



DUEY STROEBEL

STATE SENATOR • 20TH DISTRICT

Testimony on SB 710

January 30, 2018

Chairman Craig and members of the Senate Committee on Insurance, Financial Services, Constitution and Federalism, thank you for having a public hearing on SB 710. SB 710 would create a framework and biennial report on potentially coercive requirements from the federal government.

In the 2012 U.S. Supreme Court case NFIB v. Sebelius, the Court elaborated upon and reinforced the principal that the federal government does not have the right to place coercive requirements on states because they are receiving some quantity of federal dollars. Regardless of which party is in power in Washington, the tendency of the federal government to pressure states to act in accordance with the political will of Washington is universal and timeless. The unfortunate result is coercive and onerous requirements have been built up, unexamined for decades in federal law.

SB 710 defines coercive as meeting one of two criteria:

- 1) the federal condition requires the expenditure of nonfederal state or local funds, including maintenance of effort and similar requirements.
- 2) the federal condition relates to matters of state or local policy other than the manner in which federal, state, or local funds must be spent.

The bill exempts grants for which the state applies and therefore truly voluntarily take on any requirements. This is intended to deal with examples like research grants applied for by the UW System.

SB 710 orders the Legislative Fiscal Bureau and Legislative Council to create a biennial report. All expenditures of federal funds greater than \$5 million per biennium will need to be identified by Fiscal Bureau and compiled, along with a general description of the conditions, for review by Legislative Council. Legislative Council then reviews this information and identifies which federal requirements on the appropriations may meet the definition of coercive under the Constitution. The Attorney General is then authorized, at his or her discretion, to sue the federal government on any of the issues outlined in the report.

The report is due 90 days after the completion of the biennial budget. Acknowledging the first report will require the most work, SB 710 gives LFB and Legislative Council all of 2018 to complete the first report on the '17-'19 state budget. Whether one is concerned about overreach in Obama era regulations or Trump era rules on local cooperation with federal immigration priorities, SB 710 helps protect the sovereignty of Wisconsin and keeps decision making power in Madison, not Washington D.C. Thank you.



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January 30, 2018

TO: Committee on Insurance, Financial Services, Constitution and Federalism
FR: Representative Dale Kooyenga
RE: support for Senate Bill 710 – federal coercion

Thank you for holding a hearing on Senate Bill 710. This bill relates to coercive conditions attached to federal funding.

Over the last several years, the coercive conditions attached to federal funding has become excessive. This bill establishes a framework through which future legislatures can evaluate the conditions for receipt of federal funding and determine whether or not it is in the state's interest to accept those conditions.

Regardless of which party is in power in Washington, the tendency of the federal government to pressure states to act in accordance with the political will of Washington is universal and timeless. The unfortunate result is coercive and onerous requirements have built up and gone unexamined for decades in state and federal law.

We have introduced this bill as a means by which to identify, evaluate and with the assistance of the Attorney General, fight back on some of the more egregious infringements on state's rights.

This bill requires the Legislative Fiscal Bureau and the Legislative Council to submit a joint report following each biennial budget to the governor, attorney general and the legislature that identifies coercive conditions attached to federal funds. Lastly, the bill does not create a permanent recurring report as the legislation sunsets in 2039 if a future legislature does not act to retain the provisions.

Thank you for hearing this bill and I respectfully ask for your support.



What Military Uniforms' 'Flag First' Can Teach Us About Good Government

The American flag has 50 divinely beautiful stars in the canton with each one representing our 50 states. So, even in battle, as a unified national fighting force, the states lead the way.



By Dale Kooyenga
FEBRUARY 1, 2017

Army Drill Sergeant Henry was born to be a drill sergeant. He looked like a drill sergeant. His chiseled features were striking, and only his bulging eyes stuck out further than his bulging biceps. Everything about this man was flawless, topped with his meticulously worn drill sergeant cap.

During basic training, Drill Sergeant Henry asked us if we knew why the American flag is “backwards” on U.S. military uniforms. We all stood there clueless—a common pose for recruits in basic training—and Drill Sergeant Henry reminded us that we didn’t know anything until he taught us so, of course, we didn’t know the answer.

At 6’7” and the only soldier in basic training heading off to Officer Candidate School, I received more than my share of the drill sergeant’s attention. Drill Sergeant Henry eyeballed me, “Come on college boy, didn’t they teach you anything about the American flag in all your education?” I responded, “No, drill sergeant, I was not taught why the flag flies backward on the U.S. Army uniform.”

Drill Sergeant Henry then informed us that when you head into battle, some mother’s son would run ahead of another mother’s son, and that fortunate soldier would run as fast as he could with the U.S. flag. “And did that flag fly with the stars in the back? Hell, no! Because when a flag is on the move, the stars are leading the way. Yes, the stars lead us into battle and they are always moving forward.”

The American flag has 50 divinely beautiful stars in the canton with each one representing our 50 states. So, even in battle, as a unified national fighting force, the states lead the way. This, of course, is wholly appropriate, for the states created the federal government and our Constitution, not the other way around.

