S. HRG. 99-450

# THE IMPACT OF THE SUPREME COURT'S GARCIA DECISION UPON STATES AND THEIR POLITICAL SUBDIVISIONS

## HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC GOALS AND INTERGOVERNMENTAL POLICY

OF THE

## JOINT ECONOMIC COMMITTEE CONGRESS OF THE UNITED STATES

NINETY-NINTH CONGRESS

FIRST SESSION

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# THE IMPACT OF THE SUPREME COURT'S GARCIA DECISION UPON STATES AND THEIR POLITICAL SUBDIVISIONS

TUESDAY, JUNE 25, 1985

CONGRESS OF THE UNITED STATES, SUBCOMMITTEE ON ECONOMIC GOALS AND INTERGOVERNMENTAL POLICY OF THE JOINT ECONOMIC COMMITTEE,

*Washington, DC.*

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SD-562, Dirksen Senate Office Building, Hon. Pete Wilson (member of the subcommittee) presiding.

Present: Senator Wilson and Representative Fiedler.

Also present: Charles H. Bradford, assistant director; and Kenneth Brown, professional staff member.

## OPENING STATEMENT OF SENATOR WILSON, PRESIDING

Senator WILSON. Good morning, ladies and gentlemen. Welcome to this hearing conducted under the auspices of the Joint Economic Committee into the subject of the application of the Fair Labor Standards Act to State and local government and the FLSA's mandatory premium overtime requirements.

We are expecting other members to attend as their schedules permit. Several members of the committee have indicated their interest. We are going to proceed and we are very pleased this morning to have a distinguished panel of witnesses.

First, I am Pete Wilson. I am pleased to chair this hearing on an issue that has the economic potential to many of a ticking time bomb and there are some who feel that it is a bomb that is about to be lobbed at local governments throughout the country and ultimately the taxpayers who support them and depend upon them for their services.

We are here this morning to examine the impact of the recent Supreme Court decision, *Garcia* v. *San Antonio Metropolitan Transit Authority,* which overruled a longstanding practice by which public employees were offered compensatory time off—or as is popularly known, "comp time"—in lieu of actual mandatory premium overtime pay.

Until now, that system of compensatory overtime has been applied widely. It has provided flexibility and I think several benefits for many of the parties to municipal compensation negotiations, to workers, including police and firefighters, who are compelled by the nature of their work to work irregular shifts and to accept as part of their daily circumstance overtime in order to pursue their

particular employment. It has offered benefit to other employees who use their comp time to extend annual vacations and clearly it has offered flexibility to cities appreciating any opportunity that they could find to manage rising payroll costs.

Now, however, with the Court ruling, cities across America will have to scrimp to find millions of extra dollars in already tight budgets because they are now mandated to pay premium overtime.

In California alone, it has been estimated that *Garcia* will cost some $300 million, with Los Angeles accounting for perhaps $50 million of that total, San Jose, $4.2 million, and San Francisco many millions more.

The problem can best be summed up in this way. Very large sums of tax money which might otherwise be applied in the discretion of local governments in their determination of their own priorities to pave streets, to support libraries, to dig sewers, to hire more police officers or more firefighters, will now instead be siphoned off to comply with overtime provisions mandated upon them by a court decision and by Department of Labor regulation.

But dollars are not the only concern which these local governments confront. As a former mayor, one who spent 11 years at the local government level, I share the concerns about the severe economic and administrative impact of the *Garcia* decision on States and localities. This decision undermines State and local autonomy. It severely reduces the control of State and local governments over wages, hours, over the regulations by which they have governed the functioning of their employees and their labor relationships with them.

A compelling effect of the *Garcia* decision may very well lead to a tremendous increase in the cost for public safety, and fire protection in particular, to State and local governments. Indeed, police and fire employee salaries and benefits comprise nearly one-half the budget for many cities; in some cases, more. Increasing the costs of these vital services may force local governments to shift revenue from other critical programs to public safety or, in my view, a still more serious possibility, to reduce overall spending for these services.

I know firsthand the difficulty of administering a local government, particularly in a setting where a proposition like California's proposition 13 has resulted in tax reduction and a lid upon the authority of local governments, if they have the courage to do so, to engage in revenue raising activity.

I have seen firsthand the difficulty which other congressional actions have placed on State and local governments. Currently, the all-important effort to reduce the deficit has impacted upon local government's ability to deliver services, and now the *Garcia* decision will leave localities around the country with still more difficult financial decisions and with considerably reduced autonomy to deal effectively and independently with their unique problems, problems varying from one situation to the next.

A mistake that Congress too often makes, with the best intentions in the world, is to apply a generalized prescription to the problems of Lodi and Los Angeles, and the communities are not the same, their problems are not the same.

I seriously question whether anything has occurred since the landmark *Usery* decision which held that "traditional" State functions are exempt from congressional regulation, that warrants the Supreme Court's insistence now upon Federal intrusion into decisions rightfully made by State and local governments.

To date, State laws have been more than adequate to regulate State and local governmental employer-employee relationship. Most local government employees and their municipal employers have engaged in collective bargaining to negotiate their contracts. What, I ask, has made it necessary at this point to supersede the relationship that existed under which State laws seemed to have been more than adequate?

I have very serious doubts whether State and local government employees will benefit from the applicability of the Fair Labor Standards Act. Clearly, the plaintiffs in this case thought they would, but I would suggest that one possibility at the very least is that this decision may inevitably lead to a very unfortunate choice for State and local government. That choice very simply stated is whether they will have more employees, not just in public safety, but more employees to deliver more service, or whether they will have fewer, more highly compensated, employees to deliver less service to the taxpayers, who foot the bill.

The task before the committee today is to determine the full ramifications to all affected parties of the *Garcia* decision. I look forward to hearing the testimony from all of our distinguished witnesses. For the record, the committee invited participation from the National Mass Transit Workers' Union to testify here today. The Transit Workers declined to participate in the hearing. We have participation from the AFL-CIO national, which we welcome; a written statement will be received and placed in the record in its entirety.[1]

Let me invite those who may wish to add to our record by written statements to do so. We will be pleased to have the statements of those whom we cannot hear personally this morning and their statements will be included in the record.

I thank all of our witnesses. They are busy people. We will begin this morning with the statement of Ms. Sue Meisinger, Deputy Under Secretary for Employment Standards of the Department of Labor. She will be followed by Talmadge Jones, chief counsel, California Department of Personnel Administration. We will hear then from Ms. Pat Russell, president of the Los Angeles City Council; and Mike Gillespie, chairman of the board of commissioners of Madison County, AL, to provide a local government perspective. Offering a perspective of an affected local public safety employee, Detective Carlton Olson, of the Los Angeles Police Department; and offering the expertise of those with whom municipal governments consult in this hour of their need, Finis Welch, a labor expert; and Kenneth Howard, an expert in the financing of municipal government.

We will begin with Ms. Meisinger's statement. We welcome you here and are eager to hear your testimony.

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[1] The written statement referred to for the hearing record may be found in the subcommittee files.

STATEMENT OF SUSAN R. MEISINGER, DEPUTY UNDER SECRETARY FOR EMPLOYMENT STANDARDS, DEPARTMENT OF LABOR, ACCOMPANIED BY HERB COHEN, DEPUTY ADMINISTRATOR, WAGE AND HOUR DIVISION

Ms. MEISINGER. Thank you, Mr. Chairman. With me is Herb Cohen, who is the Deputy Administrator for the Wage and Hour Division which falls within the Employment Standards Administration.

Senator WILSON. Good morning, Mr. Cohen. We're delighted to have you here.

Ms. MEISINGER. I would like to do a brief summary of my prepared statement and submit my prepared statement for the record if I might.

I appreciate your invitation to be here today to discuss the Department of Labor's implementation of the Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority* decided February 19, 1985. The effect of the *Garcia* decision is to broadly apply the Federal minimum wage and overtime law—the Fair Labor Standards Act—to State and local governments.

Pursuant to the *Garcia* decision, the Department has developed an investigation policy designed to establish an orderly and equitable procedure for implementing the act with regard to these governmental units.

The Department's investigation policy was announced on June 14, after discussions with representatives of individual State and local governments, associations representing various categories of State and local governments, and representatives of public employee trade unions.

After these discussions and our own analysis, the Department decided on an investigation policy that would be attentive to the requirements of the FLSA but would also responsibly address the fact that the Supreme Court's decision in *Garcia,* overturning its earlier judgment in *National League of Cities* v. *Usery,* dramatically changed the obligations of State and local governments to their employees. Under National League of Cities, these governmental units were required to adhere to FLSA requirements only for their employees who were employed in "nontraditional" jobs, not for those employees—the vast majority—who were engaged in the "traditional" activities of State and local government.

With those facts in mind, the Department developed an investigation policy with five major elements. First, the Department determined that April 15, 1985, would be the appropriate benchmark date for conducting FLSA investigations and paying any back wages which might be due. The Department determined that April 15 was the appropriate date because that was the date that all appeal rights were exhausted and the Supreme Court issued its mandate in the case.

Second, effective June 14—the date the Department's policy was issued—the Department's Wage and Hour Division has been authorized to conduct investigations of State and local governmental employment which the Department, pursuant to the *National League of Cities* decision, had previously determined were "nontra-

ditional" and for which there were no significant legal challenges pending at the time of the *Garcia* decision.

Third, the Department decided it would be appropriate to defer the initiation of FLSA investigations for all categories of State and local government employment that had not been earlier listed by the Department as "nontraditional," and also for mass transit employment whose coverage under the FLSA was not definitively determined until the *Garcia* case was finally decided. This deferral of investigations will extend to October 15 and will allow government employers to bring their pay practices into compliance with FLSA requirements. Once this adjustment period is over, however, Wage and Hour Division investigations will extend back to April 15.

Fourth, in order to provide any affected governmental unit with additional time to come into compliance, once an investigation has been completed and the Department has administratively determined that monetary violations of the FLSA exist, that governmental unit will be given at least 30 days written notice of the violation before any lawsuit is filed.

Fifth, the Department's investigation policy recognizes that the FLSA authorizes private parties to bring their own lawsuits to enforce their rights under section 16(b) of the act and in no way affects these rights. If successful in such litigation, an employee may under the law receive back pay, liquidated damages, attorney's fees and court costs.

It is, therefore, to the advantage of all parties, Mr. Chairman, for compliance with FLSA to be achieved in an orderly, nonlitigative way. For this reason, the Department has been providing a great deal of technical assistance and has just made available a comprehensive guide developed especially for State and local governments and their employees. And I would like to submit that for the record.[1]

Now, Mr. Chairman, I would like to discuss for the committee some of the background of FLSA coverage of State and local governments. It is important to understand this history in order to understand the impact of *Garcia.*

State and local governments were first made subject to the minimum wage and overtime pay provisions of the FLSA by the Fair Labor Standards Amendments of 1966, which specifically extended the act's coverage to employees engaged in the operation of hospitals, residential care facilities primarily in the care of the sick, aged, and the mentally ill or defective; schools, and mass transit systems. On June 10, 1968, the Supreme Court in *Maryland* v. *Wirtz* decided that this congressional extension of FLSA coverage to State institutions "could not be said, on the face of the Act, to exceed Congress' power under the commerce clause."

The FLSA was next amended by the Education Amendments of 1972, effective June 30, 1972, which extended FLSA coverage to employees of public and private preschools.

The Fair Labor Standards Amendments of 1974, effective May 1, 1974, then extended the provisions of the FLSA to virtually all remaining State and local governmental employees. However, on

[1] The submission referred to for the hearing record may be found in the subcommittee files.

June 24, 1976, the Supreme Court ruled in *National League of Cities* v. *Usery,* that Congress had acted unconstitutionally in extending FLSA to the integral operations of the States and their political subdivisions in areas of "traditional governmental functions." The Court then expressly overruled *Maryland* v. *Wirtz.*

The *Garcia* case arose from the distinction between "traditional" and "nontraditional" governmental functions. The legal controversy began on September 17, 1979, when the Department's Wage and Hour Division issued a letter advising the Amalgamated Transit Union that—

> Publicly operated local mass transit systems such as the San Antonio Transit System * * * are not within the constitutional immunity of the 10th amendment as defined by the Supreme Court in the National League of Cities versus Usery * * * and that they are therefore subject to the act's requirements.

As a result, the San Antonio Metropolitan Transit Authority filed suit in November 1979 seeking a declaratory judgment that the FLSA could not be enforced against a city-owned bus system because of the 10th amendment. Also on that same date, a San Antonio Transit employee, Mr. Garcia, filed suit under section 16(b) of FLSA for back wages.

Based on its determination, the Department filed a counter claim against San Antonio Transit on February 1, 1980, on behalf of the bus system's employees seeking back pay and injunctive relief.

In November 1981, the district court judge ruled in favor of the city and held that the Department could not constitutionally enforce the FLSA provisions against San Antonio Transit. After a Department of Labor appeal, the Supreme Court remanded the case for further consideration in light of its 1982 decision in *United Transportation Union* v. *Long Island Railroad Company.* Subsequently, the district court judge reaffirmed his earlier decision and held that the San Antonio bus system was a "traditional" governmental function. The Department again appealed to the Supreme Court.

At issue before the Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority* was the question of whether employees of publicly owned mass transit systems were constitutionally covered by FLSA.

The Supreme Court first heard oral argument in the *Garcia* case on March 19, 1984, but instead of deciding the case, ordered reargument so that the parties could address the question of whether or not the constitutional limitation on congressional action, as set forth in the *National League of Cities* decision, should be reconsidered. The Labor Department argued that the doctrine of League of Cities good constitutional law and should be retained, but that mass transit was a "nontraditional" governmental function and, therefore, properly covered under FLSA.

In its 5 to 4 ruling, the Court held that it was no longer constitutionally acceptable to draw the line between proper and improper congressional regulation of State activity by determining whether an activity was "traditional" or "nontraditional" in nature. The dissents argued that the impact of the decision was to leave States and localities to whatever regulation Congress wanted to adopt, removing the special constitutional protections for these governmental units which *League of Cities* had established.

While the Court's decison was close, the Labor Department's obligations under that decision were clear. We were—and we are—obligated to carry it out.

Mr. Chairman, there are several issues involved, two of which I would mention to the committee.

For example, what overtime hours standard is appropriate for employees such as public safety officers who perform both police and firefighting functions. Since the overtime hours standard under the act is different for police officers and firefighters, the question arises as to which standard should be applied in these cases?

Another problem arises when a local government employee is employed by two district agencies of that government. Does this constitute a joint employment situation? If so, all hours worked during the week are added together to determine if any overtime pay is due the employee.

Mr. Chairman, these are the type of issues we now need to address. We have received several hundred inquiries from both State and local government officials and representatives of government workers. We are aware of the concerns of the various interested parties and, in developing our investigation policy, have attempted to balance these interests.

This concludes my statement, Mr. Chairman. I will be happy to answer any questions that you or other members of the committee may have.

[The prepared statement of Ms. Meisinger follows:]

## PREPARED STATEMENT OF SUSAN R. MEISINGER

Mr. Chairman and Member of the Committee:

I appreciate your invitation to be here, today, to discuss the Department of Labor's implementation of the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, decided February 19, 1985. The effect of the Garcia decision is to broadly apply the federal minimum wage and overtime law -- the Fair Labor Standards Act -- to State and local governments.

Pursuant to the Garcia decision, the Department has developed an investigation policy designed to establish an orderly and equitable procedure for implementing the Act with regard to these governmental units. I would like to briefly outline this procedure for the Committee and then discuss the legislative and judicial developments which provide the necessary background for understanding the Department's actions. Finally, I would like to indicate to the Committee some of the enforcement issues that have not yet been settled, but will be addressed as the implementation policy proceeds.

The Department's investigation policy was announced on Friday, June 14, after broad-ranging discussions with individual State and local governments, associations representing various categories of State and local governments, and representatives of public employee trade unions. We are also, of course, engaged in our own extensive analysis of the Garcia decision and the underlying law to determine the degree of flexibility available to us.

After these discussions and our own analysis, the Department decided on an investigation policy that would be attentive to the requirements of the FLSA, but would also responsibly address the fact that the Supreme Court's decision in Garcia, overturning its earlier judgement in National League of Cities v. Usery, dramatically changed the obligations of State and local governments to their employees. Under National League of Cities, these governmental units were required to adhere to FLSA requirements only for their employees who were employed in "nontraditional" jobs, not for those employees--the vast majority--who were engaged in the "traditional" activities of State and local government.

With these facts in mind, the Department developed an investigation policy with five major elements. First, the Department

determined that April 15, 1985 would be the appropriate benchmark date for conducting FLSA investigations and paying any back wages which might be due. The Department determined that April 15 was the appropriate date because that was the date the Supreme Court issued its mandate in the case.

Second, effective June 14--the date the Department's policy was issued -- the Department's Wage and Hour Division has been authorized to conduct investigations of State and local governmental employment which, pursuant to National League of Cities, the Department had previously determined were "nontraditional" and for which there were no significant legal challenges pending at the time of the Garcia decision. Thus, since June 14, investigations have been authorized for the following categories of employment:

(1) Alcoholic beverage stores;

(2) Off-track betting corporations;

(3) Generation and distribution of electric power;

(4) Provision of residential and commercial telephone and telegraphic communication;

(5) Production and sale of organic fertilizer as a by-product of sewage processing;

(6) Production, cultivation, growing or harvesting of agricultural commodities for sale to consumers; and

(7) Repair and maintenance of boats and marine engines for the general public.

Third, the Department decided it would be appropriate to defer the initiation of FLSA investigations for all categories of State and local government employment that had not been earlier listed by the Department as "nontraditional", and also for mass transit employment. Although the Department had included mass transit within the listing of "nontraditional" employment, its coverage under the FLSA was not definitively determined until the Garcia case was finally decided. This deferral of investigations will extend to October 15 and will allow government employers to bring their pay practices into compliance with FLSA requirements. Once this adjustment period is over, however, Wage and Hour investigations will extend back to April 15.

Fourth, in order to provide any affected governmental unit with additional time to come into compliance, once an investigation has been completed and the Department has administratively determined that monetary violations of the FLSA exist, that governmental unit will be given at least 30 days written notice of the violation before any lawsuit is filed.

Fifth, the Department's investigation policy recognizes that the FLSA authorizes private parties to bring their own lawsuits to enforce their rights under section 16(b) of the Act and in no way affects those rights. If successful in such litigation, an employee may receive back pay, liquidated damages, attorney's fees and court costs.

It is, therefore, to the advantage of all parties, Mr. Chairman, for compliance with FLSA to be achieved in an orderly, non-litigative way. For this reason, the Department has been providing a great deal of technical assistance and has just made available a comprehensive guide developed especially for State and local governments and their employees. This is the first time that such extensive material has ever been prepared for a single sector of the economy covered by the Act. We hope it will be useful to everyone affected by the Garcia decision.

Now, Mr. Chairman, I would like to discuss for the Committee some of the background of FLSA coverage of State and local governments. It is important to understand this history in order to understand the impact of Garcia.

State and local governments were first made subject to the minimum wage and overtime pay provisions of the FLSA by the

Fair Labor Standards Amendments of 1966, which became effective on February 1, 1967. These amendments specifically extended coverage of the Act to employees engaged in the operation of hospitals; residential care facilities primarily engaged in the care of the sick, aged, and the mentally ill or defective; schools; and mass transit systems. On June 10, 1968, the Supreme Court in Maryland v. Wirtz affirmed the ruling of the United State District Court for the District of Maryland that this Congressional extension of FLSA coverage to state institutions "could not be said, on the face of the Act, to exceed Congress' power under the Commerce Clause." In doing so, the Court upheld the constitutionality of the 1966 amendments.

The FLSA was next amended by the Education Amendments of 1972, effective June 30, 1972. Those amendments extended FLSA coverage to employees of public and private preschools.

The Fair Labor Standards Amendments of 1974, effective May 1, 1974, then extended the provisions of the FLSA to virtually all remaining State and local governmental employees who had not been previously covered. However, on June 24, 1976, the Supreme Court ruled in National League of Cities v. Usery, that Congress had acted unconstitutionally in extending FLSA to the integral operations of the States and their political

subdivisions in areas of "traditional governmental functions" including, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. In deciding the National League of Cities case, the Court expressly overruled its earlier decision in Marvland v. Wirtz.

The Court's decision in establishing a constitutional distinction between "traditional" and "nontraditional" government functions, permitted the application of the FLSA to State and local government employees who were engaged in activities which were of a "nontraditional" governmental nature.

From this distinction, the Garcia case arose. The legal controversy began on September 17, 1979, when the Department's Wage and Hour Division issued a letter advising the Amalgamated Transit Union that "publicly operated local mass transit systems such as the San Antonio Transit System ... are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in the National League of Cities v. Usery ... and that they are therefore subject to the Act's requirements." As a result, the San Antonio Metropolitan Transit Authority filed suit in district court on Novermber 21, 1979, seeking a declaratory judgment that the FLSA could not be

enforced against a city-owned bus system because of the Tenth Amendment. On that same date, a San Antonio Transit employee, Mr. Garcia, filed suit under section 16(b) of FLSA for back wages. In December 1979, the Department published in the Federal Register a list of State and local government functions, including mass transit, which the Department considered as "nontraditional" and, therefore, subject to the minimum wage and overtime pay provisions of FLSA.

Based on its determination, the Department filed a counter claim against San Antonio Transit, on February 1, 1980, on behalf of the bus system's employees seeking back pay and injunctive relief. The suits by the Department and Garcia were consolidated and treated as one in subsequent proceedings.

In November 1981, the District Court Judge ruled in favor of the city and held that the Department could not constitutionally enforce the FLSA provisions against San Antonio Transit. The Department of Labor appealed, and the Supreme Court remanded the case for further consideration in light of its 1982 decision in United Transportation Union v. Long Island Railroad Company, which had held that the doctrine of League of Cities was not applicable in that case. On February 18, 1982, the District Court Judge reaffirmed his earlier decision and held that the

San Antonio bus system was a "traditional" governmental function under the National League of Cities decision. The Department again appealed from the District Court to the Supreme Court.

At issue before the Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority was the question of whether San Antonio bus drivers were due overtime pay for time worked beyond 40 hours per week. San Antonio drivers were required to work a standard 43 and 3/4-hour workweek before becoming eligible for overtime pay. Garcia argued that employees of publicly-owned mass transit systems were constitutionally covered by the FLSA, and should have been paid time and one-half their regular hourly rate--$9.22--for the hours they worked in excess of 40 in the workweek.

The Supreme Court first heard oral argument in the Garcia case on March 19, 1984, but instead of deciding the case, ordered reargument so that the parties could address the question of whether or not the constitutional limitation on Congressional action, as set forth in the National League of Cities decision, should be reconsidered. The Labor Department argued that the doctrine of League of Cities was good constitutional law and should be retained, but that mass transit was a "nontraditional" governmental function and, therefore, properly covered under FLSA.

The Supreme Court decided the case in its decision of February 19, 1985, by overturning its 1976 decision in National League of Cities. In its 5 to 4 ruling, the Court held that it was no longer constitutionally acceptable to draw the line between proper and improper Congressional regulation of state activity by determining whether an activity was "traditional" or "non-traditional" in nature. The dissents argued that the impact of the decision was to leave States and localities to whatever regulation Congress wanted to adopt, removing the special constitutional protections for these governmental units which League of Cities had established.

The Court's decision was close. But the Labor Department's obligations under that decision were clear. We were--and we are--obligated to carry it out. That is what we have begun to do, as I have outlined today. I want to briefly mention, however, several matters which have not yet been decided but which we are currently addressing. This list is illustrative only, Mr. Chairman, and not by any means exhaustive.

