Senate Budget Committee Republican Staff
BUDGET BULLETIN
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INFORMED BUDGETEER

FEDERAL MANDATES: IS LEGISLATION REALLY UNFUNDED, OR JUST UN-FUN?

- The Energy bill currently in conference has provided a good case study for testing the degree of understanding that participants in and observers of the legislative process have of the unfunded mandates provisions within the congressional budget process.

- The cost estimate that the Congressional Budget Office (CBO) prepared for the introduced version of the House version of the energy bill (H.R. 6) stated that the bill would impose an unfunded mandate on state, local, or tribal governments (aka intergovernmental mandate) because "future damage awards for state and local governments. . . would likely be reduced. . . .[by] shield[ing] manufacturers of motor fuels and other persons from liability for claims based on defective product relating to motor vehicle fuel containing methyl tertiary butyl ether [MTBE] or renewable fuel." (http://www.cbo.gov/ftpdocs/62xx/doc6297/hr6.pdf)

- CBO's estimate for the Senate version of the bill reported by the Senate Energy and Natural Resources Committee (S. 10) stated that while there is no significant intergovernmental mandate (MTBE provisions were not included in the bill), the bill "would impose a private-sector mandate on domestic refiners, blenders, and importers of gasoline by requiring that gasoline sold or dispensed to consumers in the contiguous United States contains a minimum volume of renewable fuels" (aka, the ethanol provisions). (http://www.cbo.gov/ftpdocs/64xx/doc6423/s10.pdf)

- Two of the most common, but erroneous, reactions to these two estimates were that the House's MTBE provision could not be a state and local mandate (as in, "we're not mandating that governments do anything that costs money"), and that there was a 60-vote point of order against the Senate bill because of the private-sector mandate resulting from the ethanol provisions.

- These observations are erroneous, but perhaps understandable, given that treatment of mandates has not been as familiar a part of the budget process as the rest of the year-in, year-out congressional budget activity. Although CBO started doing cost estimates of state and local mandates (but not private-sector mandates) in 1982, there have been several key developments since then.

- The Unfunded Mandates Reform Act (UMRA), enacted a decade ago, replaced the State and Local Government Cost Estimates Act of 1981, extended CBO's responsibility for mandate estimates to private-sector costs, and created two points of order (simple majority) against legislation if either: (1) the bill is being considered on the floor before there is a CBO estimate available on both intergovernmental mandates and private-sector mandates, and (2) the bill creates an intergovernmental mandate that exceeds a certain threshold (this point of order does not cover private sector mandates). These points of order were designed to make it more difficult for Congress to consider legislation without information about any mandates in the legislation.

- Whether UMRA has accomplished its goal is perhaps an open question as there is little direct data to measure its success: in the Senate, the unfunded mandate points of order were never raised.

- Nonetheless, among the other enforcement-related changes included in the Congressional Budget Resolution for FY2006 (H. Con. Res. 95), section 403(b)(1) of the resolution changed the threshold for waiving the unfunded mandate points of order (under sections 425(a)(1) and 425(a)(2) of the Congressional Budget Act) in the Senate from a simple majority to 60 votes.

- While the point of order now has longer teeth, the teeth remain not as sharp as some may have assumed for the last decade because the definition of an unfunded mandate has been more narrow than some might expect (and desire). This has led to confusion about what is and is not an unfunded mandate.

- What is an Unfunded Mandate? According to CBO's most recent annual review of its activities under UMRA, the law "defines a mandate as any provision in legislation, statute, or regulation that would impose an enforceable duty on state, local, or tribal governments, or the private sector; that would reduce or eliminate the amount of funding authorized to cover the costs of existing mandates; or that would increase the stringency of conditions or make cuts in federal funding for certain mandatory programs." (http://www.cbo.gov/ftpdocs/61xx/doc6134/03-05-UMRA.pdf)

- In the case of large entitlement programs (those that provide $500 million or more annually to state, local, or tribal governments), a provision that either reduces or puts a new condition on federal assistance can be a mandate, but only if states lack the ability to offset the loss of federal funding or the cost of the new condition by making reductions elsewhere within the program. This definition of a mandate currently applies to nine programs: Medicaid; Temporary Assistance for Needy Families; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support payments for Job Opportunities and Basic Skills; and Child Support Enforcement.

- Provisions to reduce or eliminate federal funding to cover the costs of existing mandates are themselves considered unfunded mandates. In addition, federal preemption of state and local law (such the Internet Tax Freedom Act preventing state and local governments from imposing taxes on internet activity) can be a mandate, and limits on existing rights of state and local governments under current law can also be a mandate (case in point: because H.R.6 would deny revenues that state and local governments would receive from MTBE litigation, it is a mandate).

- What is not an Unfunded Mandate? Conditions that are imposed as a result of receiving federal assistance or grants, or that arise as a result of participating in voluntary federal programs are not mandates as defined by UMRA. An example of this is the No Child Left Behind Act, which is frequently, but incorrectly, cited as a federal mandate on state and local governments. The No Child Left Behind law requires school districts to undertake many activities, including designing statewide achievement tests, but only if they want to receive certain federal education grants. Although states consider such conditions to be mandates, their **participation in the grant programs is still voluntary**, and therefore, the No Child Left Behind Act is not a mandate under UMRA.

- Policing Unfunded Mandates. UMRA requires CBO to prepare a cost estimate of any federal mandate that results from any bill ordered reported by authorizing committees. These CBO estimates evaluate whether the federal mandates contained in a bill would impose direct costs that exceed the thresholds (adjusted annually for inflation) established in UMRA. For 2005, the thresholds are $62 million for intergovernmental mandates and $120 million for private sector mandates.