Government Is For Us, Not Us For Government

The symbolism of our flag is a reflection of our framers’ reality: We are a republic, not a Washington DC-based, centralized power that dictates to the states what they can and cannot do. There are limits to federal power. The Constitution details what the federal government (and states) cannot do to citizens. The Tenth Amendment is clear that the federal government’s power is limited, and all other power is reserved to the states or states’ citizens.

The first three words of the Constitution—“We the People”—declare that the document was written for citizens, not the government. The role of the federal government is to

ensure that our individual freedoms are protected. Examples of this protection are the right to bear arms, freedom of speech, and protections of civil rights.

The federal government has effectively neutered the Tenth Amendment by collecting tax revenue from the states and then returning the same dollars with thousands of conditions that effectively federalize state and local government operations. It does something similar on the regulatory front when it approves or disapproves state implementation plans for federal programs, forcing states into the role of field agencies of the federal government.

States Do Most Government Jobs Better

I am a citizen-soldier. I'm a member of the Army Reserves, an accountant, and a Wisconsin state representative. In Wisconsin, we've passed historic labor reforms, cut taxes, expanded school choice, and continue to work to right-size and properly focus government. Throughout our history, the states have led the way.

States are able to quickly adapt based on the experiments other states conduct. Geography, demographics, natural resources, and other factors position local and state elected officials better than federal elected officials to develop public policy.

Unfortunately, federal elected officials and, even worse, unelected federal bureaucrats heap scores of regulations on states, businesses, and individuals. According to the U.S. Chamber of Commerce, since 1976 federal agencies have issued more than 180,000 new regulations, making it nearly impossible to even define the breadth and scope of the federal government's reach into our personal and professional lives.

Federal Regs Keep Me From Representing My Constituents

Let me explain my concerns about federal overreach in legislating at the state level. I ran for office to solve problems, but over my six years in office I've been continually reminded that states lack many of the tools necessary to create innovative solutions in response to significant problems.

Medicaid is a perfect example. In 2012, the Supreme Court handed down a landmark decision that affirmed limits on federal power to coerce states into action. Their ruling quashed the federal Medicaid blackmail scheme, which would have forced states to accept expansion of the program or risk losing existing funds.

That was a significant ruling, but problems persist. Medicaid is a federally mandated but state-run program in which the federal government matches a share of expenditures in return for the ability to dictate state program parameters. The federal government retains the ability to decide the model of care for each state, as opposed to allowing states to create a system that matches their local needs.

Because of the perverse financial relationship between states and the federal government, states have very limited flexibility to experiment with innovative health-care delivery models, which could raise the standard of care and save scarce taxpayer resources. Some have gone so far as to describe the relationship as coercive, whereby the federal government uses the threat of withholding federal funds to coerce states into its plan.

Even worse, some have described the federal government's conduct as commandeering, such as when it dictates specific commands to state agencies, essentially commandeering a state agency for federal purposes.

Recently, I participated in a conference call with the Centers for Medicare and Medicaid Services (CMS), the federal authority that approves all Medicaid deviations. A CMS official dashed my hopes by saying individual state legislators do not have the power to seek exceptions to Medicaid laws or rules, and that only a state executive branch can request waivers.

This leaves the fastest-growing portion of all 50 states' budgets outside the purview of the legislative bodies that most closely and directly represent the people. The frustration is compounded when the growth of Medicaid expenditures cannibalize nearly all of the growth in state revenue, diverting state lawmakers' power to reduce tax burdens or increase resources for priorities such as education.

Stop Blackmailing Us

The federal government collects billions of dollars from taxpayers in every state, yet in order for those same state taxpayers to become or remain eligible to receive their own money back, state governments must agree to and comply with Washington's terms and conditions. These are often arbitrary, ridiculous, and completely unrelated to the underlying rules and regulations.

When one of my soldiers returns home from a deployment, I maintain the tradition of taking that soldier out for a beer. However, occasionally that soldier is less than 21 years old, so not able to legally have a beer in the United States. I'd guess most Americans would agree a soldier who has been entrusted by his country with weapons of war to protect our nation's security deserves to legally have a beer when he or she returns home to American soil (especially if that soldier is from a proud beer-producing state like Wisconsin).

Washington's 'solutions' usually come with strings attached that only create more problems.

If Wisconsin's representatives agreed with me and decided to pass a law to allow our combat veterans younger than 21 the freedom to enjoy a beer, our state would face significant financial retribution from the federal government. In fact, if Wisconsin lowers the drinking age, the state could annually lose at least \$53 million in federal highway funds for each year the state is out of compliance. That's blackmail, and it's wrong.

States residents and therefore governments in states like California and Wisconsin have dramatically different ideas on government's role in health care. Americans across all political affiliation should unite and encourage our elected officials in Washington DC to divest power to states and individuals.