For example, what overtime hours standard is appropriate for employees such as public safety officers who perform both police and firefighting functions? Since the overtime hours standard under the Act is different for police officers and firefighters,

the question arises as to which standard should be applied in these cases?

Another problem arises when a local government employee is employed by two distinct agencies of that government, such as the public works department during the week, and the parks department on weekends. Does this constitute a joint employment situation? If so, all hours worked during the week are added together to determine if any overtime pay is due the employee.

An additional example is where a full-time paid firefighter "volunteers" to be a firefighter in an area of the locality where the local government has both paid firefighters and volunteer firefighters. Is that firefighter truly a volunteer in this instance, and therefore not covered by the FLSA during the hours volunteered, or is that firefighter to be treated as a paid firefighter working extra hours?

Mr. Chairman, this a mere sampler of the issues we now need to address. We have received several hundred inquiries from both State and local government officials and representatives of government workers. We are aware of the concerns of the various interested parties and, in developing our investigation policy, have attempted to balance these interests.

This concludes my statement, Mr. Chairman. My colleagues and I will be happy to answer any questions that you or other members of the Committee may have.

Senator WILSON. Thank you very much, Ms. Meisinger.

I could ask why the Department felt that operating a transit company that was city-owned was a "nontraditional" employment, but that seems academic in light of the real holding of the case, so I will not waste time with that.

You have focused I think properly on the specific problems facing the Department in trying to administer this law now, the situation where you have a joint firefighter and police officer, where you do have people performing in this double role, and the additional problem where volunteer firefighters, as the example that you have chosen, are under certain circumstances to be compensated.

I think the questions are good questions and point up what in my view was the inadvisability of the Court's decision, but I take it that what the Department has done since the decision is to try to determine the impact on local governments, although I note earlier in your statement that the effective date of April 15 was determined simply really by operation of law.

Ms. MEISINGER. Basically, we felt that it was reasonable that State and local governments would await the final Supreme Court action in light of the magnitude of the decision, and April 15 was the date that all appeals were over and we felt that that was a reasonable date to peg to.

Senator WILSON. Now the law provides really two remedies for the aggrieved employee; one, as a private party he may bring suit under 16(b) of the act; the other is that rather than monitoring his own claim, the Department has a role there.

I am curious as to exactly what the costs to Federal taxpayers are going to be in terms of the Department's performing that function and if you could explain, not in infinite detail but give a broad outline, of how the Department intends to discharge that responsibility and what you conceive to be the nature of your responsibility in monitoring the efforts of local government to comply; and also, whether or not there's any recoupement on the part of the Federal Government for the costs involved in implementation, if you could pursue those three points.

Ms. MEISINGER. If I miss one, please remind me what it was.

Basically, we proceed by investigation of complaints and all complaints we receive for violation of minimum wage or overtime are investigated or checked out and resolved. To date, we have received approximately 150 from what we believe are State and local government employees. Out of an annual number of 49,000 or 50,000 complaints that we investigate, we think that's a manageable work load to date and it really is a little bit early for us to determine what the cost implications to the Wage and Hour Division will be because we are not sure what the complaint work load might be.

While the universe that we estimate now subject to minimum wage and overtime laws is about 7 million of the 14 million public employees, we don't know yet if that kind of an employment work force is more prone to filing complaints, less prone to filing complaints, whether a public employer is prone to violate the law or whether there's a public scrutiny that they are under that might make it a little less likely to have abuse.

We are trying to provide as much technical assistance to State and local governments as we possibly can and we are disseminating as much information as we can. We're trying to put in an 800 phone number in the national office so people who have questions regarding their obligations can call the Wage and Hour Division when an issue arises.

I guess my summary conclusion is that it's a little bit early for us to judge what the cost implications might be for us within the Federal Government.

Senator WILSON. Has OMB volunteered any estimate of that?

Ms. MEISINGER. No; we would be the ones responsible for putting that together. We just don't have the working knowledge to be able to do that to date.

Senator WILSON. I assume they have requested that they have your earliest estimate in that area.

Ms. MEISINGER. We haven't had a discussion on the issue.

Senator WILSON. You haven't?

Ms. MEISINGER. No.

Senator WILSON. That's not the OMB that I know and love, but OK.

Are there any provisions made for any sort of recoupment?

Ms. MEISINGER. Under the law for liquidated damages for child labor penalties there is a provision that those moneys go back directly to the Department of Labor Wage and Hour.

Senator WILSON. For child labor?

Ms. MEISINGER. For child labor. But otherwise, no.

Mr. COHEN. In ligation cases where there are moneys on hand for unlocated employees, those funds would revert to general receipts to Treasury after a period of time.

Ms. MEISINGER. But that's limited to cases where the employees are unlocated, where the employee can't be found to pay the back wages to. If we find a violation against John Doe and we can't find John Doe, those moneys are then returned to the Federal Treasury for general revenues.

Senator WILSON. I don't think that is likely to occur often if you're proceeding on employee complaints. In other words, the implementation by the Department is really responsive to individual employee complaints?

Ms. MEISINGER. Basically, yes. As a matter of how we enforce the FLSA in the private sector, we do target employers for investigation. While we do investigate complaints, we also do some targeting. However, targeting is generally where there is a situation of a repeat violator in an industry that has a history for violating minimum wage laws and, quite honestly, it's too early to say that we would ever get into that mode with a State or local government. But arguably, if we find that there are some State and local government entity that is continually abusing the FLSA, we would target them for investigations.

Senator WILSON. Well, I would suspect that your experience will develop that State and local governments are probably more responsive than some segments of the private sector. They are certainly more in the glare of the public spotlight. They may not be any more willing, but they will probably be more compliant.

I'm informed that certain draft regulations that have been lying fallow since the *Usery* case have been under review and that you are thinking of modifying those.

Ms. MEISINGER. That's close. The regulations that we have that were issued in 1974 to which I think you are referring are 29 CFR part 553 and those are the regulations that govern the employment hours of work issues that arise for law enforcement officers and firefighters. Those regulations have been in place. We have been very open with the various local and State government representatives that to the extent that they believe there are problems in those regulations, that those regulations as crafted present problems for them, to please provide to us specific information for our review in contemplation of possibly going to a rulemaking to make improvement to those regulations.

To date, I believe last week the mayor of Cleveland has replied to us some specific recommendations on behalf of I believe it's the National League of Cities.

So we do have regulations in place. They have been dormant to the extent that prior to the *Garcia* decision they really weren't effective on anybody except the Federal work force, but they are in place and active.

Senator WILSON. Well, is it possible that the mandatory premium overtime requirements contained in FLSA relating to public safety employees may be reduced? In other words, firemen must be paid time and a half for hours worked in excess of 212 during a 28-day period. Is the Department considering reducing the hourly ceiling for these or any other employees which would thereby require local governments to pay overtime for fewer hours worked?

Ms. MEISINGER. To date we have not looked at that at all.

Senator WILSON. What are the limits of the authority that the Department has in that respect? I mean, if you decided that the city of Los Angeles is working people too long and you're going to shorten the shift, what limits are there?

Ms. MEISINGER. Well, the limits are those that are placed on us by the Congress. The statute that was passed in 1974 provided for specific hours limitations in a stairstep 3-year decreasing number. I believe the first year of 1975 the hours for firefighters was 240. It dropped to 232 the next year, and it dropped to 216 the following year. And Congress in a statute required the Secretary of Labor to do a study of the overtime hours worked in law enforcement and firefighters based on 1975 data.

That research was done—that study was done by the Department of Labor who concluded that the hour standards at that time was 216 for firefighters. We were promptly sued by the Federal Firefighters Union who argued that in our tabulation of the data that we had received as required by Congress we had excluded State and local government data, which we had because at that time we had the *League of Cities* decision and the State and local governments weren't covered. When we did, as the court required, include that data, the number dropped to 212. Since that time, the number of 212 is required as a result of a study based on 1975 data which was required by the statute. I really find it difficult to contemplate that we would go back and restudy 1975 data. It hasn't been something that's actively been discussed, quite honestly.

Senator WILSON. So what you're saying is that the Department is limited by statute.

Ms. MEISINGER. Yes, sir.

Senator WILSON. And Congress, I would say by this decision, is limited not at all. So that the effect of this is really to say there's damned little left of the 10th amendment and Congress has decided to substitute its judgment for that of the city councils'.

Ms. MEISINGER. Not being a constitutional lawyer, I think that some might share that view.

Senator WILSON. Since the Department is considering a change to some of these regulations, what advice is the Department giving to local governments that are compelled to implement FLSA immediately?

Ms. MEISINGER. They basically are required to comply with the law and our regulations unless and until those regulations are changed through the Administrative Procedures Act, and we are providing as much technical advice as is possible. They do need to come into compliance.

Senator WILSON. All right. I take it that the plan that was initially propounded by the Department in 1974 which involved some phasing-in has been discarded?

Ms. MEISINGER. The phase-in that was contemplated in 1974 was based on the statutory language which spoke to in 1975 this happens, in 1976 this happens, in 1977 this happens; and the statutory language speaks to the actual year.

Senator WILSON. And it's now 1985 and it's all going to happen at once.

Ms. MEISINGER. Our attorneys' view is that we are bound by the language in the statute.

Senator WILSON. Something to which I gather the Court gave little attention. And, of course, collectively bargained agreements are in no way exempt from this coverage?

Ms. MEISINGER. Not to my knowledge. I believe that without attempting to speak on behalf of those with collective-bargaining agreements, there is a legal opinion that many of those agreements have severability clauses which say that if any part of this contract becomes illegal for whatever reason that particular section is null and void but that the remainder of the collective-bargaining agreement remains in place. But you cannot negotiate your rights under the Fair Labor Standards Act.

Senator WILSON. That is a statement that I think deserves considerable attention and it raises an interesting point, your observation, that these contracts that were negotiated during the period that *Usery* was in effect which simply prolonged to that circumstance whereby the parties were able to collectively bargain, during that period certain benefits were negotiated and now, with the *Garcia* decision, what has in effect occurred is a windfall to public employees by the Court's mandate that they now receive time and a half for overtime since that may have been an issue, and indeed was an issue in any number of collective-bargaining negotiations.

So your statement I think has even greater point than perhaps anybody has considered. The effect of this decision is very likely to change and to undo a number of very carefully negotiated agree-

ments, something that the Court also doubtless gave great attention to.

Has it been suggested by counsel to the Department that if possible there would be some equity in at least exempting for the term of their existence existing negotiated collective bargaining agreements?

Ms. MEISINGER. Well, the fact that people cannot waive their rights under the FLSA is not a departmental policy. It's Supreme Court law.

Senator WILSON. And what you're saying is that under the interpretation of the *Garcia* decision by Department counsel, there is no leeway even for the grandfathering of presently existing agreements?

Ms. MEISINGER. That's correct.

Senator WILSON. Unhappily, I think I would have to agree with that interpretation.

Ms. Meisinger, just one additional question—there are many that we could ask, but I think that your testimony has been quite direct and to the point. I am advised that there are roughly 3,000 countries, 19,000 muncipalities, 17,000 townships, 15,000 school districts, and 29,000 special districts in the United States.

I come back to my question about costs to the Department of administering this. Have your counsel and those who attempt to project the burden of compliance by the Department with the Court's decision made even a preliminary estimate as to what is going to be required of you to respond to the complaints? You respond to complaints under other Federal law, other employee complaints. Have they not been able to extrapolate from your existing experience what they think the costs of this are likely to be?

Ms. MEISINGER. To date, we haven't done any kind of analysis, quite honestly.

Senator WILSON. Well, I'm going to ask you to do so, not only for the benefit of the Department in its own planning and its own budgeting, but also because I think that concomitant with estimating what the burden is going to be on Federal taxpayers in supporting the Department in its compliance with the *Garcia* decision we should also make some estimate of what the cost is going to be to local governments in complying with the *Garcia* decision. And I will simply suggest that however great the cost may be to the Department of Labor, it will be far, far greater to State and local governments.

But let me ask what effort is being made now by the Department to achieve those cost estimates and when might we expect them?

Ms. MEISINGER. Well, we will go back and start working on it immediately.

Senator WILSON. Please do. It is something that you need to know and something we need to know.

Thank you very much.

Ms. MEISINGER. Thank you.

Senator WILSON. Our next witness is Talmadge R. Jones, chief counsel of the Department of Personnel Administration of the State of California. Mr. Jones brings to this hearing a very considerable background and experience as a constitutional lawyer and

especially one who has been concerned with the problem before us this morning.

So we are delighted to have him here and eager to take advantage of his experience and knowledge. With that, I welcome, Mr. Jones.

**STATEMENT OF TALMADGE R. JONES, CHIEF COUNSEL, DEPARTMENT OF PERSONNEL ADMINISTRATION, STATE OF CALIFORNIA**

Mr. JONES. Thank you, Senator. It's good to see another Californian here in Washington, DC, and the beautiful weather here.

Senator WILSON. That's not the norm here, Mr. Jones.

Mr. JONES. As I looked out of my hotel window last night, I saw something that looked very much like lightening which I wasn't used to in the garden city of Sacramento.

I am the chief counsel of DPA, which is the department of personnel administration, in California. I'm appointed by Governor Deukmejian to that position. We are basically the labor relations branch for the State government and we administer some 20 different contracts for about 120,000 State employees in the State of California.

I'm a lawyer, as you pointed out. I obtained my J.D. degree at Hastings Law School, University of California, in 1967, where I first broached the subject of the commerce clause, and there I was interested to see that over the years of constitutional history the Supreme Court did routinely uphold extensions of Federal law to various functions within the States and I was interested as a student that 18 years ago that there were very few limits upon the ability of Congress to regulate local functions.

I then became a deputy attorney general in Sacramento for most of my legal career and in 1974 I had my very first opportunity to see if there were any limits on the commerce clause. In that case, the *National League of Cities* v. *Usery,* 20 States and thousands of municipalities and California as a separate party tested the limits of the commerce clause before the Supreme Court. As you know, we had a decision out of the Court, a close decision 5 to 4, that held that the Fair Labor Standards Act Amendments of 1974, the ones that we are talking about this morning, were a patent denegration of the rights of State and local governments to regulate and govern the rights of their employees, their salaries, wages and working conditions.

Now in 1985, the National League of Cities have been upset and we are back again in the scenario of 1974. I sympathize with you, Senator, in trying to understand the FLSA. You're in the middle of tax reform and looking at the Internal Revenue Code, but the Fair Labor Standards Act will make the Internal Revenue Code simple reading.

Mark Twain I think said, "The more you explain it, the less I understand it." And that is true of the FLSA. The more you read into the FLSA, the more you understand the extent to which the Federal Congress are attempting to regulate local functions.

I come here today to really point out some very particular problems that the FLSA presents for California. I am not here to rear-

gue the *National League* case, although that's what I would like to do, but I think we have a phrase in the law called res ipsa loquitur—for the lawyers in the room you'll know what that means—it's a Latin phrase that means the thing speaks for itself.

When you look at the FLSA, you can't help but think of res ipsa loquitur because the FLSA speaks for itself. That is, clearly on its face, it attempts to regulate in detail what State and local governments do in terms of their public functions and the compensation of their employees.

Before I talk briefly about California, I want to tell you three things about our State which shouldn't come as a surprise to you, Senator, having been a native of our State.

The first thing is that we perceive ourselves in California as a fairly generous employer. Our studies of comparable wages in other jurisdictions show that California—that is the State of California—is approximately 20 percent greater in terms of compensation than other public jurisdictions, including the Federal Government and including the classes of correctional officers, highway patrol, and other functions which the FLSA really intrudes upon. So California doesn't come in here with dirty hands. California comes before the Congress with clean hands as a good employer of its employees.

The second thing about California I want to emphasize is that we are in a growth mode. The graph that I put in my prepared statement that I submitted to you shows that by the year 2020, which is only a mere 35 years away, California will half again be as large as it is now. We are now 24 million residents. We will be 36 million residents by the year 2020. But why that's important I will demonstrate in a minute because the people who are coming into California are moving into the rural areas where our fire protection problem is the greatest.

The third thing I want to mention about California is that we are geographically unique from all the other States in many, many different ways. We are obviously larger, but more important than that, our geography is such that two-thirds of our State is rugged hills and mountains. Most people have a perception of California as rolling beaches and urban areas, and it's not that way at all. Two-thirds of our State is very rugged. It's very difficult to fight a California fire. A California fire, as you know, Senator, is not a fire that you find on the east coast. Our fires sometimes take 2 to 3 hours just to get to the fire. Our fires are the kind of fires where you can't tell a 40-hour employee, "Hey, time to knock off and go home and see the kids and come back on Monday." Our firefighters jump out of airplanes to get to fires and they stay on those fire lines—I have talked to employees who have been in the fire lines for almost 30 days and haven't seen their wife and kids. Those are the kinds of things I want to emphasize.

I brought a chart which was a little difficult to get on the airplane, but I thought a picture is worth a thousand words. What we have, at least for the moment is the impact of FLSA upon the State of California. You will notice the large green areas appropriately for the Department of Forestry. That figure is approaching $20 million. The total impact of the FLSA on all California programs, at least for the moment, as we calculated it—and it's still a little bit mushy but it's getting firmer as the days go by—we are

now over $50 million. If I were listening to the Jerry Lewis telethon I would be happy about these figures, but I'm not.

One-third of that pie chart that you see, the green area, is the Department of Forestry. Most of the money that you see on that pie chart represents comp time or CTO that we can no longer utilize in our State practices. The employees have to be paid cash when they work that overtime within their work period.

A couple more interesting statistics about California. That is, 40 percent—this is going to sound unusual but it's true—40 percent of the National U.S. Forest Service budget for national forests is spent in California. Here's another good figure; 37 percent, over one-third, of all national wildland fire protection other than U.S. Government—that is if you add up all the States that protect their forests—California is 37 percent of that figure.

So when we're talking about fire problems, California takes the brunt of that. In 1970, for example, we lost 16 lives just in wildland fire protection. We are talking about firefighters and people losing their lives out there.

Now just talking about fire for a minute, let me show you an interesting problem. This compares wildland fire protection across the United States—and we picked some rather major jurisdictions and we picked the State that's probably closest to California—that is the State of Florida. This bar chart shows the acres protected—that is, the numbers of acres that the State protects against forest fire—the black area is the acreage burned and the pink area is the budget of those States to protect their wildlands from fire. I will ignore these other smaller States.

Florida and California and off the chart in terms of fires and fire protection. The interesting thing is in terms of the acreage protected you will notice the blue bars for Florida and California are very close to one another, pretty much the same number of acreage protected. It looks like about roughly 30 million acres that we protect in both States.

Then you get to the number of acres burned, also very similar. Florida lost—we're talking acreages now—Florida lost an average of about 175,000 acres on the average from year to year. California's average is about 165,000. So again, Florida and California are very similar in terms of acres protected and acres burned.

Now here's where we part company. If you look at the pink chart, these are the average budgets of Florida and California. The Florida budget is not quite $40 million. The California budget is $165 million.

Now that seems unusual given the fact that the acres burned and the acres protected are somewhat similar to one another. There's a reason for that, and that is this chart.

This chart shows the number of personnel that California requires to fight the kind of fires that I told you about a moment ago, the fires that it takes parachutes to get to. We've got roughly over 5,000 personnel compared to Florida down here, under 1,000. I had somebody tell me that in California—and I hope somebody is here from Florida to straighten me out on this—Florida doesn't even have a fire engine and the reason for that is that they take something like a tractor and the tractor goes in there and circles the fire and cuts a trench around the fire and the fire extinguishes

itself. It can't get away. In California, we can't do that. We have rugged terrain that goes up to 12,000 or 13,000 feet, as you well know.

That's the kind of problem we are talking about in FLSA. FLSA puts the State of California in the position where, because of our unique—and I point this out again—unique geographical problem, we have to pay our firefighters more than the State of Florida or any of the other 49 States in this country. That does not make sense. It has no rational basis and I submit to you and I would submit to the Supreme Court, it's unconstitutional

One other thing before I leave fire, and that is that in California we have a mutual aid system whereby one entity aids another. The U.S. Government is one of those entities. You asked a moment ago about Federal costs. Last year, California billed the U.S. Forest Service's Bureau of Reclamation and some other Federal entities for fighting U.S. forest fires on Federal land. We billed them $3 million.

Under FLSA, as our costs go up—and they most certainly will under these statistics I'm showing you—the cost to the U.S. Government is going to increase commensurate with that. The future is not good, as I pointed out, in our FLSA. Our population is skyrocketing by 50 percent. Those people are moving next to these wildlands I'm talking about; 90 percent of all forest fires are people-caused fires. Of that figure, 35 percent are arson. Ten percent are caused by lightening and the like. So when people are moving closer to forests, the problem can only get worse. Our FLSA liability can only get worse.

Now let me talk about another problem. Let's talk about the California Highway Patrol. The California Highway Patrol estimates the fiscal impact of the FLSA at $2.4 million. One of the reasons for that is that we have hundreds of cadets going to our academy to receive training. California has one of the largest CHP organizations in the country, highway patrol organizations. Our cadets do not fit within the 7(k) exemption of the FLSA. That is, we cannot apply the longer 28-day work period that that law allows. We have to put our cadets on a 40-hour week. The difficulty with that is that these people are living in the academy. It's like bootcamp. They stay there for weeks. The result of FLSA is that we wind up paying our cadets more then we pay our sergeants on the highway patrol.

When you ask about the relationship between sergeants and cadets, you're talking about people's lives out there on the highway that are going to be less covered because of the training in the highway patrol academy. I think that's a very serious situation but one that fiscal demands make necessary.

On the other class, down at the bottom, you will see a blue pie. Now that's a big part of the chart and it's a very small program. That's the California Conservation Corps, if you know about that, Senator. We are very proud of that in California. It started under Governor Deukmejian's predecessor, Governor Brown, but it's a very good program and the Governor likes it. It supports local government's rehab, conservation projects, but we estimate the cost of that program is going to be $8.4 million. The employees—there are only 220 employees who train these young people in the California

Conservation Corps. They are going to get $860,000 in overtime and the corps people—we can't figure out how to exempt them from certain training they have—they are going to get about 3 to 4 overtime hours per day, and there's $75 million. That's a good program and it's really in jeopardy by virtue of the FLSA. There's no question about it.

It's like the ecology corps, which was a different program, and I remember arguing in the Supreme Court about the danger to that program 10 years ago. This is a new and better program that's equally in danger of extinction.

Finally, let me talk about one more department. The department in black up there on the chart is called the Department of Development Services. It administers about 8 of the 11 mental hospitals in California. They estimate the impact of FLSA to be presently $2.2 million of my pie chart. That department does some very worthwhile things, such as the special olympics and those kind of things for the people that are in the hospitals. Those programs are in serious jeopardy because of the FLSA volunteer requirements and overtime requirements. Anybody that participates in those and are called back will have to be compensated at time and a half but will be paid the premium pay that we're talking about.

With that background—and I could spend all day talking about the FLSA and the problems it creates, but let's try to do something constructive now for a minute and talk about the things the Congress can do to assist what is a very serious problem for State and local government.

The first thing that we recommend in California that you do, the ideal, if you will permit me for a moment, is to exempt State and local government form the overtime requirements of the FLSA. And I say that not only sociologically and governmentally, but I say that constitutionally. There is no legal reason why the State and local governments should not be exempt.

