



MEMORANDUM

To: Adam Stewart, Office of Chairman Rob Bishop
From: National Governors Association
Council of State Governments
National Association of Counties
National Conference of State Legislatures
The U.S. Conference of Mayors
National League of Cities
International City/County Management Association

Date: July 27, 2017

Re: **Proposed Roadmap for Speaker’s Task Force on Intergovernmental Affairs**

On behalf of the seven leading organizations representing state and local governments at the federal level – the National Governors Association, National Association of Counties, National League of Cities, U.S. Conference of Mayors, Council of State Governments, National Conference of State Legislatures and the International City/County Management Association – thank you for the opportunity to make programmatic suggestions for the Speaker’s Task Force on Intergovernmental Affairs (“Task Force”). We understand Chairman Bishop’s goal to create a forum for action on process and procedural opportunities by Congress to improve intergovernmental relations.

With that goal in mind, this memorandum outlines a proposed agenda through the end of this year for the Task Force to consider, and includes a series of possible recommendations for action from our seven organizations.

Proposed Agenda Topics through 2017

We understand that Chairman Bishop would like to hold at least two Task Force meetings before the end of this year. The next meeting is scheduled for the week of September 11, and subsequent meetings would occur every other month. Here are several meeting topics for consideration:

September 2017: *Are We “Federalizing” Federalism? A Primer on Federalism, State and Local Government and Interrelations with the Federal Government*

- Purpose: This session would offer Task Force members a concise review of federalism’s application over the past forty years by the courts, Congress and at the state and local levels.
- Possible Participants: Tim Conlan (George Mason University); Jennifer Bradley (Brookings); Mary Davis (UKY Law); Deborah Merritt (OSU Law); Catherine Sharkey (NYU Law); Randy Barnett (Georgetown Law); Richard Nathan (SUNY-Albany); Rick Schraegger (UVA Law); Gerald Frug (Harvard Law)

- Proposed Outcomes:
 - Introduction to the operations of state and local governments and their growth and development;
 - Appreciation for the role of the judiciary in shaping the boundaries of federalism;
 - Consideration about how the economic, political and policy conditions that influence federalism have changed, and whether they require a reset in intergovernmental relations in a post-recession environment.

November 2017: *Advisory Commission on Intergovernmental Relations (ACIR) – A Short History of the ACIR.*

- Purpose: This session would offer Task Force members a brief history of the Advisory Commission on Intergovernmental Relations (ACIR). Congress established the ACIR in 1959 to monitor the operation of the U.S. federal system and recommend improvements, but terminated it in 1995.
- Possible Participants: Bruce McDowell (former ACIR senior official); Carl W. Stenberg (University of North Carolina); David B. Walker
- Proposed Outcomes:
 - Review the purpose and role of the ACIR in formulating solutions to the nation’s intergovernmental challenges;
 - Review why the ACIR was terminated by Congress in 1995; and
 - Explore what structures or institutions are needed to strengthen intergovernmental relations today.

Proposed Policy Recommendations and 2018 Agenda

We are sharing the attached recommendations on intergovernmental relations our groups prepared several years ago. They represent action steps the Task Force may pursue in response to what it learns through these meetings. Our list is not comprehensive. It is also subject to amendment based on our work together, but it offers a good starting point for consideration.

Finally, here are a few additional meeting topics for consideration as we work together on planning an agenda for 2018:

- *The Unfunded Mandates Reform Act (UMRA) of 1995 – Federalism’s High Water Mark or Bust?* This session would provide a close evaluation of the purpose and goals of UMRA. It would consider whether what Congress enacted into law tracked the intended purposes and whether UMRA has moved the needle on intergovernmental relations beyond offering all parties a “federalism” talking point. Potential panelists include Frank Shafroth (George Mason University) and Bill Hoagland (Bipartisan Policy Council).
- *Administrative Procedures Act (APA) of 1946 – Does this Aging Boomer Need a Makeover?* This session would include a primer about the APA, which drives the federal administrative and rulemaking machinery. Selected panelists would address the APA’s application in practice; its political, economic, and social effects; and consider areas for potential change. Potential panelists would include legal scholars, former Office of Information and Regulatory Affairs (OIRA) officials and regulatory practitioners.

