Order*, LAS VEGAS REV.-J., Aug. 3, 1998, at 7B.

President Clinton attempted to declare martial law on or about January 1, 2000.¹⁶¹ Yet President Clinton's attempt to enlarge the power of the national government was strongly vetoed by state and local officials, and state interests have temporarily won the ideological battle over federalism. State and local groups gained a powerful position in this debate by displaying an unprecedented show of force in their mobilization to counter the 1998 Order.

Future administrations will likely think carefully before attempting to shift policy away from the states any time in the near future. Congress has also demonstrated that it will respond in support of state and local groups. The Big Seven and Congress have proven themselves well-armed to challenge any presidential power grab. For the time being, the balance of federalism hangs in favor of the states.

Jennie Holman Blake

161. *See id.*