The purpose of the Fair Labor Standards Act, FLSA, is to spread employment. If that is so, its application to State and local government does not fulfill its purpose. The reason is this: when you hire a new employee, which the FLSA would like us to do rather than pay overtime, you have to train that employee. You have to pay that employee a new benefit package. You have to carry administrative records on that person.

Our State has estimated that it will cost three times more to hire a new employee than to just keep the existing employees and pay them all this money in premium overtime. So the purpose of the FLSA as far as State and local government is concerned is not met by these overtime requirements. So we don't need it.

Second, as you pointed out earlier, Senator, because of the collective bargaining rights of employees in the country, the FLSA purpose in protecting employees is hardly germane. Public employees have more union organization and more employee rights than the private sector. I don't know if everybody knows that. There are more public employees who are members of unions than in the private sector. If that is so, we don't need the FLSA to protect them.

Third, as you pointed out, Senator, the employees want that CTO, that comp time. Many of them do. For example, the people that work up there in the Developmental Services Department in

the mental hospitals, that's tough work. I'm a lawyer and I've lived a rather isolated existence, a rather antiseptic existence, but if you work in a mental hospital you don't want the cash; you need the time off, you need to get your head together so you can be constructive and responsive to these people in these mental hospitals.

Senator WILSON. I can appreciate that. I work in a similar environment. [Laughter.]

Mr. JONES. So our first recommendation is simply to exempt the State and local governments. There's no reason for not doing that.

But if Congress, in its wisdom, seeks to keep us under the FLSA overtime requirements—and I want to make one point clear—and that is, we don't object to the minimum wage provisions. I think everybody ought to be paid a minimum wage out there. We are not worried about that.

Let's talk about overtime. Our second recommendation is to recognize but limit the use of comp time. The California practice is to allow the CTO to be utilized within a 1 year period. If it's not utilized, then it's cashed out. There's no legitimate reason why we can't do that.

The third thing and probably the most important thing that I can urge this morning, as Ms. Meisinger pointed out earlier, is to phase-in the FLSA for State and local governmet. The original act of 1974 allowed what I call lowering the boom. They lowered the maximum hour requirements from 240 and 232 and then to 216 before we had to pay overtime. It was a phase-in or screw-down, if you will, provision. That phase-in process has lapsed and the Department of Labor, Ms. Meisinger's lawyers tell her, is bound by the law and would not give us the break under the lower standards.

So at the very least, if you scrap recommendations one and two, in the interest of fairness and equity and what Congress originally intended in this act in 1974, there should be a phase-in, three-step tier process, as has happened with every other industry—shoemakers, watchmakers, everybody else under the FLSA—there's been a phase-in process. That's all we're asking.

I hope I haven't razzle-dazzled you with too many facts and statistics. If I have, I refer you to my prepared statement which I have submitted to you and I will be more than happy to answer any questions that you or members of the committee may have.

[The prepared statement of Mr. Jones follows:]

## PREPARED STATEMENT OF TALMADGE R. JONES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Good morning, my name is Talmadge Jones, Chief Counsel for the Department of Personnel Administration of the State of California, the labor relations branch of the state government. The department administers twenty different contracts for approximately 120,000 civil service employees of the state.

I hold a J.D. degree from the University of California, Hastings College of the Law, and am a member of the California State Bar. Until my recent appointment by Governor Deukmejian, for 18 years I served as a Deputy Attorney General in Sacramento, where I essentially defended the state or state officials in various kinds of civil litigation against the state. I have argued many cases before our State Supreme Court, many of which involved the constitutionality of salary appropriations in excess of $200 million.

For approximately ten years of my service in the California Attorney General's Office, I served as "house counsel" to the State Personnel Board, and thus became (whether I liked it or not) an "expert" in civil service matters.

For that reason, in 1974 I was drafted to represent Governor Ronald Reagan and the State of California in an action against the United States Department of Labor regarding constitutionality of the Fair Labor Standards Act Amendments of 1974. Our co-plaintiffs in that case were the National League of Cities, 20 other states, and numerous fire districts and municipalities.

I orally argued National League matter before the United States Supreme Court on April 16, 1975, which had to be reargued a year later, in 1976. Later that year, the court announced its decision in a 5-4 opinion which became a landmark case. The high court held that the FLSA amendments of 1974 were a patent denigration of the sovereign rights of California to administer its own traditional governmental activities (such as fire and police protection) and to deal with its own state personnel. For nearly ten years, the National League decision was the law of the land.

As you know, the Supreme Court unexpectedly overturned the National League decision in its Garcia decision of February 19, 1985. The Garcia decision, decided like National League by a narrow 5-4 margin, has once again subjected California and other local jurisdictions to the FLSA amendments of 1974.

In its most recent Garcia decision, the United States Supreme Court majority held that the only limitation on the federal government under the Commerce Clause is the "built-in restraints that our system provides through state participation in federal governmental action." In other words, the majority of the court believes that the political process will insure that laws that unduly burden states will not be enacted, or as here, where they have been enacted, that the Congress will be sensitive and correct the inequity. That is why I am here.

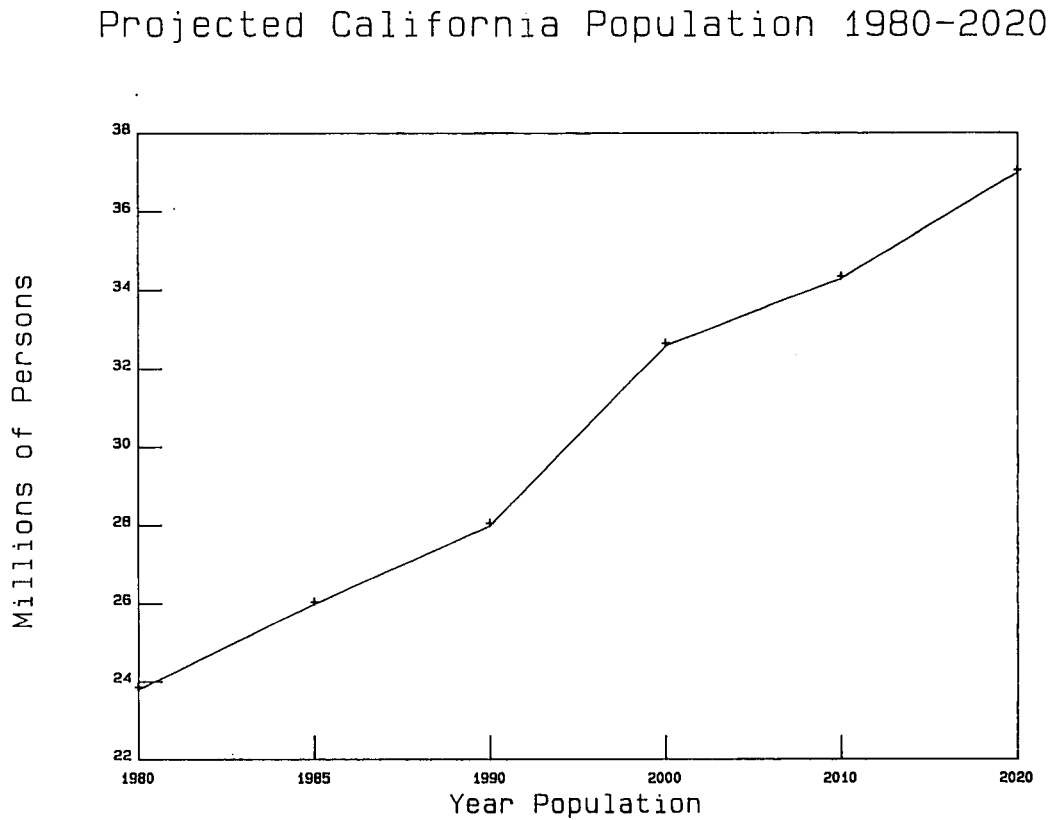
I do not wish to reargue the National League matter, although that is certainly my temptation as a lawyer. In 1974, the annual fiscal impact of the FLSA overtime provisions on California state and local programs was an astounding $34.5 million. But I don't have to talk to the Committee about the 1974 fiscal impact, because those figures have nearly doubled. I am here to present you with those new figures, and new facts which unequivocally demonstrate the detrimental impact which the FLSA provisions have upon California public services and upon the California taxpayer.

However, before doing so, there are three things that the committee should understand about California as a state and as an employer.

## SOME BASIC FACTS ABOUT CALIFORNIA

The first fact is that California, as an employer, treats its employees very well. According to studies undertaken as recently as August 1984, on the average California leads the federal government and over 300 other public jurisdictions by 21.1% in salaries paid to its employees. These employees include firefighters, fire captains, correctional officers, state traffic officers, and a number of other clerical as well as technical positions.

The second important fact, which should come as no surprise, is that California can expect a tremendous growth in its population over the next 35 years. Our current population of 25.4 million will increase to 27.9 million by 1990, and 31.4 million by the year 2000, or a one-sixth increase in only 15 years. The following chart will indicate where our population is going.


Projected California Population 1980-2020
Millions of Persons
38
36
34
32
30
28
26
24
22
1980
1985
1990
2000
2010
2020
Year Population

The third, and perhaps most important, fact is that California is geographically unique among all the states. Only Alaska and Texas are larger. California is 158,690 square miles, roughly equivalent to the area of the eight northeastern states (including Pennsylvania but not New Jersey), and stretches more than 700 latitudinal miles. These figures convert into 61 million acres, which is more than the Library of Congress has books. Of the 61 million acres, two-thirds of the state is rugged mountains and hills which are covered by timber, woodland, brush or grass. We have in California what is called a "Mediterranean climate," which is a cool, moist winter followed by a long, dry summer.

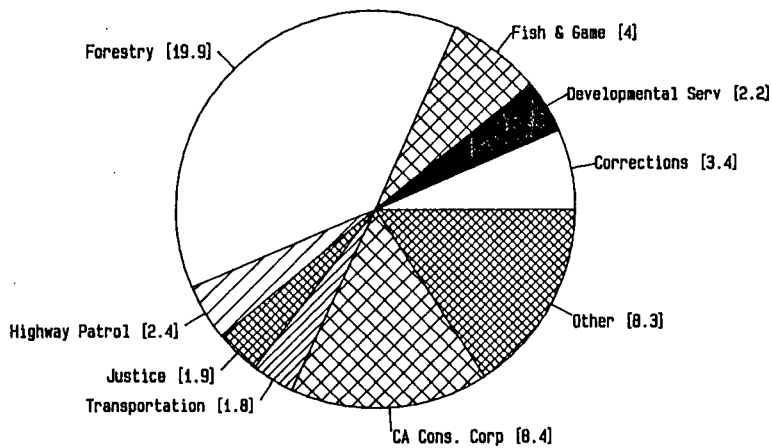
I'll now discuss how each of these facts impacts upon the state's liability, both short and long term, under the FLSA.

## $50 MILLION IMPACT AND GROWING

The FLSA permeates virtually all of our state personnel and has a tremendous fiscal impact on state programs, particularly our fire service. I would first like to give you an overview of the total cost to the state under FLSA, and then highlight some of the particular problems it presents.

The FLSA virtually eliminates the ability of state and local government to recognize the overtime hours of public employees in other than cash. The former practice of giving employees time off at a later period, known as "compensating time off" (or CTO) is effectively eliminated by FLSA. The cost of converting former CTO credits into cash, on an annual basis, is presently estimated at $30-$50 million, and growing. Utilizing the higher potential figures, the following graph demonstrates how the FLSA could impact California state programs, absent any changes in work schedules or reduction in public services.

# FLSA Overtime Impact on California Programs




Other Major Departments (1.3 to .4) -
Mental Hlth, Parks & Rec, Motor Vehicles, YA,
Ind Rel. Social Serv, Bd of Equal, Education

Graph is based on presently incomplete, maximum cost projections, without any changes in work schedules or reductions in public services

**FIRE SUPPRESSION--THE MAJOR FLSA IMPACT**

This graph demonstrates that over one-third of the fiscal impact of FLSA is upon the fire protection services performed by our Department of Forestry. Why is that so?

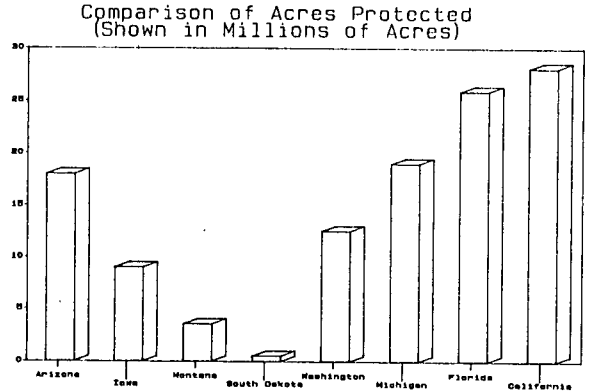
The answer should come naturally to the five members of this committee who represent the State of California in the Congress. They each know the unfortunate history of destruction of California's natural resources, life, and property by large fast-spreading fires in our wildlands and rural areas. The 62 million acres of California wildlands contain some of the dryest and fastest burning areas in the world. About 37% of the total expenditures for fire protection on privately-owned wildlands in the entire United States is expended in the State of California. In addition, the United States Forest Service allots about 40% of its nationwide budget for fire protection in 18 national forests in California.

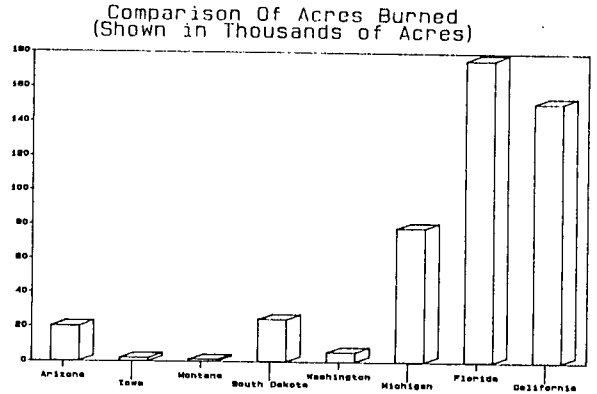
The long and short of the problem is that a California wildland fire is very difficult to suppress quickly. Because of the limited road construction and inaccessibility of ground equipment, initial attack travel time from suppression station to fire may often exceed three hours by road and trail. Therefore, California has amassed a tremendous fire suppression force unequalled in the nation. It includes 13 primary air attack bases, 220 fire stations, 354 fire engines, 800 support vehicles, and 37 conservation camps providing 157 hand crews.

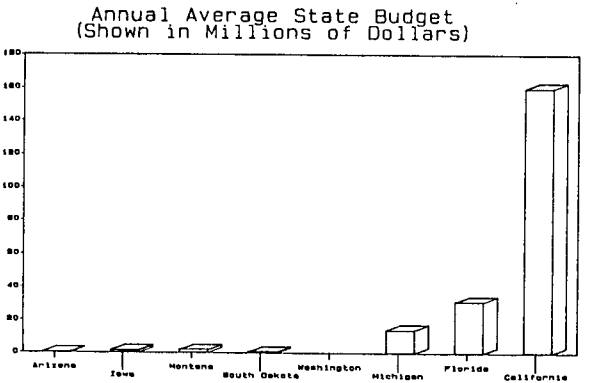
In a particularly bad fire year, such as that which occurred in 1970, California firefighters are required to expend great amounts of time in these remote areas in fire suppression work. Containing California wildland fires can require a literal army of fire suppression personnel. For example, in 1970, we lost 540,000 acres, 653 homes, and 16 lives in tremendous wildland fires. At one point, 19,500 professional firefighters from 500 different fire departments were engaged in fighting those fires.

My point is that California fires are very difficult, and very expensive, to contain. Let's look at some comparisons with other major jurisdictions. The following graphs are very instructive.

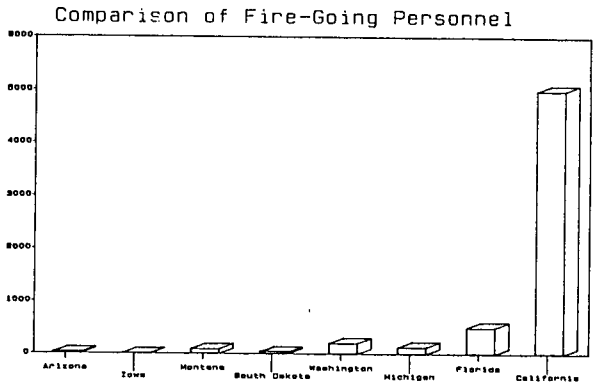
As you can see, the cost of California firefighting is six times that of the next highest state, the State of Florida. This is due to California's extremely difficult terrain, intensely burning wildland fuels, and long travel distances which are far greater than those in Florida. This is true even though the two states directly protect approximately the same number of acres, and experience roughly the same amount of burned acreage. The difference is direct personnel costs. California has approximately ten times the number of permanent and seasonal employees that are used by the State of Florida.




Washington State Budget Unknown



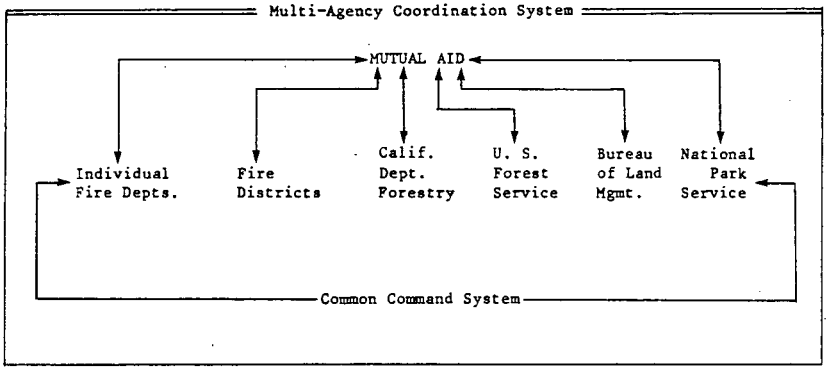

CA includes 8,000 seasonal fire fighters

Permanent fire suppression personnel in California presently acquire an average of about 300 hours of overtime per employee in fighting California fires. They receive credit for this overtime in the form of CTO, which the employees utilize in the slow, wet winter. Conversion of that CTO to cash, both for permanent and seasonal employees, will cost the state from $10-$20 million annually. This expenditure will have to borne by the state's general fund revenues, which are from state income and sales taxes. Ironically, the general fund is primarily funded by taxpayers in the ten most populous urban counties of the state. In other words, because of the FLSA, urban dwellers will receive the brunt of the FLSA increases for what is essentially rural wildland fire protection.

The future costs of protecting California forests under the FLSA is even more bleak. Since 1960, there has been a definite increase in the number of human-caused wildland fires. Of all major wildland fires, 90% are caused by people (20-30% by arson). Statistics show that the most rapid growth counties are those which are in or near our state wildlands. This growth pattern, coupled with the rising demand for the use of California's natural resources and forests, leave little doubt that the potential for fire-caused disasters is growing faster than California's ability to cope with them. It is very reasonable to expect that new residents and greater number of visitors in our wildlands will cause

more wildland fires to start in the future. The wildland fires in the future will be even worse because of the proximity of new homes and residents in those areas. In the period 1970-1980, there was a 30% increase in the incidence of wildland fires, which is now 8,000 per year. If this trend continues, there will be 11,000 fires in 1990, and 15,000 fires by the year 2000, nearly double the present level. Therefore, while the impact of the FLSA upon other states will undoubtedly be great, the long range effects of FLSA on California's vast, sophisticated firefighting system will be tremendous.

The problem in California is augmented by the Multi-Agency Coordination System (MACS), which is system of mutual aid among all the individual fire departments of districts, state, local and national. That system can be graphed as follows:



Presently, if the personnel or equipment of a particular fire jurisdiction is inadequate to meet a particular fire, each jurisdiction aids the other for a free 24-hour period (workers and equipment included). Because of the tremendous impact of FLSA upon all fire jurisdictions, state and local, it is quite likely that this free sharing mutual aid practice will cease. Municipalities and special fire districts simply have no remaining means of increasing revenue to meet these costs. California's Proposition 13, and a reduction in federal revenue sharing, has made that very clear.

You should also know that because of the participation of federal agencies in mutual aid, the federal government itself will be picking up an FLSA tab. The United States Forest Service, Bureau of Land Management, and National Park Service all utilize the services of the California Department of Forestry, even more so in recent years because of cuts in the federal budget. When the federal government invokes mutual aid, the cost will be much higher under FLSA standards. For example, last year's billing to these agencies for mutual aid by the California Department of Forestry was $3 million, a relatively light fire season. Stay tuned because the federal bill will be growing considerably under the FLSA.

**CALIFORNIA HIGHWAY PATROL--2.4 MILLION IMPACT OF FLSA**

Our California Highway Patrol, which has one of the largest law enforcement operations in the nation, has estimated the annual FLSA impact at $2.4 million.

For example, as to dispatchers, the implementation of the 40-hour workweek under the FLSA will seriously hamper CHP's ability to schedule for needed coverage in difficult enforcement periods without incurring additional overtime costs. The CHP estimates that the current scheduling practice would increase overtime costs by 66% under FLSA. The current, more flexible, scheduling utilized for dispatchers is specifically provided for in their collective bargaining agreements.

The most serious impact of FLSA will be on the Academy Training Program for cadets. Cadets are covered employees under FLSA and do not have the benefit of the partial exemption and longer 28-day work period under the section 7(k) exemption. They are currently paid $1082/mo. and are required to work 53 hours a week during their 20 weeks of training. This results in 13 hours of overtime in each seven-day work period, based upon a 40-hour week. Continuing the current academy training, it will result in approximately a 49% increase in the cadet salaries, because of overtime, and place those salaries close to the top step of a state traffic sergeant, $3,104. Upon graduation from the academy,

and assignment as a regular state traffic officer, each cadet would experience about a 33% cut in pay. This is obviously an untenable situation. Increased costs to the current academy training program will approximate 1.2 million based on training 240 new officers per year. All other alternatives considered by CHP, which would meet FLSA standards, are disadvantageous to the cadets, to public safety, and to the citizens of California.

The most viable alternative is to extend the training period from 20, 53-hour weeks to 24, 40-hour weeks. To accomplish this, the CHP would eliminate some of the less critical training. However, CHP would still experience a 20% increase in training costs per cadet, and would keep these employees from being fully-sworn officers in a productive status for an additional four weeks. The increased cost would be approximately $1.0 million. Moreover, extending the training period would increase the dropout rate, which would further increase the cost per cadet graduated. The Commissioner of the Highway Patrol, James Smith, has stated that meeting the FLSA requirements would be very difficult at a time of ever-diminishing revenues available to state government.

**DEPARTMENT OF FISH AND GAME--$4.0 MILLION IMPACT BY FLSA**

The Department of Fish and Game in California estimates that conversion of present CTO to actual cash is approximately $4.0 million, equivalent to 139 personnel years.

Alternatives are not pleasant. Elimination of the overtime would have a detrimental impact on the department's ability to accomplish its mission. Given the current anticipated condition of the Fish and Game Preservation Fund, the department does not have the ability to continue operations "as usual" and simply pay the overtime.

The bottom line is that the FLSA has had a very detrimental, adverse impact upon this important state program.

## DEPARTMENT OF DEVELOPMENTAL SERVICES --$2.2 MILLION IMPACT

Eight of 11 of California's state hospitals are operated by the Department of Developmental Services. The staffs of each hospital include full and parttime firefighters and law enforcement personnel.

The fulltime firefighters currently work an average 63-hour workweek, which results in ten hours of overtime for each employee per week.