ATTACHMENT ONE

Recommendations to Improve the Federal-State Regulatory Process

- **Update the Unfunded Mandates Reform Act:** Federal agencies, including independent agencies, regularly fail to quantify and assess the impact of federal regulations on state, local and tribal governments. Closing the loopholes to ensure federal agencies fully examine the potential economic costs is important in minimizing unfunded mandates.
- **Reestablish an institution like the Advisory Commission on Intergovernmental Relations (ACIR):** The ACIR was an important platform to improve intergovernmental communication, cooperation and coordination between federal, state and local governments. The commission was independent, nonpartisan and comprised of a combination of federal, state and local government officials. With the current political environment in Washington, reestablishing an institution like the ACIR would help provide a process to review and assess the potential impact of federal policy on state, local and tribal entities.
- **Develop a pre-consultation process:** The Administrative Procedure Act (APA) of 1946 established the framework for the rulemaking process largely used today. It requires agencies to publish a notice of the proposed rulemaking to collect comments from the public and provide at least a 30-day waiting period before the rule can become effective. However, there is no process in place to ensure federal agencies consult with state, local and tribal governments before (and during) they develop the proposed regulation. A pre-consultation process will help ensure there is proper input from all levels of government, which will strengthen the proposed regulation and reduce possible litigation.
- **Establish state and local government advisory committees within federal agencies:** Advisory committees in federal agencies play a key role in reviewing policy impacting state and local governments. However, the structure, role and authority of advisory committees vary greatly by agency, and there is no consistent agency reviewing policy impacts on policy on state, local and tribal governments. Establishing a state and local advisory committee within each federal agency would help ensure there is consistent input, consultation and analysis of proposed rules and regulations.
- **Establish consistent definitions of the consultation process across federal agencies:** Executive Order 13132 – Federalism – was issued in 1999 to further the policies of the Unfunded Mandates Reform Act and to ensure federal agencies do not promulgate rules or regulations unless they consult with elected state and local officials or their representative from national organizations. However, this process is inconsistently applied both among agencies and from regulation to regulation. There should be a clear and consistent definition of the consultation process across federal agencies to reflect the true purpose of E.O. 13132.
- **Develop annual or bi-annual sessions between agency staff and association staff:** This would allow all groups to make introductions and facilitate dialogue, including with both political and career federal agency staff. Big Seven organizations and agencies should also exchange rosters of key contacts responsible for writing or assisting with regulations (i.e. Deputy Assistant Secretaries).
- **Employ individuals with experience in state and local government:** When vacancies appear, consider hiring employees with knowledge and experience in state and local government affairs. Additionally, the Office of Information and Regulatory Affairs (OIRA) should include having experience in state and local government in the job description and application process.

- **Establish oversight reports on federal agency regulatory coordination:** Instruct agency Inspector Generals, the Government Accountability Office (GAO) or other oversight agencies to conduct assessments on agencies' outreach and coordination with state and local governments.
- **Offer a 101-type session for agency staff on topics related to state and local government:** These sessions could address the basics about the roles and responsibilities of state and local governments. They could also include topics like state budget cycles or how county budgets are determined.
- **Create an internal alert system or communication informing state and local organizations when agencies bypass necessary process requirements:** OIRA should flag rules that have bypassed standard agency intergovernmental procedures and communicate those rules to state and local associations. This should include when agencies fail to quantify a major rule that may have a direct effect on state and local governments.
- **Identify best practices for intergovernmental cooperation:** The Task Force could document and highlight best practices around intergovernmental coordination and outreach from federal agencies. These best practices can be instrumental for continued improvements among federal, state and local governments.