- While the bar has been raised in the Senate to 60 votes in order to waive the mandates points of order, it has been the rare piece of legislation indeed that has even had the points of order apply to it. In the past nine years, only one percent of the all the legislation

that CBO reviewed has contained intergovernmental mandates that would exceed the thresholds set out in UMRA.

- Of that small subset, policymakers have enacted only five intergovernmental mandates whose costs exceeded the UMRA threshold for intergovernmental mandates: an increase in the minimum wage, a reduction in federal funding of the Food Stamp program, a preemption of state taxes on premiums for some prescription drug plans, a temporary preemption of state authority to tax Internet services, and a requirement that state and local governments meet certain standards for issuing driver's licenses and ID cards. (http://www.cbo.gov/showdoc.cfm?index=6052&sequence=0)

- Recently, state and local governments have lodged many complaints about the current number of intergovernmental unfunded mandates. The common sentiment is that, although fairly inexpensive when taken individually, the increasing number of mandates taken together is creating a huge burden on state and local governments. But another revision to how Congress evaluates mandates could probably benefit from waiting until we have more information about the effect that the current process and points of order have on consideration and enactment of mandates.

BUDGET QUIZ #1: SUNDAY SURPRISE

Question: Which Senate committee has jurisdiction over legislation related to the Congressional Budget Act?

Answer: Budgeteers who didn't come to work on Sunday, October 9, 2004, may have missed an important vote (50-35) on an amendment to S. Res. 445 (a resolution to modify the jurisdiction of the Intelligence and Governmental Affairs committees) that strengthened the jurisdiction of the Senate Budget Committee. In a bipartisan effort, then-Chairman Nickles and ranking member Conrad joined forces to consolidate jurisdiction over the Congressional budget process within the Senate Committee on the Budget. Their amendment also established the Budget Committee's shared jurisdiction with the re-named and realigned Committee on Homeland Security and Governmental Affairs (HGSA) over the nomination and confirmation of the OMB Director and the Deputy OMB Director for Budget.

The two Budget Committee senators saw this debate on the jurisdiction of Senate committees as an opportunity to fix a longstanding anomaly in the Senate rules: jurisdiction over the congressional budget process was shared with the then-Committee on Governmental Affairs and the nomination of the federal government's budget director wasn't ever even considered by the Budget Committee.

It seems that the Governmental Affairs Committee, which wrote the legislation that created the congressional budget process and the Budget Committee in 1974, wasn't quite ready to give the new guys full power over budget issues. Since both committees had some jurisdiction over these issues, a unanimous consent agreement was reached in 1977 by which the Budget and Governmental Affairs committees received joint referral for legislation affecting the budget process. Under that UC, if one committee acted on a jointly-referred bill, the other committee was required to act within 30 days or be automatically discharged.

Senators Nickles and Conrad argued that, after 30 years, the time had come to give sole jurisdiction to the committee with the accumulated expertise over the budget process.

The Nickles-Conrad amendment started with the substance of the 1977 unanimous-consent agreement and modified it so that congressional budget process legislation would be referred only to the Budget Committee, while preserving HSGA's jurisdiction over accounting and management issues. The amendment also gave the Budget Committee shared jurisdiction over the nominations of the OMB Director and Deputy OMB Director for Budget. Regarding federal mandates under UMRA (see previous article), the HSGA Committee remains as arbiter of what is a mandate, while the Senate Budget Committee continues to be responsible for evaluating whether the cost of a mandate exceeds the threshold.

BUDGET QUIZ #2: ONE TRUE SCOREKEEPER

Question: Is there an official "scorekeeper" on spending and revenue matters in the Congress, and, if so, who is it?

Answer: During a May 11th floor speech about his amendment to the highway bill, the chairman of the Senate Finance Committee insisted that "the Joint Committee on Taxation, as we all know – maybe some of us forgot – is the official scorekeeper on tax matters in the Congress….It is not the Senate Budget Committee that is the scorekeeper; it is the Joint Committee on Taxation."

The chairman then quoted section 201(f) of the Congressional Budget Act of 1974:

> For the purposes of revenue legislation, which is income, estate and gift, excise, and payroll taxes, considered or enacted in any session of Congress, the Congressional Budget Office shall use exclusively during that session of Congress revenue estimates provided to it by the Joint Committee on Taxation. During that session of Congress, such revenue estimates shall be transmitted by the Congressional Budget Office to any committee of the House of Representatives or the Senate requesting such estimates, and shall be used by such committees in determining such estimates.

The implication was that this should put to rest the debate about whether the offsets in the amendment were real, because they had been scored by the Joint Committee on Taxation -- the "official [sic] scorekeeper" under the Congressional Budget Act for revenue purposes.

However, when the chairman spoke, he omitted the last sentence of section 201(f), which states:

> The Budget Committees of the Senate and House shall determine all estimates with respect to scoring points of order and with respect to the execution of the purposes of this Act [emphasis added].

Furthermore, section 312(a) of the Budget Act, reaffirms the status quo quite clearly:

> For purposes of this title [the Congressional Budget Process] and title IV [Additional Provisions to Improve Fiscal Procedures], the levels of new budget authority, outlays, direct spending, new entitlement authority, and revenues for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the House of Representatives or the Senate, as applicable [emphasis added].

This clears up any confusion about who is, under the law, the official scorekeeper -- it is the Budget Committee. Typically, the Budget Committees have relied on CBO scoring (including JCT scoring that is included in CBO estimates); the House or Senate Budget Committees have only sparingly used an estimate that was different from what CBO reported.