Special programs which are operated by the department, such as the "special olympics" program, require certain employees to be "on duty" for 24 hours. During this duty, employees are generally allotted a sleep period of eight hours, which may occasionally be interrupted by residents of the hospitals which require special care. Under FLSA, these hours are compensable work time.

**CALIFORNIA CONSERVATION CORPS--$8.4 MILLION IMPACT**

The California Conservation Corps (CCC) was established in 1976 to provide a meaningful, productive, and gainful employment opportunity in public service to young men and women of the state in a helpful, outdoor atmosphere. Many of these young persons, when entering the program, are unskilled. The CCC program, which has been highly regarded by other public jurisdictions, including the federal government, will be seriously in jeopardy because of FLSA requirements.

CCC estimates that the FLSA cost, for its 223 permanent civil service employees, will be $862,051 annually, a high expenditure for a relatively small program.

The cost for participation of the 2000 corpsmembers is even greater. Even though these persons attend mandatory evening training to enhance their skills and employability, under FLSA standards these young persons are technically working three hours of overtime per day, resulting in a liability to CCC of $7.6 million.

Thus, there is a new additional cost to CCC of $8.4 million because of FLSA requirements.

## RECOMMENDATIONS OF THE STATE OF CALIFORNIA

There are a number of remedial measures which the Congress should undertake to ameliorate the unnecessary and unfair effects of the FLSA upon California and other state and local government programs.

### RECOMMENDATION ONE: EXEMPT STATE AND LOCAL GOVERNMENT FROM FLSA OVERTIME REQUIREMENTS

No public jurisdiction, including California, objects to the application of the minimum wage standard to our employees. We all pay our employees minimum wage.

But overtime requirements are quite another matter. There is simply no need for Congress or the Department of Labor to dictate national requirements for the payment of overtime to state and local employees.

First, it is clear that the FLSA overtime requirements do not fulfill their 1938 purpose of generating greater employment. Quite the contrary. Even ten years ago, the Program Review Branch of the California Department of Finance concluded that the cost of hiring additional permanent personnel under FLSA was over three times greater than just maintaining the same duty week and paying the employees the overtime.

Secondly, the FLSA is not necessary to "protect" public employees, who already enjoy greater union or organizational rep-

resentation than do private sector employees. California's civil service employees (like many public jurisdictions) have sophisticated collective bargaining rights, which are reflected in 20 separate contracts. The right to compensating time off, rather than cash compensation, is in every one of those contracts. Therefore, it is not surprising that the Garcia decision has been met with mixed reviews by public employees.

Third, many of the employees need the CTO more than they need cash. For example, many employees of the state hospitals, such as psychiatric technicians, who work very intensively with mentally disturbed patients, would much prefer the time off than the cash payment. Likewise, many fire suppression employees who spend weeks in fighting California fires would prefer the time off for physical and mental rehabilitation. (NOTE: In 1974, the union representing Forestry employees in California denounced the provisions of the FLSA in a formal resolution which stated that the FLSA was "not in all ways in the best interest of the welfare of Forestry employees and the public" and "could result in a severe curtailment of fire protective services to the public").

Fourth, if cash rather than compensating time off is demanded of public employers, it is likely that these jurisdictions will have to convert to seasonal (rather than permanent) workforces. Such a conversion would generate layoffs or furloughs during periods of light activity (winters for fire suppression, summer

for snow removal, for example). Moreover, under those conditions, furloughed employees would be entitled to unemployment, yet another fiscal burden for the public jurisdiction to bear.

For these reasons, an absolute exemption of the states, and local governments from the FLSA overtime reqirements is both necessary and appropriate.

**RECOMMENDATION TWO: RECOGNIZE BUT LIMIT THE USE OF COMPENSATING TIME OFF**

Assuming Recommendation One is unacceptable, the Congress should nevertheless restore the use of CTO by public jurisdictions under controlled conditions.

As discussed supra, there are some very telling statistics from all public jurisdictions showing the effect of eliminating CTO as a proper (and accepted) personnel practice between management and labor alike.

The historical purpose in prohibiting the use of CTO was to prevent bankrupt or fraudulent employers from depriving their employees of cash that would have otherwise been paid. This rationale is inapplicable to state and local jurisdictions. Most public jurisdictions operate under very structured statutes or ordinances, as well as written collective bargaining contracts. In short, employees of public entities are amply protected from any abuse of CTO practices by most public employers.

However, in the spirit of insuring that CTO is properly exhausted within a reasonable period, and to account for the seasonal or cyclical work of employees who earn CTO, it is recommended that the Congress require a one-year period within which all CTO must be exhausted, or the employee paid cash. This is the present California practice, both by statute and by contract. (NOTE: The Committee may wish to take notice of the provisions of Title 5, Code of Federal Regulations, § 551.531, in which federal fire suppression employees are given special "compensatory time off" entitlements.)

**RECOMMENDATION THREE: PROVIDE FOR "PHASE-IN" COMPLIANCE PROCESS**

Since 1938 when the FLSA was first adopted, Congress when adding new industries to FLSA coverage has always allowed for a gradual "phase-in" process to account for new fiscal demands on the new industry.

Likewise recognizing the fiscal impact upon state and local governments, Congress when enacting the 1974 FLSA amendments provided for a "phase-in" period for compliance by these entities. For firefighting personnel, in the year 1975 public employees were not required to pay overtime to fire suppression personnel until a maximum work period of 60 hours was achieved; in 1976, that standard was reduced by two hours to a 58-hour maximum; and in 1977, a 56-hour standard was imposed.

As the Committee undoubtedly knows, these established "phase-in" standards were never used by state or local government because of the Supreme Court's permanent injunction against the FLSA in the National League decision.

Now, because of the Garcia matter, state and local governments are once again under the FLSA provisions, but under entirely new standards which were never the intent of the Congress. Because the "phase-in" standards have lapsed, due to the intervening National League decision, simple fairness and equity dictates that the Congress immediately restore the "phase-in" levels which were a key ingredient in passage of the FLSA in the first place.

## CONCLUSION

California very much appreciates the opportunity to address the Joint Economic Committee on this important issue common to all public jurisdictions, and stands ready to provide the Committee, its individual members, or the Congress with any additional or supporting data used in the course of this presentation.

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Senator WILSON. Thank you very much, Mr. Jones. Both your prepared statement and your oral presentation here this morning have been superb. I'm not given to flattery, but I must say that I think that you have focused very specifically, and the long experience and the intimate experience that you have had are very clearly evident.

A number of the questions I had you have really answered in your testimony, but let me ask a few. Before I proceed, though, I am very pleased to note that we have been joined by a member of the Joint Economic Committee with a very keen interest in the subject of this morning's hearing, Congresswoman Bobbi Fiedler. I'm delighted that you are here.

First, as a constitutional lawyer, I would ask you what is left of the 10th amendment after *Garcia?*

Mr. JONES. Well, that's one that's out of the ball park, but the bottom line is that I don't think you will find any annotations in the Constitution under the 10th amendment after *Garcia.* There are no cases, to my knowledge, which use the 10th amendment as a defense. There's no case that I can think of that's followed the *National League* case a while back in which the Congress attempted under the ecology or environmental laws to throw the Governor in jail if our State legislatures didn't appropriate sufficient money to take care of air pollution or something of that kind and our Ninth Circuit Court of Appeals held that was a clear violation of the 10th amendment, but that's an unrelated case. I guess my answer would be that there's very little left of the 10th amendment, but there's a lot left to the commerce clause in the Federal Constitution as far as the U.S. Government is concerned.

Under *Garcia,* there is absolutely no limits, in my opinion, as to what this Congress can do under *Garcia* to the State and local governments.

Senator WILSON. The sole restraint is the political process in its doubtful wisdom?

Mr. JONES. That's what the majority in *Garcia* said and that's why I'm here. I think before we ever go back to court in the U.S. courts we're going to have to justify the Justice Blackmun who wrote that decision who just got up one morning and changed his mind—but I think the record should show, at least my testimony to show here, that I came to this Congress and I gave it the best pitch that I possibly could to change this law before I dragged my State and my local governments back into the U.S. courts for further relief under this act.

Senator WILSON. Well, I think that you have clearly established that you have done so this morning.

I'm not aware of anything—and if you are, I wish you would share it with us—any basis for the change in the Court's decision from *Usery* to *Garcia.*

Mr. JONES. Well, I don't want to be in a position of criticizing the High Court. I, of course, disagree with their decision, but the principal problem that Justice Blackmun had was trying to define what "traditional governmental functions" were, and rather than come to grips with that problem and working out the definition that the courts have been doing all across the country, he decided to throw out the baby with the bath water, and he forgot all these charts

and graphs and statistics that we put before the court 10 years ago which motivated him to be on the other side of this case. Therein lies the problem.

The problem of definition of what is a traditional governmental function which would be exempt from Federal control is certainly not an easy task, but neither is being a Justice on the Supreme Court.

Senator WILSON. Let's come specifically to the point of your first recommendation and that is for exemption from the provisions of the Federal Fair Labor Standards Act for State and local governments in their labor relations.

Having suggested that exemption, are there other exemptions?

Mr. JONES. There are many exemptions in the Fair Labor Standards Act. I think it's section 13 or thereabouts that goes through and exempts all kinds of agricultural workers weird groups—I don't mean weird groups, let's strike that. Let's say very limited industries.

Senator WILSON. Remember, all those weird groups are our constituents.

Mr. JONES. That's right and I apologize if I have offended any of the other exemptees, but there are quite a number. When I was reading on the airplane on the way out here to Washington, I counted probably a couple dozen in the Fair Labor Standards Act which Congress in its wisdom has sought to exempt.

Senator WILSON. I was going to suggest there were about 18 or 19, but in any case, the point of the question really is to determine whether or not there is in the announced rationale of the Court holding, and overturning of the *Usery* decision that there is reason to include State and local government. I am not aware of either any changed circumstance or any reason that they felt it necessary to move from the column of exempt activities to those included.

Mr. JONES. No.

Senator WILSON. The activities of State and local governments?

Mr. JONES. That's true. The Congress at least 10 years ago in the Congressional Report said that there was something like 95,000 State and local employees—there are 11 million, incidentally—95,000 were not being paid the minimum wage. We took Labor's deposition 10 years ago and asked them questions under oath, "Where are the 95,000?" They never identified them. They are ghosts. They don't exist as far as I'm concerned.

There is no basis for a minimum wage and overtime law in State and local governments in the Congressional Reports or anyplace else. You won't find them.

Senator WILSON. What is the stated basis in the Fair Labor Standards Act for exemption or, conversely, for inclusion?

Mr. JONES. Well, as I was reading on the airplane, I saw very little rationale for the industries that were exempt, except they seemed to be very seasonal type jobs, agricultural type jobs, seasonal type work. If you take that and put it on the pie chart up here, you will see that one-third of the forest industry is really a seasonal job. It takes place in the 5-month fire season in California from May until the end of the summertime. We have a lot of seasonal jobs. If we just got our fire and police out from under the FLSA, we could eliminate a third of that chart up there. That's a big step.

But the answer to your question is the rationale supporting exemption of those various groups really has no common thread or theme except as I read through them it seemed to me they were kind of seasonal, limited, narrow type jobs.

Representative FIEDLER. Could I follow up?

Senator WILSON. Yes. Congresswoman Fiedler.

Representative FIEDLER. I was just wondering if they do have any exemptions at all, wouldn't that provide some type of basis for a challenge under equal protection?

Mr. JONES. Well, I, of course, thought of that. Basically, the equal protection clause does not apply to the States. The equal protection clause applies to "persons," and there's case law saying that the States and local governments are not "persons."

So in terms of equal protection, it's certainly unfair and unequal and a lousy situation, but from a constitutional standpoint and an equal protection standpoint, I don't believe an argument lies there.

Senator WILSON. What about the persons who are the employees of these entities, though?

Mr. JONES. That would have a spinoff effect, that's true, in terms of the impact on employees. For example, like a lot of other unfair applications of law, when you start skewing salaries and you start paying cadets more than you pay sergeants, then those persons who feel they are entitled to more pay may have that kind of equal protection argument. But as far as the State itself is concerned, I doubt if we—that is, the State of California—could make that argument.

There are other arguments we certainly can and would make and have thought about, but that is not one of them.

Representative FIEDLER. Could the Attorney General perhaps bring a cause of action based upon a class action of individuals?

Mr. JONES. Yes. In the *National League* case I believe our attorney general, where I was working then, Arthur Younger in California, represented the State of California, and Ronald Reagan, who was then our Governor, in bringing the action in the first place under the FLSA——

Representative FIEDLER. It's kind of a cross-action. It's a vicious circle. If you do that, then you're saying that there is no right to exemption which is working in contradiction to the fact that you're looking for an exemption.

Mr. JONES. Yes.

Representative FIEDLER. But I was just curious as to whether or not there might be a hook there.

Mr. JONES. The way the *Garcia* case reads, there's a higher court than the Supreme Court. And believe it or not, you're it. But as I see it, Justice Blackmun was saying that before you come back before the Supreme Court, you go to the Congress, and that's why we are here and that's why we want to make the strongest case we can for change because I can't think of any act more than the FLSA that requires change. And I want to make clear that California just doesn't willy-nilly take on Federal acts.

We filed an amicus curiae brief in favor of the 1964 Civil Rights Act and its implementation in the State of California. We were on your side in that case. We believe that was a good law, good for everybody. It's burdensome, sure, and it costs a lot of money to

fight civil rights cases, but there's a good purpose there. There's a real good purpose.

This is not one of those kind of cases. This is a different case. This has no legitimate rational basis whatsoever.

Senator WILSON. Mr. Jones, in your prepared statement as well as your oral presentation, you supplied us with a good deal of data about what the cost implications of this will be for the State of California, the grand total being $52.3 million as of the latest estimate.

You have also pointed out the anomaly that public safety trainees, notably those in the California Highway Patrol Academy, will receive more than their sergeant instructors.

You have anticipated a great many of the concerns that I had. Let me just ask you this. You have also pointed out that a number of employees, as a matter of personal preference, if they have the full range of choice, would choose CTO, compensatory time off, as an alternative to cash, to premium overtime payments, simply because they want the time more than the money and because they prefer the flexibility which that gives them.

Can you envision any situation in which police and firefighters would end up with less take-home pay, less actual cash compensation under the Fair Labor Standards Act?

Mr. JONES. That's a good question and it's something I meant to point out earlier.

Under California's retirement law and probably under the retirement laws of most jurisdictions, overtime is not counted as compensable cash for retirement purposes. So if a fireman during that 5-month season gets a big hunk of cash which you would normally utilize in the wintertime and spread out, the employee gets a bunch of cash in the summertime for all this overtime that he works, but in the wintertime when they're taking off or when the season is down, there's no benefit there. So what we're trying to work out now with the unions—and the unions are very concerned about this—there may be very seriously a diminution in the retirement benefits because of the overtime cash compensation.

To answer your question more directly, if you pay employees a great deal of money in a season, like the fire season, you don't need those employees in the wintertime when normally they are taking off and using their comp time. So if you go to a seasonal work force, there's a lot of bad things that happen. You lose experience and continuity and training and these employees who are going to be laid off who are going to be furloughed in the wintertime because we don't need them around are going to find other jobs and other things to do, and that could be very serious in terms of fire protection.

We are already losing a lot of people from the California work force who go to the counties and the cities to work because the salaries—our salaries are 20 percent higher than most jurisdictions, but our county and city pay a lot more than some of our State jobs. So all they need is that little incentive in the winter to take a walk, and that really reflects our permanent firefighting force in California.

Senator WILSON. Let's move now to the situation of nonseasonal public employment. Let's talk about police and firefighters. Since

that is the most critical classification, the one that accounts for the largest share of municipal budgets, can you envision any situation in which we will wind up with cities having fewer police officers and firefighters as a result of the application of the Federal Fair Labor Standards Act? Or let me put it more fairly, I guess, since we have a panel of local officials following you. You are counsel to DPA, the department of personnel administration in the State of California. You, if not directly charged with budgeting, at least are well aware or privy to the budgeting problems faced by your agency.

Is there in prospect, as you are compelled to face the implementation of the FLSA and its application to California State government, is there the prospsect that you are going to reduce the number of employees as you budget specific amounts for premium overtime?

Mr. JONES. Well, I am not at liberty to speak for the cities and counties. You have some very good people here from Los Angeles who will speak after me, but I think they will probably echo what I'm about to say. That is, in California, we have something called proposition 13, which many of the other States and their localities have enacted in the form of their own State constitutions and their own municipal ordinances, which limit the ability of local government to pass on increased costs to their taxpaying constituents.

There is no such thing as a free lunch. So that if new salaries are going to have to be paid and can't be paid, the only alternative is a reduction of service. And if you're talking about impact on firefighters and police, that's where the cut is going to come, plus the revenue sharing, as you probably know, is not what the State and local governments would like it to be. That's down. And the ability to get the funds is simply not there. There are too many restrictions. The taxpayers simply will not stand for greater taxes for some kind of premium overtime law that the Supreme Court on a whim decides is in the best interest of local employees. There are too many restrictions on the ability to raise the money necessary.

So the answer to your question would be, yes, it is very reasonable to expect a reduction in public services because of the FLSA.

Senator WILSON. And one final question. Is it possible under the act for regular employees to volunteer overtime and, if it is possible, what administrative hassle is involved in their doing so?

Mr. JONES. The FLSA will virtually destroy voluntarism. That is, the ability of State and local governments to take care of fire problems and the like through the use of volunteers. If there is any form of compensation that those employees get in terms of any kind of benefit, they are no longer a volunteer; they are an employee.

The FLSA defines an employee as one who is suffered or permitted to work. That means if I let my secretary come in 15 minutes or half an hour early—she may come in to straighten records or put some flowers out or puts erasers or paperclips out—I don't know what she does—but if she comes in early and I know she does, I owe her overtime if she works over the FLSA maximum.

The same is true for volunteers. If you line up a person to work for your entity and that employee receives any form of remuneration or compensation in any form whatsoever, you destroy that per-

son's volunteer status and you owe that person straight time and overtime if that's required. Plus you have a problem Ms. Meisinger raised, and that is, if you have an employee who works for a State as a firefighter and he wants to help out his county or city, which many of them do, and he helps them out by being a volunteer, if there's any kind of remuneration, you get a joint employment relationship where if he works for the other entity it's suddenly time and a half; that's not straight time. so it destroys joint employment relationships and voluntarism. It's a very, very serious situation.

The situation is particularly important because, Senator, if your guess is right and I suggest your view is very reasonable that we are going to have to reduce public services in fire and we have to rely on volunteers, then the volunteers are equally in trouble under this act. We are going to have to pay them as well. So there is very little alternative here.

Senator WILSON. So are the taxpayers, not as taxpayers, but as recipients of service, and the crowning irony of this application to State and local employees, it seems to me, is that it will not spread employment as was intended in the 1930's when this legislation was first enacted with the thought to trying to spread work to very low-income employees.

So what you're saying is that someone who is an employee can't volunteer the 15 minutes—you used the example of your secretary coming in early. Let me ask you about the example of the employee in one instance we would say the employee of the mental institution of the State of California. In other words, that person, if he or she elects to work after normal working hours in setting up some sort of special olympics program would have to be compensated?

Mr. JONES. If it's solely for the employee's benefit, it is not compensable. But if it gives the State as an employer any benefit whatsoever, which it certainly would in the special olympics situation—it helps the patient and everybody else—if they sleep overnight, for example, which is the problem we have, and that sleep is interrupted at all—say, you have a patient problem of some kind—boom, all the overtime provisions of the FLSA come right down on your head.

Senator WILSON. And there is no way that the employee can, by some oral or even written declaration, avoid that?

Mr. JONES. I have to agree.

Senator WILSON. That's what Ms. Meisinger said when she said the employee cannot negotiate away his rights? He can't volunteer them away either, I gather.

Mr. JONES. That's absolutely correct. The Federal law provides that neither the person has a right under the FLSA nor their union can waive away their contract and that same principle of law has been part of title VII of the Civil Rights Act and section 19 of the old Civil Rights Act. You can't waive those things away. You can't contract it away.

Senator WILSON. Congresswoman Fiedler.

Representative FIEDLER. Just a couple points, if I may. One, I would like to remind you that there is a process which is being used by government entities today to raise revenues for a variety of different types of things that they believe they need in the form of

the benefit assessment. So proposition 13—and I will add that I personally suported it enthusiastically and believe that it's done a good job for the property owners of our State—the creative State legislature, especially in the State of California, has managed to find the necessary loopholes to provide some of those resources.

I think the real question is whether or not it serves the interest of the people of our State or our local government entities to be required to pay those kinds of fees for existing services, and I, too, am quite concerned about the implication for job reduction because it's clear that, given the choice between a 40-hour employee at regular wages, even though it will cost you a certain amount of money to train new employees, over the long haul there will be less people employed as a result of this kind of change and it kind of contradicts, as Senator Wilson said earlier, the primary purpose.

Do you believe that any Federal action, congressional action, ought to have a universal approach or are you strictly interested in a waiver or exemption for State and local governments?

Mr. JONES. Well, that's a difficult question. I can't speak for my Governor, but I am quite certain that—the Governor is very sensitive about the municipalities and counties in his State and I would think that, speaking for him, he would certainly like relief not only for the programs for which he is directly responsible for, which is on my pie charts up here, but those jurisdictions in the State of California to whom he feels a very sincere duty to.

So I would think the universal approach is the one to take and that is to exempt all State and local government from these provisions.

I want to point out too that the State of California is able to pass on these kind of costs to our taxpayers in the form of sales and income taxes. That is not true with respect to local government who operate, as you know, entirely on a different kind of revenue generating basis. So they can't pass it on, which means that they are going to be coming to Governor Deukmejian and the legislature of California for some kind of a bail-out relief, and although the Governor is certainly a very fiscal conservative and he's not going to be real crazy about upping his budget with a lot of bail-out money for the local government, he would like Congress to take some kind of reasonable approach here in addressing this problem.

Senator WILSON. Mr. Jones, thank you. Your testimony has been far more than helpful and I hope that we can respond to the needs that you so clearly articulated. We found you so interesting that we've gone 10 minutes past the time that we were supposed to, so now we will excuse you with thanks and welcome to the witness table a panel consisting of Ms. Pat Russell, president of the Los Angeles City Council, and Mr. Mike Gillespie, chairman of the County Council of Madison County, AL.

We will hear first from Ms. Russell and next from Mr. Gillespie. Welcome. We're glad to have you here.

## STATEMENT OF PAT RUSSELL, PRESIDENT, LOS ANGELES CITY COUNCIL, ACCOMPANIED BY JOHN HARDY, LOS ANGELES CITY ADMINISTRATIVE OFFICE

Ms. RUSSELL. Thank you, Senator Wilson and Congresswoman Fiedler. On my left is John Hardy from our city administrative office. I am Pat Russell, president of the Los Angeles City Council. I am also the first vice president of the League of California Cities. I welcome the opportunity to appear before the committee today on behalf both the city and the league.

I commend the committee on calling these hearings to explore the full ramifications of adapting the FLSA to local government, and want to provide you with the California perspective.

I do not wish to portray this issue as one of confrontation between city governments and unions that represent our city employees. Indeed, what we have before us is an opportunity to adapt, in an orderly fashion, local preferences to Federal priorities.

I am confident that we can do this, but we will have to work together closely in a spirit of accommodation and patience.