Fortunately, leaders like House Speaker Paul Ryan have advocated for this approach, and 2017 may be the year we see a return to the principles of federalism. Many, if not most, Americans are skeptical of Washington. We, as states, should not be looking to or

relying upon the federal government for solutions, because Washington's "solutions" usually come with strings attached that only create more problems.

We are at a crossroads and a time for choosing. It's time to return power to the states. Let's let our states, the real stars, lead us into the battle for a better America. If not now, when?

Dale Kooyenga is a state representative and Army Reserve member from Wisconsin.

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PREPARED TESTIMONY OF SOLICITOR GENERAL MISHA TSEYTLIN

Testimony on SB 710

Senate Committee on Insurance, Financial Services, Constitution and Federalism
Tuesday, January 30, 2018

Chairman Craig and Committee Members,

Thank you for the opportunity to testify in support of SB 710, which will assist the Wisconsin Department of Justice and its Office of the Solicitor General in protecting the State and people of Wisconsin from unconstitutional overreach by the Federal Government.

A primary reason that Attorney General Brad D. Schimel strongly supported the Legislature's creation of the Office of the Solicitor General, Wis. Stat. § 165.055(3), is to help battle against unconstitutional federal overreach. Over the last two years, the lawyers in the Solicitor General's Office have worked hard to fulfill that purpose. To take just a couple of examples, the Office played a leading role in obtaining the historic stay of the so-called Clean Power Plan from the United States Supreme Court, a stay that saved Wisconsin consumers from having their electricity rates sky-rocket. *AG Brad Schimel Applauds SCOTUS Clean Power Plan Stay*, Wisconsin DOJ, <https://www.doj.state.wi.us/news-releases/ag-brad-schimel-applauds-scotus-clean-power-plan-stay> (Feb. 9, 2016). That stay was the first time that the Supreme Court has blocked a federal regulation while litigation over that regulation was still pending in a lower court. The Office also led a bipartisan, multistate coalition—with States ranging from Vermont to Arkansas—successfully challenging a Federal Communications Commission order that removed from the States their statutory authority to decide which companies would be eligible to provide free broadband services to low-income consumers. *AG Schimel Declares Victory in Challenge to "Designation Rule" in FCC's "Lifeline Reform Program,"* Wisconsin DOJ, <https://www.doj.state.wi.us/news-releases/ag-schimel-declares-victory-challenge-designation-rule-fcc-s-lifeline-reform> (Mar. 30, 2017).

Enactment of SB 710 would be helpful to the efforts of the Wisconsin Department of Justice and its Office of the Solicitor General in protecting the State of Wisconsin from federal overreach. It is axiomatic that under the United States Constitution, the Federal Government has only limited, enumerated powers. As the Supreme

Court has concluded in cases such as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), Congress' powers do *not* include the authority to commandeer the States into administering federal programs. Congress has, however, sought to evade this limitation by requiring States, as a condition of receiving federal funding, to administer federal programs. In *South Dakota v. Dole*, 483 U.S. 203 (1987), and then in *NFIB v. Sebelius*, 567 U.S. 519 (2012), the United States Supreme Court made clear that it is unconstitutional for the Federal Government to use its Spending Clause authority to coerce the States into doing its bidding. In *NFIB*, for example, the Supreme Court held that it was unconstitutional for Congress to take away a State's entire Medicaid budget simply for refusing to administer the Affordable Care Act's Medicaid expansion in its State.

SB 710 will assist the Wisconsin Department of Justice and its Office of the Solicitor General in identifying, evaluating, and, if necessary, bringing lawsuits against federal spending conditions. Federal funds make up more than a quarter of the budget of most States, including Wisconsin. *Federal Grants to State and Local Governments*, Congressional Budget Office, <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/03-05-13federalgrantsonecol.pdf> (March 2013); *Which States Rely Most on Federal Aid?*, Tax Foundation, https://files.taxfoundation.org/legacy/docs/FedAidtoStates_hi-res.png. Given the volume and variety of such federal funding programs, it is infeasible for the Office of the Solicitor General to comprehensively evaluate all of these funding conditions to determine which ones should be challenged in court. It is my understanding that the Legislative Fiscal Bureau and Legislative Council are well-positioned to carry out this task.

SB 710 is worthy of this Committee's support without regard to partisan affiliation. Federal overreach crosses party lines, as the Federal Government aggregates power to itself at the expense of the States and the people. Having a catalogue of federal coercive spending measures impacting Wisconsin will help assist in identifying and challenging those measures, regardless of the party in power in Washington or Madison. Notably, a successful litigation challenge in court would often leave the State with *more* policy options. For example, after the Supreme Court's *NFIB* decision, each State now has the option of accepting (or not) the Medicaid expansion, without fear of losing its entire Medicaid budget.

Thank you, again, for allowing me to testify before you today. If you have any questions please contact Lane Ruhland, Director of Government Affairs at ruhlandle@doj.state.wi.us, or Misha Tseytlin, Solicitor General, at tseytlinm@doj.state.wi.us.