Senator Wilson, it is my understanding that your intent in calling these hearings is to examine the relevant facts and determine what additional Federal action, if any, is needed to make an orderly transition. I would like to take this opportunity to acquaint you with some of the key issues we see in California, and in the city of Los Angeles as we look to implementation of the FLSA based on the *Garcia* decision.

Throughout my testimony you will note that I raise more questions than answers. For this reason, we ask that Congress delay the effective date for full implementation of the FLSA as it relates to State and local governments. This delay would give both State and local governments, and the Federal Government, sufficient time to develop appropriate answers before implementing multimillion-dollar programs.

The city of Los Angeles, like all other State and local jurisdictions, is facing great operating and economic challenges. While you grapple with the overwhelming problem of bringing our Federal deficit in line, State and local governments must provide needed goods and services, comply with the regulations imposed on them by other levels of government, and work within their given revenues.

While we acknowledge the importance of protecting the worker, the sudden imposition of the Fair Labor Standards Act, we interpreted by the recent Supreme Court decision, will have a substantial impact on our ability to operate.

The Fair Labor Standards Act was born in the Great Depression of the 1930's for the purpose of increasing employment opportunities. It gave private employers an incentive to hire additional employees rather than work existing employees longer hours. The act was particularly important for workers at the lowest pay scales.

One reason for extending FLSA to State and local governments in 1974 was to protect low paid employees. This rationale is no longer valid because public sector employment has no minimum wage problems. In addition, the principal employees to whom

FLSA will apply, such as police and fire personnel, enjoy salaries well above the average wage earner.

In our city of Los Angeles, we have firefighters and police officers who currently earn between $30,000 and $40,000 per year on regular duty. In the case of our firefighters, many of whom voluntarily work additional straight-time hours in our current staffing program, we have individuals who earn over $50,000 per year. It is doubtful the original 1938 legislation was drafted with these individuals in mind.

Our city, and other State and local juridictions throughout the United States, has in good faith, entered into agreements with labor groups. These agreements satisfy both the needs of the employees and the needs and economic constraints of the municipality. Under the FLSA, the entire ballgame has been changed, but our revenue sources have not.

We estimate that, under a worst case scenario, our annual costs in Los Angeles could run as high as $100 million. Add to this possible cutbacks in programs such as general revenue sharing, which would cost us an additional $50 million, and you realize why our local government faces drastic reductions in goods and services.

Ironically, while the FLSA was designed to protect the worker, its implementation in Los Angeles would undoubtably have a negative effect on our employees. Unless the financial impact of FLSA can be moderated, the city will be faced with attempting to raise local taxes to fund a Federal mandate, or laying off personnel and curtailing essential services for our citizens. Significant layoffs are the most likely alternative.

Senator Wilson and members of the committee, we do not appear before you to beg for additional revenue, or to ask that Congress exempt State and local government from the FLSA. We do ask that you take action now to guarantee the intent of the act is met, without harming our mutual constituents who would be forced to pay the bill for our immediate compliance with unclear regulations.

In his letter to the White House and to you, Senator Wilson, Mayor Tom Bradley requested that the Department of Labor allow a grace period to permit an orderly implementation of the Court's decision on FLSA through the *Garcia* case, and I would like to introduce his letter to you now to put into your record.

[The letter follows:]


June 6, 1985

Mitchell E. Daniels, Jr.
Deputy Assistant to the President
Director, Officer of
Intergovernment Affairs
The White House
Washington, D.C. 20500

Re: Fair Labor Standards Act

Dear Mr. Daniels:

We appreciate the Administration's concern over the impact of the Garcia case on cities and your solicitation of information.

It is indeed ironic that, at the time the General Revenue Sharing Program is being eliminated, another costly Federal Program is being imposed. FLSA could be double the financial problem caused by eliminating our $55 million in General Revenue Sharing.

For civilian employees, the financial impact of FLSA now appears managable. Certain operations and employees, however, will be adversely impacted. Where the workload is variable, overtime hours worked are now put on the books to be taken off later, when the workload is lower, at time-and-one-half. Many employees prefer the compensatory time-off option, or at least want the freedom of choice in the matter. It is also clearly much less costly for the taxpayers to operate this way. If your new rules can help in this area, they will be valuable.

The major problem will be with our police, fire, and paramedic services. Over one-half of the City budget is allocated to these services.

Our police, fire, and paramedic personnel are some of the best compensated private or public front line workers in the nation. Their unions are the strongest in the City. As required in State law, we already have negotiated agreements with them covering hours of work and overtime compensation.

Police, fire, and paramedic personnel have been satisfied with the current situation. However, they see a gold mine in the Garcia decision. As examples, following are some of the claims made by the police union.

Meal time - The City's current provisions do not count meal time as time worked for police officers. FLSA defines meal time for police officers as time worked (if the City elects a 7(k) exemption, which permits the selection of a work period of up to 28 days). The City's total daily tour of duty is 8 hours, 45 minutes, with 45 minutes for lunch. We also define overtime as time worked in excess of 8 hours a day. (FLSA defines overtime as time worked in excess of a specified number of hours in a 7 to 28 day period). If FLSA is imposed and unless we can negotiate out of our current 8 hour provision, then either our police officers will be paid $20 for eating lunch or we will reduce the tour of duty to 8 hours, thus reducing our already thin police service to our citizens.

Dogs and motorcycles - Bomb sniffing dogs are taken home by their police officer handlers. The union claims that the home care of these dogs is time worked under FLSA. As a convenience to motorcycle officers, motorcycles are used for commuting. The union claims that the officers' travel time from station of assignment to home and return as well as any minor maintenance done at home is time worked.

The list of police union claims will continue to grow.

Police workload is one of unpredictable peaks. When a major crime occurs at the end of a shift or at the end of a work period, the officers assigned must continue their investigation. Balancing this extra time worked within the work period becomes infeasible thus resulting in overtime. The officers involved are physically tired. The best way to do business is to grant them time off, a practice FLSA would prohibit.

Our fire service follows the western pattern of working three 24-hour tours of duty every nine days. It is our understanding that it was the eastern fire unions, which generally work 8 hours

a day, 5 days a week (at much higher taxpayer cost), who pushed for the 1974 FLSA amendment. The western unions opposed it.

To replace absentees, some of our off-duty firefighters volunteer to work extra shifts at straight-time cash. We have ample volunteers under this system. Firefighters now have a genuine, personal choice: time off or more cash. Under FLSA, they will just become rich but will have less time to enjoy their wealth.

The total additional costs to the City will depend on how the regulations are written. Based on current union demands, the additional costs could be as high as follows:

| | |
|---|---|
| Civilian | $10 million |
| Fire and Paramedic | 20 million |
| Police - regular | 20 million |
| Police - meal time | 35 million |
| Police - motorcycles, etc. | 15 million |
| | $100 million |

At a minimum, cities need time. The 1974 amendments provided a three year phase-in for fire, police, and paramedic services. Whatever is decided in 1985, time is still needed. Many jurisdictions are in the middle of multi-year labor contracts. To reopen contracts on the single issue of FLSA overtime will place management at an extreme disadvantage.

Also needed is some recognition of the difference between the eastern and western patterns of fire service work schedules. Some flexibility should be written into the regulations.

Again, I must express my sincere appreciation at being able to provide input at the policy level.

Yours truly,

Tom Bradley

TOM BRADLEY
Mayor

Ms. Russell. On June 14, 1985, the Department of Labor announced a grace period for DOL enforcement only, but established liabilities for cities and counties back to April 15 of this year. In addition, DOL has refused to grant any relief whatsoever in the area of the original congressional phase-in period for police and fire services. Under this scenario, we have already incurred a liability of roughly $2.5 million in overtime pay for our firefighters under the voluntary constant staffing program.

On behalf of the League of California Cities, I would like to tell you that a good deal of work has already been done to assist cities in understanding some of the implications of compliance with the Fair Labor Standards Act.

The league has retained counsel and, together with its own staff, has sponsored several seminars and meetings around the State on this issue. The league is hearing a consistent message from our 439 member cities that the costs, complications, and lack of clear guidelines will make immediate implementation of FLSA a fiscal and administrative problem. These cities take very little comfort in the 6-month delay in DOL's investigatory proceedings, because their liability is not changed by this action.

Many ramifications of this act are not clear, even to the experts and DOL. It is very understandable that most cities are unable, at this time, to assess all the costs for which they may be liable. However, I do have some estimates from some California localities which paint a picture of concern for municipal government.

For example, Laguna Beach estimates that its annual cost of compliance will be $141,535, almost 1½ times the amount it receives in general revenue sharing funds. Smaller cities may be affected in an even more dramatic fashion. Yuba City, with a population of 20,000, has estimated that FLSA will cost approximately $200,000 for the first year alone.

The total impact for California cities could be as high as $350 million. This is the inflation-adjusted figure used in congressional testimony in the 1974 hearings. California cities cannot afford to absorb this magnitude of increased costs in the face of decreasing Federal support. It is important to realize that none of the legislative option we are pursuing will cost the Federal Treasury a dime. However, if there is a lack of congressional action on this issue, the cost to local government will be staggering.

The Department of Labor believes that only Congress has the power to delay the effective date for State and local government compliance. Unless some action is taken to modify the April 15, 1985, effective date, State and local governments face enormous liabilities during the period preceding full compliance with the act, as well as tremendous future costs.

We believe that by delaying the effective date of the FLSA, as it relates to State and local governments, with full recognition of the fact that benefits of the original 3-year phase-in have never been realized, we can achieve our objectives. This delay will give us the time we need to work with the Department of Labor in answering the many questions raised by the *Garcia* decision. In the interim, State and local governments should be freed from retroactive liabilities of the *Garcia* decision.

We also request that Congress take into consideration existing negotiated contracts which are currently in effect, and those which run beyond the delayed effective date. In those cases, the existing collective bargaining agreements, entered into before the *Garcia* decision, should be allowed to remain in force without hindrance of the FLSA. It is neither in the interest of fairness to the tax paying public nor to employer/employee relations to prematurely abrogate agreements which were mutually agreed upon before the decision.

Senator Wilson, I have concluded my testimony regarding the impact of the FLSA on local government in California and I would be pleased to answer any questions you have.

[The prepared statement of Ms. Russell follows:]

PREPARED STATEMENT OF PAT RUSSELL

Mr. Chairman, my name is Pat Russell and I am President of the Los Angeles City Council. I am also the First Vice President of the League of California Cities. I welcome the opportunity to appear before the Committee today on behalf of the City and the League.

I commend the Committee on calling these hearings to explore the full ramifications of adapting the Fair Labor Standards Act (FLSA) to local government, and want to provide you with the California perspective.

I do not pretend to be an expert on Labor Law nor do I wish to portray this issue as one of confrontation between City Government and unions that represent our City employees. Indeed, what we have before us is an opportunity to adapt, in an orderly fashion, local preferences to federal priorities.

I, for one, am confident that we can do this, but in order for this to happen, we will all have to work together closely in a spirit of accomodation and patience.

Mr. Chairman, it is my understanding that your intent in calling these hearings is to examine the relevant facts and determine what additional federal action, if any, is needed to make an orderly transition. I would like to take this opportunity to acquaint you with some of the key issues we see in California, and in the City of Los Angeles, as we look to implementation of the Fair Labor Standards Act, based on the Garcia decision.

Throughout my testimony, you will note that more questions are raised than are answers. For this reason, we ask that Congress delay the effective date for full implementation of the FLSA as it relates to state and local governments. This delay would give both state and local governments, and the federal government, sufficient time to develop appropriate answers before implementing multi-million dollar programs.

The City of Los Angeles, like all other state and local jurisdictions, is facing great operating and economic challenges. While you grapple with the overwhelming problem of bringing our federal deficit in line, state and local

governments must provide needed goods and services, comply with the regulations imposed on them by other levels of government, and work within their given revenues. We are not provided the luxury of deficit spending.

While we acknowledge the importance of protecting the worker, the sudden imposition of the Fair Labor Standards Act, as interpreted by the recent Supreme Court decision, will have a substantial impact on our ability to operate.

The Fair Labor Standards Act was born in the Great Depression of the 1930s for the purpose of increasing employment opportunities. It gave private employers an incentive to hire additional employees rather than work existing employees longer hours. The act was particularly important for workers at the lowest pay scales.

The Act is now being made applicable to public jurisdiction employees, jurisdictions which have not been given an opportunity to adjust their sources of revenue or their current work practices.

One reason for extending FLSA to State and Local governments in 1974 was to protect low paid employees. This rationale is no longer valid because public sector employment has no minimum wage problems. In addition, the principal

employees to whom FLSA will apply, such as police and fire personnel, enjoy salaries well above the average wage earner.

In the City of Los Angeles, we have firefighters and police officers who currently earn between $30,000 and $40,000 per year on regular duty. In the case of our firefighters, many of whom voluntarily work additional straight time hours in our current staffing program, we have individuals who earn over $50,000 per year. It is doubtful the original 1938 legislation was drafted with these individuals in mind.

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We estimate that, under a worst case scenario, our annual costs in Los Angeles could run as high as $100 million. Add to this possible cut-backs in programs such as General Revenue Sharing, which would cost us an additional $50 million, and you realize why our local government faces drastic reductions in goods and services.

Ironically, while the FLSA was designed to protect the worker, its implementation in Los Angeles would undoubtably have a negative effect on our employees. Unless the financial impact of FLSA can be moderated, the city will be faced with attempting to raise local taxes to fund a federal mandate, or laying off personnel and curtailing essential services for our citizens. Significant layoffs are the most likely alternative.

Mr. Chairman and Members of the Committee, we do no- appear before you to beg for additional revenue, or to ask that Congress exempt state and local government from the FLSA. We do ask that you take action now to guarantee the intent of the act is met, without harming our mutual constituents who would be forced to pay the bill for our immediate compliance with unclear regulations.

In his letter to the White House and to you, Senator Wilson, Mayor Tom Bradley requested that the Department of Labor allow a grace period to permit an orderly implementation of the Court's decision on FLSA through the Garcia case.

On June 14, 1985, the Department of Labor (DOL) announced a grace period for DOL enforcement only, but established liabilites for cities and counties back to April

15, 1985. In addition, DOL has refused to grant any relief what-so-ever in the area of the original Congressional phase-in period for police and fire services. Under this scenario, we have already incurred a liability of roughly $2.5 million in overtime pay for our firefighters under the voluntary constant manning program.

On behalf of the League of California Cities, I would like to tell you that a good deal of work has already been done to assist cities in understanding some of the implications of compliance with the Fair Labor Standards Act.

The League has retained counsel and, together with its own staff, has sponsored several seminars and meetings around the States on this issue. The League is hearing a consistant and steady message from its 439 member cities that the costs, complications, and lack of clear guidelines will make immediate implementation of FLSA a fiscal and administrative problem. These cities take very little comfort in the six month delay in DOL's investigatory proceedings, because their liability is not changed by this action.

Many ramifications of this act are not clear, even to the experts and DOL. It is very understandable that most cities are unable, at this time, to assess all the costs for which they may be liable under the FLSA. However, I do have

some estimates from some California localities which paint a picture of concern for municipal government.

For example, Laguna Beach estimates that its annual cost of compliance will be $141,535 - almost one-and-one-half the amount it receives in General Revenue Sharing funds. Smaller cities may be affected in an even more dramatic fashion. Yuba City, with a population of 20,000, has estaimted that FLSA will cost approximately $200,000 for the first year alone.

The total impact for California cities could be as high as $350 million dollars. This is the inflation-adjusted figure used in Congressional testimony in the 1974 hearings. California cities cannot afford to absorb this magnitude of increased costs in the face of decreasing federal support. It is important to realize that none of the legislative options we are pursuing will cost the Federal Treasury a dime. However, if there is a lack of Congressional action on this issue, the cost to local government will be staggering.

The Supreme Court decision makes it clear, and the Department of Labor concurs, that only Congress has the power to delay the effective date for state and local government compliance. Unless some action is taken to modify the April 15, 1985, effective date, state and local governments face

enormous liabilities during the period preceding full compliance with the act, as well as tremendous future costs.

Mr. Chairman, Members of the Committee, we are all in the business of serving the public. Our goals are to provide needed goods and services and to develop and implement laws which serve the public good and protect the rights of all citizens. To this end, we wish to work with you to achieve the goals of the Fair Labor Standards Act without punishing either employees or tax payers.

We believe that by delaying the effective date of the FLSA, as it relates to State and Local Governments, with full recognition of the fact that benefits of the original three-year phase in have never been realized, we can achieve our objectives. This delay will give us the time we need to work with the Department of Labor in answering the many questions raised by the Garcia decision. In the interim, state and local governments should be freed from retroactive liabilities of the Garcia Decision.

We also request that Congress take into consideration existing negotiated contracts which are currently in effect, and those which run beyond the delayed effective date. In those cases, the existing collective bargaining agreements, entered into before the Garcia decision, should be allowed to

remain in force without hindrance of the FLSA. It is neither in the interest of fairness to the tax paying public nor employer/employee relations to prematurely abrogate agreements which were mutually agreed upon before the decision.

Mr. Chairman, I have concluded my testimony regarding the impact of the FLSA on local government in California and I would be pleased to answer any questions you have. I truly hope that your interest in this subject will lead to the issuance of appropriate answers, in a timely manner, to the questions being raised by this issue. For it is only in this way that we can take the appropriate action and demonstrate to our shared constituency that government can work.

Senator WILSON. Thank you very much, Ms. Russell. We will hear from Mr. Gillespie first and then we will have some questions for you both.

**STATEMENT OF MIKE GILLESPIE, CHAIRMAN, BOARD OF COMMISSIONERS, MADISON COUNTY, AL, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES**

Mr. GILLESPIE. Thank you.

Senator Wilson and Congresswoman Fiedler, I am Mike Gillespie, chairman of the Madison County Commissioners, Madison County, AL, and also the chairman of the Labor and Employee Benefits Steering Committee for the National Association of Counties. I appreciate the opportunity to appear before this subcommittee to share with you some of the many problems counties are facing as a result of the Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority.* In our view, the Court's decision creates problems in two areas: First, it weakens State and local authority in our Federal structure; and second, it imposes unfair financial, administrative and legal burdens on State and local governments by expanding the Federal minimum wage and overtime pay standards to cover virtually all State and local employees.

Since the purpose of this hearing is to examine the economic impact of the Court's decision, we will spend most of our time discussing the problems that counties will need to overcome to comply with the FLSA. However, we would like to briefly mention our concerns about the problems the *Garcia* decision poses for counties in the structure of federalism.

In deciding the *Garcia* case, the Supreme Court removed itself as constitutional referee in determining the limits of Federal authority under the commerce clause. We believe the Court's action invites Federal intrusion into State and local affairs. The legislative and executive branches of the Federal Government are now at liberty to interfere in State and local matters as they see fit. In the future, Congress must be very clear about the reach of Federal authority when it enacts new legislation. Where Congress intends to regulate State and local governments, it must specifically state so. Where it does not intend to change traditional local powers, the legislative history—or the act itself—should clearly demonstrate that intent as well.

At present, Federal agencies have the responsibility of issuing rules and regulations defining the roles of the different levels of government in carrying out Federal legislation. With the courts no longer acting as arbiter to protect the rights of State and local governments, Congress must be precise in defining the intergovernmental relations specified or implied in Federal legislation.

State and local governments are as different as the people they represent. In order for our Federal system to work effectively, Federal, State, and local governments must continue to work together for the common good of all. However, States and localities must be allowed reasonable control over their own affairs without interference from Washington. We must not allow State and local governments to become field offices of the Federal Government. They must continue to represent the unique people they serve.

Senator Wilson, I encourage you and the members of this committee to develop and introduce legislation that would exempt State and local governments from the Fair Labor Standards Act. We also encourage you to establish in this legislation new principles to ensure the independence of State and local governments, and to limit the reach of Federal authority under the commerce clause of the Constitution.

Senator Wilson, when the Supreme Court issued the *Garcia* decision on February 19, many pertinent issues were left unresolved. At that time, we were unsure if the Court's decision extended FLSA coverge to all State and local employees. In the decision, the Court did not expressly overrule the Labor Department's regulations which exempted State and local governments. Furthermore, we had no way of knowing the effective date that State and local governments would be required to be in compliance with the FLSA. We were left to operate under a cloud of uncertainty for several months.

Most county officials, like myself, don't make a practice of complying with rules before we are sure what they mean. Most of us felt compelled to wait until the Labor Department clarified these issues before we took any action. Unfortunately, it did not provide any policy guidance until 4 months after the Court's decision.

On June 14, the Labor Department issued enforcement policy on the *Garcia* decision establishing April 15 as the retroactive effective date and extending FLSA coverage to all State and local employess. It took the position that it did not have the discretion to issue a prospective effective date for the enforcement policy. Since April 15 was the date that all rehearing procedures on the Court's

decision were exhausted, the Labor Department adopted it as the effective date. Athough we have substantial reservations about the Labor Department's view, we are not here today to challenge its decision. However, we would like to bring to the attention of this committee the enormous burdens *Garcia* and the Labor Department's policy impose on the vast majority of counties across the Nation.

Because of the nature of county governments, most will not be able to comply quickly with the Fair Labor Standards Act. One of the first big obstacles we must overcome is sorting out all of the different areas affected by the Court's decision. Since State and local government coverage is a new requirement, most of us do not have a comprehensive understanding of what is required to come into compliance with the FLSA. It is both unreasonable and unfair to expect counties to fully comply with the FLSA requirements before they understand them. State and local government officials must be provided training and technical assistance before they are required to comply with these requirements and before they are penalized for noncompliance.

The retroactive effective date for State and local compliance complicates matters even more. State and local officials must go back through several months of records to determine how much back pay is owed to their employees. These records may not be sufficient to satisfy FLSA requirements. Many areas must be reviewed. Public employees who worked irregular hours such as law enforcement officers and firefighters, must be paid time and a half if they worked over the regular number of hours in the work period. Volunteers who received a stipend above the FLSA limit, but less than the Federal minimum wage, must be paid the minimum wage. Public employees involved in mandatory training must be paid at the regular rate for the time spent in training. Employees who received compensatory time for working overtime must be paid time and half for all overtime. These are just a few examples of the areas that must be examined before we can determine what is needed to come into compliance with the FLSA.

Although we have not yet conducted a survey to determine the financial impact of the *Garcia* decision on county governments, NACo has heard from hundreds of counties across the Nation on how the decision affects their areas. Based on what we have heard, we believe the financial impact will be enormous.

Most counties are locked into budgets that do not provide much room for flexibility. The area that will cause the most problems is overtime pay for public safety employees. Because police officers and firefighters work irregular hours, we expect many, if not most, counties to owe a significant amount in back pay to these employees. In some instances counties will be hard pressed to come up with the funds needed to compensate these employees. That is precisely the case in my county. I am from a moderate size county with a work force of approximately 600 employees. Based on the limited knowledge we have about the FLSA, we estimate that the *Garcia* decision will cost us around $90,000 annually to implement. As chairman of the county board, I assure you that we do not have that kind of flexibility in our budget.

While our figures are not as impressive and staggering as some of the larger counties in the State of California you have heard, I can assure you the impact is as significant, if not more so. My State has 67 counties in Alabama. We are in one of the more fortunate positions of having the lowest unemployment rate in the State, the highest per capita income in the State. We still will face serious problems if this decision is upheld.

In larger urban counties the financial impact will be in the millions of dollars for back pay and annual costs. Many counties will need to make some tough budget decisions next year. They will be faced with significantly increasing spending in order to maintain current service levels, or making significant cuts in services to hold costs down.

Many counties are parties to collective bargaining agreements with employees representative groups. In many instances the salaries negotiated in these agreements are not in compliance with the FLSA overtime provision. This is another area where State and local governments and employee unions must be given ample time and technical assistance to work out a reasonable solution.

Because county governments are as different as the people they represent, services are provided through a variety of means. Counties use volunteers, flexible work hours and compensatory time to provide efficient services to their residents. The *Garcia* decision imposes great limitations on the provision of county services. The current regulations prohibit the use of compensatory time for overtime work; requires time and a half payment, in most cases, for all hours over 40 during a week, regardless of flex-time arrangements; and imposes stringent limitations on the use of stipends to reimburse volunteers for expenses.

Senator Wilson, this policy will help no one. I can assure you that most counties cannot afford time and a half and will, therefore, be compelled to limit the amount of overtime work of their employees. County employees will not be helped because they will not be able to earn extra compensatory time or use flex time. The taxpayer will not be helped because the level of services will be cut. This is clearly a policy that will serve no useful purpose.

Many county employees work on a seasonal basis. Highway department employees, for example, work more hours during summer months and build up compensatory time which they use during the winter months when there is less work to do. Building maintenance employees also have a flexible work schedule which is adjusted according to the weather conditions. Some times inclimate weather prevents them from working. In good weather conditions they are permitted to work longer hours to make up for the lost time. The FLSA regulations will require significant overtime pay in both of these cases. This will impose a severe financial hardship on counties. We urge you to move quickly to enact legislation that would provide State and local exemption from the FLSA.

Although the Labor Department has decided to delay enforcement of the FLSA provisions until October 15, there is nothing to preclude State and local employees from filing private actions in the courts. Senator Wilson, I am sure you are already aware of the cases pending against several jurisdictions in California and North Carolina.

State and local governments are currently liable for violations of the FLSA retroactive to April 15, or any other date that the courts may establish. If employees are successful in the courts, we will be liable for double monetary damages and attorney fees as well.

You have both sides geographically of the United States represented here today from California to Alabama, and I can assure you the problems are equally significant.

This concludes my testimony and I would be happy to respond to any questions.

Senator WILSON. Thank you very much, Mr. Gillespie. That is extremely valuable testimony.

Ms. Russell, you have already indicated what some of the cost would be to Los Angeles, but if I could pursue that with you just a little further, labor costs are what percent of the budget of the city of Los Angeles?

Ms. RUSSELL. 75 to 80 percent of the total budget.

Senator WILSON. And of that, what percent of your labor costs are for police and firefighters?

Ms. RUSSELL. Let me ask Mr. Hardy.

Senator WILSON. Mr. Hardy.

Mr. HARDY. About 55 percent of the city's budget is police and fire.

Senator WILSON. 55 percent of the city's budget?

Mr. HARDY. That's correct.

Senator WILSON. So we're talking about a very large sum of money. What is that budget currently?

Mr. HARDY. The budget that we call the city budget is about $2.2 billion, so it's over a billion.

Senator WILSON. All right. And you have given us in your testimony, Ms. Russell, not only the figure for the city of Los Angeles but given us a couple of other good examples of Laguna Beach and Yuba City, and stated that total statewide you estimate will be something in the neighborhood of $350 million.

We have heard from Mr. Jones, I made the observation in my opening statement, that in California and in a number of other jurisdictions that have chosen similar measures, something like proposition 13 places real limitations on the revenue-raising ability of local government. I remember years ago coming back here as the president of the League of California Cities as the spokesman for it and addressing then Congressman Holifield on the subject of general revenue sharing and he said, with a twinkle in his eye, that he thought that the joy of spending tax money should be accompanied by the joy of levying taxes, to which I rejoined, which somewhat dimmed the twinkle in his eye, that we would be happy to undertake that joyful process if we could gain a credit against the Federal income taxes paid by our local taxpayers. And there the conversation seemed to deteriorate.

Let me just ask, though, the option that you paint very clearly as the most probable is the reduction of services by the reduction of employees if you are compelled, particularly in the safety categories, to buffet for mandatory premium overtime. That seems virtually inevitable, does it not?

Ms. RUSSELL. I don't see an alternative. This year for the first time we were able to add a little money, over a million dollars, to

improve tree trimming which we had given up virtually except for emergency. So the only way we could make any cuts not in the public safety services would be to increase potholes and stop tree trimming again, to close down the hours for libraries and the parks. You are all too familiar with that particular parade of events, but that's the only alternative we have.

We cannot raise taxes, as you well know, without two–thirds vote of our people.

Senator WILSON. Well, I am all too familiar, as you point out, and my experience which I assume to be the ongoing experience of most local officials in California is that because the public places the higest priority upon the public safety functions, that it is police and fire that are indeed the lion's share—and Mr. Hardy has confirmed that this morning—55 percent of the city of Los Angeles budget goes for those services—and the public generally and those who are elected to represent them quite understandably are very reluctant to diminish service in those critical areas.

So what happens, in my experience, both my personal experience and as an observer of the experience of my colleagues in local government, has been that it is not the public safety functions that are reduced necessarily, although what happens is they are not expanded commensurate with need, and other services are severely cut back in order to avoid reduction of the public safety function.

Has that been your experience both in Los Angeles and also having served as a league president yourself, your observation of other municipalities?

Ms. RUSSELL. Yes, very clearly. We all make the same choices in terms of public safety.

Senator WILSON. I think, Mr. Gillespie, your statement is very interesting. You point out that there are distinct parallels, that the difference may be in scale, but that there are also very great differences with regard to priorities, and I think that's true. I think your phrase was that the situations are as different as the people that you represent. And yet there are certain parallels and I think we have probably just discovered the major one, that your constituents, like those of Ms. Russell and like mine, set the highest priority upon the public safety function.

But it might be that you would choose to cut different things in order to not starve necessary public safety functions. It may be that in her case they will decide that they can defer some highway or street and road repair. In your case, you might decide that you're going to cut back on the recreation function or on libraries.

But what I think is interesting is that in all of those unpleasant options, as you face the, as we've said, almost inevitable prospect of further reduction of service delivery, the *Garcia* decision is going to have an impact upon the employees involved, whether it's deferral of street and road maintenance or whether it is a reduction in the number of hours that park and recreation specialists work in a senior citizens center or the number of hours of access that the public enjoys to a public library. That means somebody's employment is going to be reduced.

And your point that employees have in many cases enjoyed the application of flextime provisions I think is an echo of the comment made by Mr. Jones that there are a number of people who

want the time rather than the money, but they will be prohibited under this law from having that option and exercising it.

Mr. GILLESPIE. The majority of our county employees are in that same posture. They would much rather have the compensatory time than the overtime pay.

To reinforce the point that you have already made, that's exactly the case, whether it's in California or Alabama or I think any other State, based on the comments we are getting back through NACo at headquarters here.

We also use a great number of volunteers in our local government. We have—I say a great number. Comparatively, it may not be. We have 60 to 75 volunteers who work anywhere from 1 hour a week to 30 to 40 hours a week doing various jobs in every area of county government. Some of those employees are reimbursed for expenses and this is going to curtail the services that we can deliver tremendously if we have to start paying them under the FLSA. And other counties are going to experience the same kinds of problems.

Every problem I have heard addressed here today applies not only to the West Coast but to the East and I'm sure the North and South together.

Senator WILSON. I'm sure as well. I would like to invite both Ms. Russell and Mr. Gillespie to submit some supplementary information, if you would be good enough to do so. You have been so generous with your time and making the effort to travel here to appear today, but I'm interested in what your administrators' estimate the cost would be of just administrative compliance, just the administrative costs, because I suspect they will be substantial.

Ms. RUSSELL. Senator Wilson, I would be very glad to do that, both from our city and from the League of Cities. I think as both of us have indicated, at this point it's very early still for cities and counties to be able to estimate total impact and if you are willing to receive we will send you data as it comes through from various cities and counties in our State.

Senator WILSON. I would be very grateful. I would also be grateful for some brief written statement that explains how the *Garcia* decision will affect your labor negotiation process and, if I might, to Ms. Russell only in that instance, I'd like to hear how it affects your negotiation process as well, Mr. Gillespie, but I don't think that Alabama has yet been as unwise as California in one particular, so compounding the problem is a recent legalization by the California courts of the right to strike by public employees. You might factor that in. But what I am interested in is just how this decision alone is going to affect your negotiation process. You have addressed that in your testimony but I would appreciate some additional detail.

Ms. RUSSELL. I would be glad to forward that to you. That is one of the items of major concern to us and to our employees.

Senator WILSON. Well, one of the questions the staff prepared was, how do you feel about having to comply with Federal regulations that did not come out of the California political process? Do you feel that the Federal Government is trying to run your city for you? I won't ask that. I think I know the answer and I suspect it's the same in Alabama and in California.

Mr. GILLESPIE. It's exactly the same. One of the things that I think concerns us as well as other counties from the feedback we're getting, Senator, is who's really in control? Is the Congress in control and willing to take control or are we letting the departments who supposedly work for those of us who are elected to represent the people establish the rules by which we play? That's one of the biggest concerns that I think has to be addressed.

Senator WILSON. I felt that way when I was sitting where you are sitting and I feel that way still. I hope enough of my colleagues will also that we can redress an imbalance that has been court-created.

Well, I think perhaps we'll let you go. We do have a number of other witnesses from whom we wish to hear. Let me just say Senator D'Amato will not be attending, but he has submitted a written opening statement and written questions for a number of our witnesses. So I would ask of the witnesses that they expect to receive those written questions from Senator D'Amato and we would, of course, be grateful if you would supply the answers to him and to us for our record.

[The written opening statement and the written questions of Senator D'Amato, together with the witnesses' responses, follow:]

## Written Opening Statement of Senator D'Amato

Mr. Chairman, I appreciate this opportunity to offer my comments to the committee regarding today's hearing on economic goals and intergovernmental policy. Specifically, we will discuss the potential impact of the Supreme Court's February 19, 1985, decision in the case of Garcia v. San Antonio Metropolitan Transit Authority.

This case held that San Antonio Metropolitan Transit Authority (SAMTA) employees are protected by the wage and hour provisions of the Fair Labor Standards Act (FLSA). The Supreme Court overturned the lower court's decision that municipal ownership and operation of a mass transit system is a traditional government function and is thus exempt from the provisions of the FLSA. The lower court's decision had been based on the case of National League of Cities v. Usery (1976) which the Court expressly overruled in Garcia.

WRITING FOR THE MAJORITY, JUSTICE BLACKMUN STATED THAT NATIONAL LEAGUE OF CITIES HAD ESTABLISHED THE RULE THAT THE COMMERCE CLAUSE DOES NOT EMPOWER CONGRESS TO ENFORCE THE OVERTIME AND MINIMUM-WAGE PROVISIONS OF THE FLSA AGAINST STATES IN AREAS OF TRADITIONAL GOVERNMENTAL FUNCTIONS. HOWEVER, HE WROTE, THE CASE DID NOT EXPLAIN WHICH FUNCTIONS ARE "TRADITIONAL" AND WHICH ARE "NONTRADITIONAL" AND HAD CAUSED WIDESPREAD DISAGREEMENT AMONG THE COURTS. THE FUNCTION STANDARD HAD PROVED TO BE BOTH UNWORKABLE AND INCONSISTENT WITH ESTABLISHED PRINCIPLES OF FEDERALISM.

THE FLSA, ENACTED IN 1938, DID NOT ORIGINALLY APPLY TO LOCAL TRANSIT EMPLOYEES; HOWEVER, CONGRESS GRADUALLY EXPANDED ITS COVERAGE TO INCLUDE TRANSIT EMPLOYEES AND MOST OTHER STATE AND LOCAL-GOVERNMENT EMPLOYEES. IN 1976, NATIONAL LEAGUE OF CITIES HELD THAT THE FLSA COULD NOT BE APPLIED CONSTITUTIONALLY TO "TRADITIONAL" GOVERNMENT FUNCTIONS OF STATE AND LOCAL GOVERNMENTS. IN 1979, THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR ISSUED AN OPINION THAT SAMTA WAS COVERED BY THE FSLA. SAMTA SUED FOR A DECLARATORY JUDGMENT TO INVALIDATE THE DEPARTMENT'S DECISION AND THE DEPARTMENT COUNTERCLAIMED FOR ENFORCEMENT OF THE OVERTIME AND RECORD-KEEPING REQUIREMENTS OF FLSA. GARCIA AND OTHER SAMTA EMPLOYEES ALSO SUED SAMTA FOR OVERTIME PAY.

THE IMPACT OF GARCIA IS DIFFICULT TO FORETELL. BASICALLY, IT MEANS THAT MILLIONS OF STATE AND LOCAL GOVERNMENT WORKERS INCLUDING POLICE OFFICERS, FIRE FIGHTERS, TRANSIT WORKERS AND TEACHERS, WILL NOW BE COVERED BY THE FLSA. HOWEVER, THERE ARE NUMEROUS EXCEPTIONS IN THE FLSA FOR MANAGERIAL AND OTHER WORKERS. PAYMENT OF THE FEDERAL MINIMUM WAGE SHOULD NOT CAUSE AN UNDUE BURDEN ON LOCAL ECONOMIES, SINCE ALL BUT THE SMALLEST JURISDICTIONS NOW HAVE WAGE STANDARDS THAT EQUAL OR EXCEED THE FEDERAL MINIMUM OF $3.35 PER HOUR. HOWEVER, THE REQUIREMENT OF OVERTIME PAY IS OF GREAT CONCERN TO LOCALITIES.

UNDER THE FLSA, OVERTIME IS CALCULATED BASED ON THE FORTY-HOUR WEEK. MANY LOCAL GOVERNMENTS DO NOT USE THIS STANDARD AND WILL HAVE TO RECALULATE PAYMENTS OF OVERTIME TO WORKERS NOW DEEMED COVERED UNDER THE ACT. THE PROVISION OF PREMIUM PAY FOR WORKING SPLIT-SHIFTS, TRAVELING TO DISTANT WORK SITES, ETC., WILL HAVE TO BE RE-EXAMINED. THE POLICY OF AWARDING ADDITIONAL TIME FOR WHICH WORKERS ARE PAID MAY NEED TO BE REVISED TO COMPLY WITH MINIMUM WAGE REQUIREMENTS AND FOR FIGURING OVERTIME.

PROBLEMS ARE ALSO LIKELY TO ARISE FOR LOCAL GOVERNMENTS WITH RESPECT TO FLEX-TIME ARRANGEMENTS FOR POLICE OFFICERS AND FIRE FIGHTERS. OFTEN THESE WORKERS ARE GIVEN

COMPENSATORY TIME OFF FOR WORKING EXTRA SHIFTS OR ARE PAID AT A REDUCED RATE FOR TIME SPENT IN COURT. SUCH ARRANGEMENTS, WHICH ARE THE PRODUCT OF COLLECTIVE BARGAINING, WILL NOT BE PERMITTED UNDER GARCIA. IT IS ALSO UNCLEAR WHETHER GARCIA WILL BE APPLIED RETROACTIVELY TO REQUIRE THE PAYMENT OF BACK PAY CLAIMS BY EMPLOYEES FORMERLY EXEMPTED FROM THE FLSA BY NATIONAL LEAGUE OF CITIES. THE COURTS WILL HAVE TO DETERMINE WHETHER RETROACTIVITY IS APPROPRIATE AND CERTAINLY THE HIGH COST OF REQUIRING RETROACTIVE PAYMENTS BY STATE AND LOCAL GOVERNMENTS WILL HAVE SUBSTANTIAL INFLUENCE ON THAT ISSUE.

I LOOK FORWARD TO HEARING THE TESTIMONY OF TODAY'S WITNESSES. THE ISSUES BEFORE THE COMMITTEE ARE FAR-REACHING ONES AND WE WILL BENEFIT FROM DISCUSSING THE DIFFERENT VIEWS OF THOSE PRESENT IN ASSESSING THE IMPACTS OF THIS SIGNIFICANT SUPREME COURT DECISION.

THANK YOU, MR. CHAIRMAN.

## Written Questions Posed by Senator D'Amato

For Local Government Representatives:

1) How will the Garcia decision impact on your local budget?

2) If the courts determine that Garcia should be applied retroactively to require payment of claims for back pay, how will this effect your budget?

For Police and Fire Union Representatives:

2) Is the Garcia decision a step forward for your workers, or will it diminish the compensation agreements they have won through collective bargaining?

ORGANIZED DEC 13 1808

MADISON COUNTY, ALABAMA

OFFICE OF

MADISON COUNTY COMMISSION

532-3492

MADISON COUNTY COURT HOUSE
HUNTSVILLE, ALABAMA
35801

July 9, 1985



Mr. Kenneth M. Brown
Economist
Congress of the United States
Joint Economic Committee
Washington, D. C. 20510

Dear Mr. Brown:

In response to your request on behalf of Senator D'Amato, you will find the information enclosed. As you can see, the Garcia decision will have a devastating effect on my county and you can infer from that it will have a greater, if not equal, effect on every county, city and state in this country.

Thank you for the opportunity to present this information. Please let us know if you need anything else.

Sincerely,

Mike Gillespie

Mike Gillespie, Chairman
MADISON COUNTY COMMISSION

MG/bs

Enclosures

PROJECTED OVERTIME COST FOR THIS

YEAR'S BUDGET

EFFECTIVE DATES: APRIL 15 TO SEPTEMBER 30, 1985

| | | |
|---|---|---|
| **SALARY COST** | | 42,143.79 |
| **FRINGE BENEFIT COST:** | | |
| F.I.C.A. | 2,971.14 | |
| Retirement | 2,908.00 | |
| Workmen's Compensation | 1,444.03 | |
| Total Fringe Benefit Cost | | 7,323.17 |
| **ADDITIONAL MANHOURS COST:** | | |
| Computer Programmer | 158.04 | |
| Account Clerk IV | 144.72 | |
| Total Manhours Cost | | 302.76 |
| **TOTAL COST** | | $49,769.72 |

ESTIMATED ANNUAL COST

(This does not include salary increases, or increases in fringe benefits cost.)

| | | |
|---|---|---|
| **SALARIES COST** | | $76,348.13 |
| **FRINGE BENEFITS COST** | | |
| F.I.C.A. | 5382.54 | |
| Retirement | 5268.00 | |
| Workmen's Compensation | 2617.09 | |
| Total Fringe Benefit Cost | | 13,267.63 |
| **OTHER EMPLOYEE'S COST** | | 289.44 |
| **TOTAL COST** | | $89,905.20 |

ESTIMATED COSTS IF RETROACTIVE PAYMENTS REQUIRED
(TWO YEARS)

| | | |
|---|---|---|
| **SALARIES COST** | | $152,696.26 |
| **FRINGE BENEFITS COST** | | |
| F.I.C.A. | 10,765.09 | |
| Retirement | 10,536.00 | |
| Workmen's Compensation | 5,234.18 | |
| Total Fringe Benefit Cost | | 26,535.27 |
| **PAYROLL CLERK** | | 578.88 |
| **TOTAL COST** | | $179,810.41 |

Pat Russell

PRESIDENT, CITY COUNCIL
COUNCILWOMAN, SIXTH DISTRICT
CITY OF LOS ANGELES

July 22, 1985

Kenneth M. Brown, Economist
Congress of the United States
Joint Economic Committee
Washington, D.C. 20510

Dear Mr. Brown:

Thank you for your letter concerning my testimony before the Joint Economic Committee. You have asked me to reply to Senator D'Amato's two specific questions.

As Mayor Bradley mentioned in his June 6 letter to the White House (copy attached), the additional costs to the city could be as high as $100 million. This is an annual, ongoing cost based on worst case assumptions. Favorable interpretation of the regulations, revised regulations, negotiated trade-offs with our unions, and changes in management practices could bring this figure down, but at this time it is only prudent to do our planning on the $100 million figure.

The City's 1985-86 budget contains no additional funds for FLSA requirements. Raising taxes is infeasible. That leaves curtailing essential services and/or laying off personnel.

As to retroactivity, the City of Los Angeles is and has been running an $8 million liability per month --not counting liquidated damages and attorney's fees. Again, we have no available funds to pay for retroactive claims.

Thank you again for your interests in the problems of state and local government. State and local governments need time to prepare for implementation of FLSA, to negotiate with our unions, and, if possible, get the Act or regulations changed.

Very truly yours,

Pat Russell

Councilwoman, Sixth District
President, City Council

ATTACHMENT:

PR:bv

City Hall, Room 260 Los Angeles 90012 485-3357 District Offices: Westchester: 641-4717 Crenshaw: 296-5997


CITY HALL
LOS ANGELES 90012
485-3311

OFFICE OF THE MAYOR

TOM BRADLEY
MAYOR

June 6, 1985

Mitchell E. Daniels, Jr.
Deputy Assistant to the President
Director, Officer of
Intergovernment Affairs
The White House
Washington, D.C. 20500

Re: Fair Labor Standards Act

Dear Mr. Daniels:

We appreciate the Administration's concern over the impact of the Garcia case on cities and your solicitation of information.

It is indeed ironic that, at the time the General Revenue Sharing Program is being eliminated, another costly Federal Program is being imposed. FLSA could be double the financial problem caused by eliminating our $55 million in General Revenue Sharing.

For civilian employees, the financial impact of FLSA now appears managable. Certain operations and employees, however, will be adversely impacted. Where the workload is variable, overtime hours worked are now put on the books to be taken off later, when the workload is lower, at time-and-one-half. Many employees prefer the compensatory time-off option, or at least want the freedom of choice in the matter. It is also clearly much less costly for the taxpayers to operate this way. If your new rules can help in this area, they will be valuable.

The major problem will be with our police, fire, and paramedic services. Over one-half of the City budget is allocated to these services.

Our police, fire, and paramedic personnel are some of the best compensated private or public front line workers in the nation. Their unions are the strongest in the City. As required in State law, we already have negotiated agreements with them covering hours of work and overtime compensation.

Police, fire, and paramedic personnel have been satisfied with the current situation. However, they see a gold mine in the Garcia decision. As examples, following are some of the claims made by the police union.

Meal time - The City's current provisions do not count meal time as time worked for police officers. FLSA defines meal time for police officers as time worked (if the City elects a 7(k) exemption, which permits the selection of a work period of up to 28 days). The City's total daily tour of duty is 8 hours, 45 minutes, with 45 minutes for lunch. We also define overtime as time worked in excess of 8 hours a day. (FLSA defines overtime as time worked in excess of a specified number of hours in a 7 to 28 day period). If FLSA is imposed and unless we can negotiate out of our current 8 hour provision, then either our police officers will be paid $20 for eating lunch or we will reduce the tour of duty to 8 hours, thus reducing our already thin police service to our citizens.

Dogs and motorcycles - Bomb sniffing dogs are taken home by their police officer handlers. The union claims that the home care of these dogs is time worked under FLSA. As a convenience to motorcycle officers, motorcycles are used for commuting. The union claims that the officers' travel time from station of assignment to home and return as well as any minor maintenance done at home is time worked.

The list of police union claims will continue to grow.

Police workload is one of unpredictable peaks. When a major crime occurs at the end of a shift or at the end of a work period, the officers assigned must continue their investigation. Balancing this extra time worked within the work period becomes infeasible thus resulting in overtime. The officers involved are physically tired. The best way to do business is to grant them time off, a practice FLSA would prohibit.

Our fire service follows the western pattern of working three 24-hour tours of duty every nine days. It is our understanding that it was the eastern fire unions, which generally work 8 hours

a day, 5 days a week (at much higher taxpayer cost), who pushed for the 1974 FLSA amendment. The western unions opposed it.

To replace absentees, some of our off-duty firefighters volunteer to work extra shifts at straight-time cash. We have ample volunteers under this system. Firefighters now have a genuine, personal choice: time off or more cash. Under FLSA, they will just become rich but will have less time to enjoy their wealth.

The total additional costs to the City will depend on how the regulations are written. Based on current union demands, the additional costs could be as high as follows:

| | |
|---|---|
| Civilian | $10 million |
| Fire and Paramedic | 20 million |
| Police - regular | 20 million |
| Police - meal time | 35 million |
| Police - motorcycles, etc. | 15 million |
| | $100 million |

At a minimum, cities need time. The 1974 amendments provided a three year phase-in for fire, police, and paramedic services. Whatever is decided in 1985, time is still needed. Many jurisdictions are in the middle of multi-year labor contracts. To reopen contracts on the single issue of FLSA overtime will place management at an extreme disadvantage.

Also needed is some recognition of the difference between the eastern and western patterns of fire service work schedules. Some flexibility should be written into the regulations.

Again, I must express my sincere appreciation at being able to provide input at the policy level.

Yours truly,

Tom Bradley

TOM BRADLEY
Mayor

Senator WILSON. We will take a very brief recess now of about 4 minutes duration, if you would please be back in your seats at a quarter before the hour. Thank you very much.

[A short recess was taken at this point.]

Senator WILSON. We will now reconvene and recognize Congresswoman Fiedler.

Representative FIEDLER. I just simply wanted to say that I will be looking at all the testimony that is presented. Unfortunately, the House is expected to have a vote in just a few minutes so I won't have a chance to sit here and hear all your testimony, but I do appreciate not only the testimony that you will be giving but that of others that I won't have a chance to hear.

Senator WILSON. Thank you very much, Congresswoman Fiedler. We are grateful to you for finding the time to attend today.

Our next witness is one I particularly look forward to hearing. He is Detective Carlton Olson of the Los Angeles Police Department. We have heard from those who are elected officials, and those who are in administrative agencies dealing with personnel speculate that there is considerable concern that employees themselves may be disadvantaged notwithstanding the intentions to the contrary of the plaintiffs in the *Garcia* case, and we are very eager to hear from a working member of the public safety service who has some views that he's come back to share with us.

Detective Olson, we are particularly grateful to you and especially interested in the perspective that you bring to the committee as we attempt to deal with what should be a proper congressional response to the *Garcia* decision. Welcome to you, sir.

## STATEMENT OF CARLTON OLSON, DETECTIVE, LOS ANGELES POLICE DEPARTMENT

Mr. OLSON. Thank you, Senator Wilson and Congresswoman Fiedler.

Basically, I will not go into any great length. I submitted a prepared statement to the committee.

I am a police detective for the city of Los Angeles and I've served in that capacity for over 18 years. I am a little bit unique as to other police officers in the city of Los Angeles as I served on our board of directors of the police union and in my final year as president of that organization.

I would like to make one thing clear, that I do not represent the city of Los Angeles today, nor the police union, the Los Angeles Police Protective League, nor the Los Angeles Police Department.

Although in my prepared statement you will note that I did talk at great length on this issue of Chief Daryl Gates to express my views and the views of the officers that I had an opportunity to talk with, and he did not disagree with my feelings or the feelings of those officers.

The *Garcia* decision dealing with the overtime problem is one that as a police officer is unique in that I work in a specialized unit within the Los Angeles Police Department. The investigations that I do are not what you consider a luxury of the community but a necessary item, but it's not a necessary item in that when put in context with a homicide that has occurred where an entire family

has been massacred and the entire neighborhood is filled with police officers for 24 hours a day working to try to come up with the little clues found in the front yard or blood stains or things of that nature, but it is an operation or a division that identifies major problems and then seeks to eliminate them from within the city of Los Angeles or the surrounding area where the overflow goes in.

Under my interpretation or understanding of the way the *Garica* decision would supply, overtime would have to be in cash compensation or overtime would be taken off in the same given period of time, say a given month, that you earned it.

The investigations that I am involved with run sometimes as long as 2 or 3 months, maybe even longer. Our days, our hours, vary greatly. We don't have the luxury of stopping at 4 o'clock in the afternoon and watching the suspect continue on off into the sunset. We need to continue our activities.

The overtime that's addressed in our memo to you deals with the time and a half issue. It also deals with the idea that police officers are paid time and a half in money or compensation time.

Under contract negotiations there isn't any control over how much money is there, but if the money isn't available then it reverts to compensation time.

Chief Gates indicated that currently it appears that too many officers are having to put too many hours on the books for compensated time and, therefore, he would seek in his future budgets to gain a little more money.

The local option I think is really what I find is a key issue here. The city—our Council President Russell was here addressing you from the city, and in the audience is a representative of the Los Angeles Police Protective League. They or their representatives meet at the bargaining table and settle the issues of overtime. As an employee and as a member of that organization, I have the right to ratify the contract or reject it. Council President Russell has the same option, as the city council has to vote on it.

What I perceive will happen in the city of Los Angeles under the *Garcia* decision as it would apply to my job, is that the lengthy investigations that I consider necessary for the city of Los Angeles will be jeopardized. At the end of an 8-hour shift, if there's no money available, I would be instructed to go home. The time it would take to catch up to that investigation after a day of laying off and coming back the next morning might not—the investigation might never be completed.

I can cite some examples if the committee wishes on some investigations that have taken a great length of time and those investigations would probably—one of them would be in 1983—would probably still be going on to reach the same conclusion that it did as early as it did.

I believe that police officers should receive time and a half for overtime. I have been shot on this job. I have been shot at on this job and I doubt, after having almost 19 years on it, I would volunteer to come in on my own time and do police work, especially if I myself or my family is not covered by some type of benefit.

But having been on the labor side, I look at the city's problems and I look at the police officers' problems and so I have somewhat

of a different viewpoint, but I did go out and I did poll officers that I worked with and other officers in the department and without that compensated time, without the opportunity to take that time off at the end of some lengthy strenuous investigations, we would probably be patients in that mental hospital instead of being out on the street working.

Basically, that concludes my statement. You have my prepared statement that I presented to the committee, and I am here to answer any questions you might have.

[The prepared statement of Mr. Olson follows:]

## PREPARED STATEMENT OF CARLTON OLSON

Mr. Chairman, Members of the Sub-Committee on Economic Goals and Intergovernmental Policy:

My name is Carlton Olson and I am currently a working Police Detective II for the Los Angeles Police Department, assigned to Administrative Vice Division. This Division deals with major vice crimes in and around the City of Los Angeles. I have worked this specialized assignment for 14 of my 18 years on the Police Department. I served on the Board of Directors of the Los Angeles Police Protective League for three years. I was President of that organization during my final year in 1981. The Los Angeles Police Protective League is the bargaining and employee representative unit for the 6800 members of the Los Angeles Police Department. I am now and have been since 1982, the President of the Los Angeles Police, Fraternal Order of Police, Lodge #1 for California. This is a small FOP Lodge made up of officers from the Los Angeles Police Department, the Los Angeles County Sheriffs Department and some Federal officers. Although Lodge #1 is small, its membership represents a cross section of Police Officers within this City. The purpose of this Lodge is not to bargain on contracts for Police Officers, but to look at legislation on both the State and Federal levels. As a representative of the Lodge and of the Los Angeles Police Protective League, I have lobbied in our State Capitol for the past six years. The issues being lobbied dealt with Penal Code laws and employee rights and benefits.

I am appearing before this Sub-Committee to express my views as a working Police Detective and to voice the opinions of other working officers that I have contacted regarding the issue of overtime as addressed in the Garcia vs San Antonio Metropolitan Transportation Authority decision. I do not represent the City of Los Angeles, the Los Angeles Police Department or the Los Angeles Police Protective League. I have personally spoken with Chief Daryl Gates about the Garcia decision and he has given me permission to advise the Sub-Committee that he does not disagree with my position or that of those officers I have polled regarding this issue.

The letter, dated June 7, 1985 from Chairman Lee H. Hamilton is attached to my response to the three questions asked of me by this Sub-Committee. I can only respond to the first question, "How do local and State police officers view being made subject to the Fair Labor Standards Act" from the perspective of a working officer. Because my investigations are usually lengthy in terms of the total time it takes to collect sufficient evidence to take enforcement action against the suspects or their entire organization and the number of hours worked within a given day vary so greatly, the Garcia decision would most probably jeopardize these investigations. Since the City of Los Angeles would be required to pay cash overtime for these lengthy investigations or allow only time off to be taken during the same period that the overtime was earned, an investigation taking place over several months would in all probability not be possible. First of all, the City of Los Angeles could not afford to allow special police investigations such as narcotics and vice to take place. Any money budgeted for cash overtime payments would be set aside for emergency situations and officers being required to attend court on their off duty time. Examples of emergency situations would be homicide and SWAT off-hour call-outs. As for court overtime, the Police Department does not have sufficient manpower to allow officers to sit in court instead of being on the streets. Off duty court impacts officers on vacation, days off or working P.M. and morning watch hours.

Chief Gates has stated that he can not work over budget with regard to allotted overtime money. Nothing in the way of special investigations could be accomplished without prior funding. As a Detective, I would not want my investigations to be terminated because I have worked an eight hours shift for that day. Trying to pick up the pieces on the following day or day after, would not work either. Naturally, taking time off during such lengthy investigations would also be out of the question.

The second question "Would they prefer their current situation with regard to wagers and hours of work" can be answered very simply "Yes". In my comments, I would like to make it clear that I do not want to jeopardize any Police Officers rights of being paid time-and-a-half for overtime. The City of Los Angeles has a Memorandum of Understanding with its employee Police Officers. Within this M.O.U., wages and hours are defind. These issues are negotiable whenever the contract is on the table. Although the total amount of money sit aside for paid overtime is not an item on the bargaining table, the City of Los Angeles, the Los Angeles Police Department and the bargaining unit for the employees all recognize that a balance needs to be maintained. Currently, Chief Gates states that too much overtime is being accumulated by officers in the form of time off and in future budgets, more money is needed for paid overtime.

The third question "What suggestions do you have for Congressional action" is addressed in question number two. Local options by City, Counties, States etc., should be the rule. Where a contract or M.O.U. doesn't decide the question, than the Fair Labor Standards Act should apply so that officers receive fair compensation for hours worked. Time-and-a-half overtime meets the requirement for fair compensation.

Senator WILSON. Thank you very much, Detective Olson. I think you put with great clarity your concerns. I note that among the examples that you cited of law enforcement activities that in your view would be jeopardized by the *Garcia* decision you have included homicide investigations, as you addressed in your oral testimony, and also SWAT off-hour callouts, and I guess it would apply to virtually every activity, including those, would it not?

Mr. OLSON. If money were available, the money would have to go to those items that are mandatory on the spot musts and the homicide callout would be one of those items of a barricaded suspect shooting at innocent children in a school playground and officers being called out off duty to cover that situation. The overtime would have to go to that.

Basically, what would be left out of any money the city had available would then go out to other special investigations.

Senator WILSON. This investigatory function which you are so deeply involved in I think probably, as pressures built to curtail not just other services but police services, I think that you're right in thinking that it would be a victim.

Chief Gates may well be budgeting additional money for that purpose, but at some point he's going to run smack up against a ceiling that is unwillingly imposed by the city council because it's imposed on them by law, and the victim will suffer good police work because it is curtailed in the name of cost.

One other thing that you didn't comment on in your oral testimony but you have in your prepared statement that I think deserves considerable attention—I don't know whether you added this after discussing it with prosecutors or simply did so from your own knowledge of the situation, but if you haven't talked with them and if no one has, one of the victims of what I think is inevi-

table under the application of *Garcia* to State and local employees is that a number of prosecutions are going to be dismissed because police officers are simply not available to testify.

Let me quote from your prepared statement. "As for court overtime, the police department does not have sufficient manpower to allow officers to sit in court instead of being on the streets. Off duty court impacts officers on vacation, days off or working afternoon and morning watch hours." That's absolutely true, and if they cannot get compensatory time off, I don't know how we can expect to see officers giving vital testimony, testimony that in many cases makes the difference between a successful prosecution and the requirement that the prosecutor dismiss.

Well, I think the point that you have made abundantly is that for good investigatory work of the kind that is needed to first break particularly difficult cases and, second, to successfully prosecute them, Chief Gates and the city attorney or district attorney have to be able to count on the presence of police officers and that means that they are going to have to budget for it, and it's just a head-on conflict building there.

But I think perhaps even more valuable is the perspective that you have given this morning with respect to the working police officer and the necessity for time off as opposed to additional compensation.

I think it's an interesting thing that when he was here at the witness table Mr. Gillespie emphasized that a number of rural officers have chosen to live and work in a smaller town setting because they enjoy that setting and because they would really prefer the time to the money. You make what is at least as compelling a point, that those who are confronted with the high-tension work of big city police work need the time off. Perhaps they need the time off, even if they didn't want to take it, in order to keep the ability to function properly.

I will be very interested in working more with you, Detective Olson, because I think this perspective is one that has been almost totally ignored. The conventional wisdom is that the plaintiffs who brought this action represent, with perhaps the best intentions in the world, the undivided, unified desire of not just working officers but of employees generally. And I think it's pretty clear that that is not true. Your testimony makes it very clear and I would be very much interested in working with you in really trying to determine the extent to which your feelings are shared not just within the Los Angeles Police Department but among peace officers elsewhere.

Mr. OLSON. Well, in conclusion, sir, I would like to say that basically in the city of Los Angeles we have a bargaining unit and that's our form of representation and the city has their side, and I believe under local options our issues are covered because our problems are dealt with at the local level and those needs are right there before the city council and they know what the problems are.

Senator WILSON. I assume that during the time that you served as leader of the bargaining unit for police officers, one of the things about which you bargained with the city was how an officer should be compensated for overtime.

Mr. OLSON. Yes, sir.

Senator WILSON. I think you make the point very well. Thank you very much, sir. We're very grateful for your presence and your testimony is very valuable.

Our final witnesses this morning will be a panel consisting of Mr. Finis Welch, labor expert, the founding partner of his own consulting firm; and Mr. Kenneth Howard, who is an expert on the financing and operation of municipal government. We are delighted to have both of you here, gentlemen. You supply the perspective of a professional observer and counselor to elected officials and administrative officials. We have had in the person of Detective Olson a very much needed perspective on the part of the employee and we now look forward to having the benefit of your years of observing and counseling State and local governments.

I will call first upon Mr. Welch and next upon Mr. Howard. Mr. Welch, welcome.

## STATEMENT OF FINIS WELCH, LABOR EXPERT

Mr. WELCH. Good morning. Thanks for giving me the opportunity of discussing possible consequences to extending FLSA coverage to State and local government employees.

I have long been a student of minimum wage issues. Much of my research on these issues is published in professional economic journals and I have testified several times before committees such as this.

Today, I testify in my capacity as professor of economics at UCLA, chairman of Unicon Research, and as head of Welch Associates.

The main points I want to make are: (1) Minimum wage laws are obverse. They bring the most harm to those they are presumably intended to help.

(2) Even though I am opposed to minimum wage laws and their accompanying maximum hours constraints, I doubt that extending FLSA to State and local government employees will have much of an effect at this time. My preference is that Congress specifically exempt government employees, but my opinion is based on a belief that the law is generally harmful and not on any rationale that governments are intrinsically different in this matter than agriculture, retail trade, or manufacturing.

You can see the obversity by exploring options available to those directly affected by minimum wage laws. Assuming a world with no wage constraint and considering employment arrangements that result, in thinking about these arrangements remember that everyone—employer and employee—has a personal obligation to do the best that he or she can. Now pass a law stating that all arrangements with wages below some level—$3.35 an hour, for example—must be abrogated. Those who cannot find a job paying as much as $3.35 are told they simply cannot work. Employers who are parties to low-wage arrangements will try to mitigate the cost increases of the new law by reducing the employment of low-wage workers. They have the following options: they can curtail production of goods or services, which they will do if profitability is threatened or if revenue sources are not there. They can substitute in favor of more skilled workers who, in any case, would earn more

than the minimum. They can automate and let machines do part of the work that would have been done by subminimum wage workers.

In contrast to employers, the options available to employees who are earning less than the minimum are not attractive. The fact that they would earn less is a statement. That wage is the best that they can get. The law says it's not good enough, find a higher wage or quit working. Some will find minimum wage jobs but others will not.

The general rule among the subminimum wage workers is that those most likely to find work are those who in any case would have had the highest wages.

By this time, job losses associated with minimum wage laws are well documented. There's much less agreement among economists abut effects of maximum hours constraints.

My own opinion is that there is little effect. I will demonstrate my rationale with the following example.

Suppose John Doe works 50 hours each week and is paid $275. We could say that his hourly rate is $5.50. That after all is $275 divided by 50 hours. If we were then to compute the added cost of the time and a half option, we would say that it's $27.50 and that would convert to the cost estimates that you have been seeing today.

But if in fact an overtime constraint, for hours above 40, is imposed, we could also say that the job is currently being paid according to an overtime rule, that his straight time wage in fact is $5 an hour for the first 40 and then for the next 10 he's being paid $7.50 for each hour or $75 above his straight-time salary of $200. My point is that nothing need change; what in one context is a long workweek without overtime pay, in another context, can be described as honoring an overtime constraint.

Presumably what matters to Doe and his employer is the full package, the hours worked and the compensation. As long as this package is mutually agreeable, why would it matter if some of it is called straight time and the rest is called overtime?

Overtime pay constraints can have an effect when combined with minimum wages because the minimum would inhibit the ability to reduce what is called the straight-time wage. And newly instituted overtime coverage can have an effect in the presence of other impediments to wage adjustments.

Returning to the example, suppose John's agreement with his employer was in the form of a union contract, stating that his hourly rate is $5.50. An overtime compensation rule would have an effect until the wage could be renegotiated.

The Labor Department's Employment Standards Administration has estimated that 81 percent of all nonsupervisory employees are covered by FLSA under interpretations and amendments they had in 1981. Adding State and local employees would bring the number to 91 percent. What would the effects be? Several points are noteworthy.

First, in addition to the District of Columbia, 43 States have their own minimum wage laws. Most of them, by the way, include State and local employees. As of 1981, most of them as well had adopted the Federal level of $3.35. In that year, 46.5 percent of all

U.S. employment was in States that used the Federal level as the basic minimum.

State and local coverage is fairly ambiguous, at least in my reading of the State laws or what there is available, but I would guess that a majority of the States do cover their State and local employees.

This is to say that the extension of FLSA to the States in many cases would be redundant with existing State laws.

Now the easiest way to get an idea of the effect of extending the level of minimum coverage per se, as distinct from the overtime constraint, is to check and see how many people are earning less than the minimum, how many would be directly affected.

Obviously a 25-cent minimum would have no effect in a world where everyone earns more than that.

The first table in my prepared statement refers to data from the Current Population Surveys in March and May 1983. It gives three percentages—the percentage of nonsupervisory employees who earned less than the Federal minimum, $3.35; the percentage earning exactly $3.35; the percentage earning between $3.35 and $3.75. The higher number, $3.75, is used to give an idea of the changes that might result from a somewhat higher minimum.

I have selected three breakdowns that contrast State and local government employees with retail trade, a typically low-wage industry, and then with all private sector employment, and the purpose of the contrast is to show that as of spring 1983 coverage extension to State and local government employees would have affected only 1.2 percent of those workers. The fraction is certainly lower today. The numbers are low because the nominal minimum is low. It would, of course, be higher if the nominal minimum were raised and I would be more pessimistic about the potential impact of the Supreme Court's recent decision.

Effects stemming from overtime pay requirements are much more speculative. The second table in my prepared statement shows two fractions—percentages of nonsupervisory employees who usually work more than 40 hours each week, and the percentage who work above 40 hours in the week preceding the census interview.

As in the first table, reference here is to the interviews conducted in March and May of 1983 and the important point is that here State and local governments are just about typical of all private employees. About 20 percent of their employees are working above 40 hours in these 2 weeks, which I presume are random or representative weeks. These fractions are not trivial.

What we would like to know is how many people working above 40 hours are currently paid according to the time-and-a-half rule. Between 40 and 50 percent of nonsupervisory employees of State and local governments are in jobs where terms and conditions of employment are covered by union contracts. Many of the contracts have overtime provisions. There are others covered by State laws which also have overtime constraints.

Whatever effect would occur is restricted to those who are not presently paid for overtime and whose basic hourly wage cannot be reduced to compensate for the added cost of the overtime rule.

As I tried to show with the earlier example, given sufficient time, the overtime restriction will be ineffective. I cannot evaluate the short-run effect, but I suspect that whatever effect there is will be confined to the short run, to the adjustment period.

Thank you.

[The prepared statement of Mr. Welch follows:]

## Prepared Statement of Finis Welch

Thank you, Mr. Chairman and members of the subcommittee, for giving me the opportunity of discussing possible consequences of extending FLSA coverage to state and local government employees. I have long been a student of minimum wages. Much of my research on these issues is published in professional economics journals and I have testified several times before congressional committees describing my results and conclusions.

The main points I want to make today are: one, minimum wage laws are perverse. They bring the most harm to those they are presumably intended to help. Two, even though I am opposed to minimum wage laws and their accompanying maximum hours constraints, I doubt that extending FLSA to state and local government employees will have much of an effect at this time. My preference is that Congress specifically exempt governmental employees but my opinion is based on a belief that the law is generally harmful and not on any rationale that governments are intrinsically different in this matter from agriculture, retail trade, or manufacturing.

You can see the perversity by exploring options available to those directly affected by a minimum wage law. Assume a world with no wage constraint and consider employment arrangements that result. In think-

ing about these arrangements remember that everyone, employer and employee, has a personal obligation to do the best that he or she can.

Now pass a law stating that all arrangements with wages below some level, $3.35/hour for example, must be abrogated. Those who cannot find a job paying as much as $3.35 are told that they can no longer work.

Employers who were parties to low wage arrangements will try to mitigate the cost increase by reducing employment of low wage workers. They have the following options:

(1) They can curtail production.

(2) They can substitute in favor of more skilled workers who, in any case, would have earned more than the minimum.

(3) They can automate and let machinery do part or all of the work that would be done by sub-minimum wage workers.

In contrast to employers, the options available to employees who, otherwise, would earn less than the minimum are not attractive. The fact that they would earn less is a statement. That wage is the best they could get. The law says it is not good enough. Find a higher wage or quit working. Some will find the minimum wage jobs but others will not. The general rule among the sub-minimum wage workers is that those most likely to find work are those who would have had the highest wage in any case.

By this time, job losses associated with minimum wage laws are well documented. There is much less agreement among economists about effects

of maximum hours constraints. My own opinion is that there is little effect. The rationale can be illustrated by the following example.

Suppose John Doe works 50 hours each week and is paid $275. We could say that his hourly rate is $5.50, which is $275 divided by 50 hours. But, if an overtime constraint for hours above 40 is imposed, we could also say that his straight-time wage is $5 per hour. The first 40 hours pays $200 and the next 10 at $7.50 per hour pays $75.

Presumably what matters to Doe and his employer is the full package, hours worked and compensation. As long as this package is mutually agreeable, why would it matter if some of it were called straight-time and the rest was called overtime?

Overtime pay constraints can have an effect when combined with minimum wages because the minimum bounds the straight-time wage. And, newly instituted overtime coverage can have an effect, in the presence of other impediments to wage adjustments. Returning to the example, suppose John's agreement with his employer was through a union contract stating that his hourly wage is $5.50. An overtime compensation rule would have effects until the wage could be renegotiated.

The Labor Department's Employment Standards Administration has estimated that 81 percent of all non-supervisory employers are covered by FLSA under interpretations and amendments that held in 1981. Adding state and local employees would bring this number to 91 percent.

What would the effects be? Several points are noteworthy. First, in addition to the District of Columbia, 43 states have their own minimum

wage laws and many states now adopt the federal rate. As of 1981, the most recent year for which I have data,[1] 46.5 percent of all U.S. employment was in states where the state's basic minimum was the federal minimum. Although I could not find a completely unambiguous source, it seems that the majority of the state laws extend their coverage to non-federal government employees.

Thus, in a non-trivial number of cases, extension of FLSA will be redundant with existing statutes.

The easiest way to get an idea of effects of extending the minimum wage itself is to check to see how many people would be affected. Obviously a 25¢ minimum would have no effect in a world where everyone earns more than that.

The following table refers to data from the Current Population Surveys in March and May of 1983. It gives three percentages. The percentage of non-supervisory employees (paid by the hour and reporting a wage) who earned less than the federal minimum of $3.35, the percentage earning exactly $3.35, and the percentage earning between $3.35 and $3.75. The higher number, $3.75, is used to give an idea of changes that might result from a somewhat higher minimum.

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[1] My comments on state legislation rely heavily on the work of Aline O. Quester, "State Minimum Wage Laws, 1950-1980," Report of the Minimum Wage Study Commission, Volume II.

Percent of Non-supervisory Workers who are Paid by the Hour and Whose Wage is:

| | Below $3.35 | $3.35 | Between $3.35 and $3.75 |
|---|---|---|---|
| State and Local Governments | 1.2 | 4.2 | 4.0 |
| Retail Trade | 11.2 | 15.3 | 20.2 |
| All Private Employees | 2.3 | 4.2 | 5.4 |

As of Spring 1983, coverage extension for state and local government employees would have affected only 1.2 percent of those workers. The fraction is almost certainly lower today. This number is low because the nominal minimum is low in comparison to general wage levels. If it were higher, I would be more pessimistic about the potential impact of the Supreme Court's recent decision.

Effects stemming from the requirement that hours above 40 must be compensated at least one-and-a-half times the straight-time wage are much more speculative.

The second table shows two fractions. The percentage of non-supervisory employees who usually work more than 40 hours each week and the percentage who worked above 40 hours in the week preceding their interview by the Census Bureau. As in the earlier table, reference here is to interviews conducted during March and May of 1983.

Percentage of Non-supervisory Workers Who:

| | Usually Work More Than 40 Hours | Worked More than 40 Hours Per Week Before Interview |
|---|---|---|
| State and Local Governments | 13.7 | 18.6 |
| Retail Trade | 8.3 | 11.8 |
| All Private Employees | 12.9 | 19.7 |

Clearly, the fraction of workers involved is not trivial. What we would like to know is how many of them are paid by a time-and-a-half rule. Between 40 and 50 percent of non-supervisory employees of state and local governments are in jobs where terms and conditions of employment are covered by union contracts. Many of the contracts have overtime provisions. There are others covered by state laws which also have overtime constraints.

Whatever effect would occur is restricted to those who are not presently paid for overtime and whose basic hourly wage cannot be reduced to compensate for the added cost of the overtime rule. As I tried to show with the earlier example, given sufficient time, the overtime restriction will be ineffective. I cannot evaluate the short run effect but I suspect it will not be large.

Senator WILSON. Thank you very much, Mr. Welch.

Mr. Howard, we have your excellent prepared statement. Go ahead. If you wish to summarize it, to whatever extent you wish to do so you may.

## STATEMENT OF S. KENNETH HOWARD, INTERGOVERNMENTAL EXPERT

Mr. HOWARD. Thank you very much, Senator Wilson.

I come before you with two strikes already. First, as the last person to appear, almost everything I care to say has been either alluded to or said. Second, I got misbilled as a municipal expert, a designation I would never accept when appearing before a Senator who spent 11 years as the mayor of one of our major cities.

What I do want to do is underscore only one point in my written testimony. The effect the *Garcia* decision can have upon the workings of the American Federal system as a federalism.

I want to spend a minute explaining how I came to this particular point of view. Until about 4 months ago, I was the executive director of the U.S. Advisory Commission on Intergovernmental Relations. ACIR is this National Government's flagship institution in the field of federalism and how it works in this country.

In addition, I have spent two periods in my career as a budget director of a State, once in North Carolina and once in Wisconsin, so I've worked the intergovernmental vineyards.

The *Garcia* decision causes me a great deal of concern. I do not represent the opinion of ACIR, nor that of the two States, nor that of my current employer, a consulting firm by the name of Chambers Associates. I am speaking as an individual who's been in the field and is very concerned about what this case says about American federalism, its strength and how it will operate.

I would give you one sentence from the majority opinion which Justice Blackmun wrote. "The political process ensures that laws that unduly burden the States will not be promulgated." I'm sure that as a former mayor, Senator, you have as hard a time believing that sentence as I do. I find it surprising that it appeared in the Court opinion, although obviously I have lifted it out of context. The basic thrust of the Court's point is that State and local governments can rely upon our existing political institutions to represent their views in national policy formulation, at least that part of national policy which is based upon the commerce clause.

It is not at all clear to State and local officials that these political institutions are a very strong defense for protecting their interests. These officials thought, as a matter of fact, that the 10th amendment had some meaning. The 10th amendment simply provides that residual powers go to the States or to the peoples of those States. The issue is: Who decides where that line is that determines when the Congress, or some other institution for that matter, has moved upon the States in a way that exceeds the limits that the 10th amendment attempted to set up?

What *Garcia* suggests is that those limits are to be defined by the Congress itself and that the courts would only get involved in the most extreme circumstances.

The idea that there will not be unduly burdensome laws coming out of this process is not reassuring, depending of course, on who decides what is "unduly." A lot of elected officials at the State and local level certainly find grants burdensome, even though the courts cited them as reflecting the fact that State and local governments have an impact on national policy. But grants come with a lot of provisions, a lot of restrictions, and a lot of requirements which do constitute a burden that local officials feel quite frequently.

From my vantage point, the most interesting thing about this decision is its timing in relation to work that was being done at ACIR. Interestingly, ACIR's work is cited in both the majority and minority opinions of this case. It struck me as really curious that at the very time that the Court was saying we ought to rely on American political institutions to protect State and local interests and to reflect them adequately in national policy formulation, ACIR was beginning to explore why State and local government interests were so little reflected in national policy formulation.

ACIR took up the question: Whatever happened to political parties? Whatever happened to the State political parties in particular so that they no longer are as influential as they once were? Why are they no longer the bastions of State and local interests in the national political scene that they once were?

Although the Commission has not completed its work, the research results are fairly clear: Modern fund-raising technologies, modern media, and similar factors have so changed the character of the American political system that the parties are not essential to electing candidates any longer, at least not for offices in the National Government.

In short, one of the major forces that the State and local governments have relied upon is essentially ineffectual. To have the Court come behind and say, "Rely on those institutions," is even more disturbing.

I think the final point to be made is that the 10th amendment is still in the Constitution. As Justice Powell commented for the dissenters, "The States' role in our system of government is a matter of constitutional law, not legislative grace." He went on to comment that despite what he called some genuflecting in the Court's opinion to the concept of federalism, "* * * today's decision effectively reduces the 10th amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."

That kind of language, admittedly in a very split, 5 to 4 Court, suggests that some very difficult issues were being faced. The conclusions reached are not reassuring to officials at State and local levels nor are they reassuring to those of us who accept the basic founding notion that we created federalism because we thought it would help prevent a tyrannical government. The 10th amendment was not some kind of a throw-away provision that got added to the Constitution to find votes in the approving conventions across the States 200 years ago. It was essential to getting the Constitution approved by those States because they insisted that as a part of the Bill of Rights there had to be such a provision.

To find this basic question of our constitutional guarantees reduced, if you will, to a political question or a procedural issue, does

not bode well for federalism. I guess we have to hope as citizens that the Congress will exercise greater restraint than we may think it has in recent history on these issues. One needs only go to the drunk driving law and setting the mandatory drinking age across the country. There was a major federalism question involved in that instance, how State and local governments should decide certain issues. But that issue got almost no attention when Congress chose to act.

The drunk driving legislation is a prime example of why we need to be concerned with whether Congress will even weigh federalism concerns as it balances decisions it must make.

Justice Rehnquist in his very short and very pointed dissent also said that he hoped "these points in principle will again in time command the support of the majority" of the Court. So we hope that eventually, with time, both the Congress and the Court will come to give the 10th amendment some greater recognition that it has received in this decision.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Howard follows:]

## PREPARED STATEMENT OF S. KENNETH HOWARD

The Impact of the Garcia Decision
on State and Local Governments

The Garcia decision has profound implications for the future viability of American federalism. This conclusion is a personal one but it is based on my experience as the budget director of two states (North Carolina and Wisconsin) and my work for the past three years as Executive Director of the U.S. Advisory Commission on Intergovernmental Relations (ACIR). The latter organization is this nation's flagship institution in studying how American federalism works, and its work was cited in both the majority and dissenting opinions in the Garcia case. I am no longer employed by any of these organizations and do not represent any official viewpoint on their behalf, nor that of my current employer, Chambers Associates, a public policy consulting firm here in Washington. However, I am very much a concerned and, I hope, informed private citizen who has also done some university teaching in this field.

At issue in this case was whether the minimum wage and overtime provisions of the national Fair Labor Standards Act (FLSA) apply to employees of publicly owned mass transit systems. In a 1976 case, National League of Cities v. Usery (426 U.S. 833), the Court had ruled that these provisions did not apply to state and local units "in areas of traditional governmental functions." That 1976 decision was the first in many years to give much judicial weight to the Tenth Amendment, which provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Court could have dealt with Garcia simply by saying whether or not mass transit was a "traditional" governmental function.

Indeed, the Reagan Administration had urged that the Court rule mass transit not a traditional function and simply extend FLSA coverage to include this group of municipal employees. The Court, however, went much further and overturned NLC v. Usery entirely and the language of the decision casts great doubt on the current significance of the Tenth Amendment.

Two types of effects from the Garcia decision can be distinguished. First there are the significant short-run effects which are mostly fiscal and procedural in character Then there are the long-run implications for the nature of our federalism.

Short-Run Effects

The Garcia decision affects the coverage of the Fair Labor Standards Act in 50 states and approximately 3,000 counties, 19,000 municipalities, 17,000 townships, 15,000 school districts, and 29,000 local special districts employing approximately 7 million persons full time and having aggregate payrolls exceeding $12 billion per month. Given that breadth of coverage, it is very difficult to estimate precisely what actions will be required to comply with the ruling and what they will cost. Many units already comply with FLSA standards, more probably do not; most probably comply in part but what it will take to get their procedures and practices into compliance will vary widely.

A few generalizations can be ventured. First, compliance with the overtime requirements will be more difficult and expensive than compliance with the minimum wage standards. Most full-time employees of most governments are already receiving the minimum wage or more, especially past the entry level.

Second, the fiscal effects of meeting the new standards will probably be more heavily felt among local than state governments. This conclusion says nothing about the relative competence of these two levels nor about the quality of their existing personnel practices. It simply recognizes the fact that the functions which are most likely to cause overtime compliance difficulties (fire and police) constitute a far higher proportion

of local than of state spending. State governments have few firefighters and their law enforcement personnel (highway patrols, bureaus of investigation, game wardens and the like) are a relatively small part of total state personnel.

Third, the bulk of the costs and changes will be associated with fire and police activities. The work practices of these fields, especially 24 hour shifts for firefighters, tend to generate work which is defined as overtime under the regulations that now apply. In addition, certain other fields that may generate a lot of overtime work, such as teaching and nursing, are exempted from coverage.

Fourth, the smallest local governments will not be affected. This generalization is the most certain of all because governments with fewer than five full-time fire or police officials have been exempted.

Fifth, personnel costs for local governments will rise initially. In the long run, labor market wages may accommodate to the new definitions of overtime and how this work is to be compensated. But in the short run, wages levels are set (many by contract) and more rigorous standards for overtime payments can only mean higher costs. Work shift practices among firefighters provide a ready example of the problem. Under FLSA, overtime must be paid to firefighters if they work more than 212 hours over a 28 day period. This standard approximates a 53 hour week, but the most common staffing pattern among cities (24 hours on and 48 hours off) comes out to 56 hours per week.

Sixth, standards based on weighted averages tend to least reflect practices in small and medium-sized communities so that the costs of compliance may be relatively higher in these localities. The 212 hour standard for firefighters was derived by trying to determine the work week practices of local governments, weighting each locality in the final calculations by the number of firefighters employed. This approach is certainly reasonable, but weighting of necessity means that the resulting standard will reflect more heavily personnel practices in the

largest urban centers, jurisdictions which tend to be more heavily unionized. These jurisdictions are the very ones which are more likely to have adapted their current operating practices most closely to FLSA standards. Jurisdictions whose current practices vary most widely from the FLSA standards will face relatively greater compliance costs.

Seventh, to the extent that localities are unable or unwilling to raise revenues to meet higher labor costs, services will be reduced. From an economic point view, this statement is axiomatic: if resources are fixed and you must get more of one thing, you are going to get less of something else. Service reductions are not the only alternative localities can select, nor perhaps even the most likely, but in the short-run, they are almost inevitable. This inevitability stems from another characteristic of state and local governments: almost without exception they must balance their spending with their revenues annually. If an event, like a court action, forces costs to rise, tax rates have already been set and other options are limited. As the 1980-82 recession demonstrated, these governments will make service reductions when required to meet the mandate of a balanced budget. These reductions need not come solely from the activities causing the higher costs; they may be spread over the entire range of local activities. Nor need the reductions be permanent depending on how the locality and the wage market deal with the new costs associated with overtime work.

Although comprehensive cost estimates on a national scale are impossible to provide, some less global estimates have been made and they are worth noting. Two states illustrate the risks encountered in trying to make broad cost generalizations. Maryland chose to implement FLSA standards some years ago voluntarily and officials there anticipate little additional cost as a result of Garcia. In contrast, Minnesota initially estimated that its additional costs could run as high as $7.4 million annually.

At the local level, probably the best broad national estimate has been compiled by the International City Management Association (ICMA) which calculated the additional overtime costs for three

groups of employees: firefighters, police and low-level professionals. It estimates an annual compliance cost of between $321 million and $1.5 billion. That spread of almost 5 to 1 from top to bottom suggests the difficulties of acquiring any reliable numbers on this issue.

None of these estimates reflect the effects of bargaining or market changes that may drive down pay rates when coming into compliance or how efficiencies stemming from efforts to reduce overtime hours may reduce costs. Nor do these estimates reflect other factors that may induce higher costs: implementing new record systems, paying legal counsel for advice on achieving compliance, court costs, retroactive payments that may be required and other factors.

Finally, the rather unpredictable swath the decision may cut through local practices and employee preferences can be demonstrated with a few specific illustrations. The new requirements virtually eliminate using compensatory time off rather than cash payments for overtime, even if the compensatory time is calculated at a time-and-a-half rate. Some employees prefer the additional time off to cash and like to accumulate such time for special purposes, but this option has been virtually removed for both employers and employees. In a similar vein, off-duty police officers are often given the opportunity to earn additional money by appearing in uniform at major events such as football games or rock concerts to help handle crowds and traffic. Usually the promoter of the event pays the municipality for this help and it is legally defined as joint employment if a local ordinance requires the use of such officers. However, under FLSA standards, this work would have to be treated as overtime employment by the municipality and compensated at time-and-a-half rates. Police officers note that this increase may cause promoters to propose other arrangements and deny the policemen this opportunity to earn a little extra money.

Even the practices of volunteer fire companies may be affected. These volunteers will have to be paid the minimum wage

for all the hours they spend on fire-fighting activities if local practice provides them with a stipend in excess of their actual expenses. The excess stipend standard currently in the regulations was set some time ago, and it is $2.50 per fire call. Finally, some seasonal employees are exempted, especially in recreational activities such as running ice rinks and outdoor swimming pools. But seasonality also comes in many shapes and forms. For example, one municipal sewerage district is reducing its sludge pond, as required by a state environmental agency, by applying the sludge to nearby croplands as fertilizer. Most of this material must be applied in April, May, September, October and November. During these months, drivers average 10 hour days, six days a week. Up to now the drivers had the option of being paid at the overtime rate, or having compensatory time calculated at that rate for use during the off-peak months. Current regulations would not permit this practice to continue and will increase the costs of environmental protection as well as disgruntle some employees.

In summary, the coverage of the Fair Labor Standards Act has been altered several times since it was first adopted in 1938 as a humane and progressive legislative initiative intended to protect workers from exploitation and to contribute to their well-being. In the opinion of the Court majority, the Garcia decision simply made state and local governments face " the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." The decision's immediate effects are real, widespread and costly, but they are probably less significant than the long-range ones.

## Long-Run Effects

As a precedent, Garcia raises serious questions about the underlying character of the relationships that exist between governments in our federal system. Our Founding Fathers were most mindful of the capacity of strong central governments to

become tyrannical. To mitigate this possibility, they created a federalism and sought to assure sufficient strength and independence to the component parts that undue centralization would not occur. Federalism is peculiarly an American contribution to the art of governance and it is actually derived from practices settlers found existing among tribes within a single Indian nation.

By its nature, a federalism is dynamic as power ebbs and flows among its constituent parts. But it is intended to be a partnership; to work well, each partner must be strong. By choosing to go well beyond simply extending FLSA coverage to transit workers, the Court raised basic constitutional issues about how best to assure and preserve a strong partnership. As the 5-4 vote and the pointedness of the dissents suggest, the issues are not easy ones.

Because local governments are not mentioned in the Constitution, discussions of constitutional issues always focus on the states, which are given constitutional recognition. In American jurisprudence, local governments are declared to be creatures of the states, deriving their powers totally from actions by the states themselves or by the state's citizens. Consequently, local governments can be no stronger than their source of power, the states, and any action which casts a shadow over the states, as Garcia does, is of concern to them as well.

For this discussion, the most important issue over which the justices divided was whether or not states' political power is great enough that judicial power is not required to protect state's rights. Where does the regulatory power of the national government cease and the sovereign power of the states begin? If that determination is made solely through political means and institutions, as contrasted with judicial ones, how will there be assurance that constitutional limitations (the Tenth Amendment) will be observed?

One can readily empathize with the majority opinion that distinctions between "traditional" and "non-traditional"

functions of government don't provide an adequate basis for demarcating the boundaries of power. Indeed, the majority felt such standards simply opened the door for judges to decide which policies they liked and which they did not, judgments far better left to elected officials and institutions. The majority contended that there are affirmative limits the Constitution imposes on federal actions under the Commerce Clause but saw no need to spell them out in this decision, suggesting subsequent litigation and legislation could be used to establish those limitations. Writing for the majority, Justice Blackmun concluded:

> [T]he principle and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal government action. The political process ensures that laws that unduly burden the states will not be promulgated.

As a practitioner in the vineyards of state government and intergovernmental relations, I have a very hard time accepting this conclusion on either constitutional or practical grounds. Undeniably senators are elected by states, electoral college votes are cast on a state-by-state basis, and state legislatures define the districts from which we elect members to the House of Representatives. How effective were these forces in restraining Congress when it came to standardizing the drinking age, a determination which this nation has left to state discretion and variation since its founding? I am no supporter of drunk driving, but I see only political reasons for such an action, not compelling national interest.

Nor does the existence of federal grant programs establish that the states are as politically effective as the majority opinion suggests. The justices may feel laws do not unduly burden the states, but state and local officials certainly think grant conditions do, and those conditions have their basis in law.

Indeed, there is a widespread feeling that our political practices have changed so much in recent years that state and local governments have less influence in our political processes than ever before. The ACIR is exploring these issues right now. Historically, political parties have been rooted in state and local governments and have been bastions for their concerns. However, modern campaign finance techniques and the centralizing and personalizing nature of modern media make today's parties far less effectual than in earlier times. Successful candidates come readily to mind who raise their own money directly, use the media skillfully and create their own campaign organizations without reference to state or local party apparatus and with only a nod to national party organizations. There is great reason to fear that the persons elected through our current political processes will give little weight to state and local concerns because structures and persons rooted in those locales often have little significance in determining the electoral success of a particular candidate.

Limitations on the exercise of power must be set out, as the majority opinion argues, but should the definitions be left to the political and electoral institutions to the extent that opinion suggests? Justice Powell, writing for the dissenters, argued that political process are not the proper means for enforcing constitutional limitations.

> The fact that Congress generally does not transgress constitutional limits on its power to reach State activities does not make judicial review any less necessary to rectify the cases in which it does do so. The States' role in our system of government is a matter of constitutional law, not of legislative grace.

And even more pointedly:

> Despite some genuflecting in Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.

The Tenth Amendment was not a vote-getting throwaway provision during the adoption of the Constitution. Much opposition to the Constitution was rooted in the fear that an overly powerful national government would eventually eliminate the states as viable political entities. This concern was voiced repeatedly during the debates over ratification and proponents of the Constitution had to make assurances that a bill of rights, including a provision explicitly reserving powers to the states, would be among the first business of the new Congress.

In short, there is reason to view with dismay any decision which downgrades federalism and the basic rights of the states within our federal system from the status of constitutional guarantees to that of political questions and procedural issues.

Conclusion

Although the Garcia decision has generated problems and actions of immediate concern and cost, its greater effects will probably lie in how it affects the balance of power in our federal system. The majority opinion places a lot of faith in the self restraint of Congress when acting under the Commerce Clause. State and local officials who have watched Congress act in such traditional state and local policy areas as rat control and drinking ages are much less sanguine about the long-run likelihood of such self restraint. However imprecise its language, the Constitution does call for a balance of power between the States and the national government, a balance the courts need to consider and the Founding Fathers thought was essential to protecting our fundamental liberties. It has been the traditional role of the Supreme Court to determine where the imprecise lines are to be drawn and the balances struck. Those of us who believe in a strong federalism share Justice Rehnquist's hope that these points of principle will again, in time, command the support of a majority of the Court.

Senator WILSON. Mr. Howard, I thank you for the attention that you have given it this morning. We have touched on it, but I think that your statement here is a very clear, sharp illucidation of what is at stake and much is at stake, and no amount of genuflecting is going to undo the eviscerating of the 10th amendment and that's what this decision has achieved.

I hope that Congress will set things right. If not, we may have to wait for Justice Rehnquist's wish to be fulfilled.

Do either of you gentlemen know how many jurisdictions have some provision similar to California's proposition 13 that imposes a revenue limitation upon their local governments?

Mr. HOWARD. Senator, there's a difference between the State imposing a limit by law and a constitutional amendment requirement. Almost all the States have some kind of limitation in the property tax field. Sometimes they're low, sometimes they're high. You don't hear about the high ones because they are not proving constraining.

In terms of statewide limitations comparable to proposition 13, or in that grouping, there are probably 15 to 17 States that have something like that at the present time.

Senator WILSON. So we're looking at something like a third of the jurisdictions that have a very real limitation upon their ability to generate greater revenues and therefore in that third, at the very least, this crunch seems virtually unavoidable?

Mr. HOWARD. I would say, Mr. Chairman, that the California example, the case with which you are most familiar, is probably one of the most strict. I would say that probably only four or five States fall into that degree of strictness on this particular problem.

On the other hand, one characteristic that's been alluded to this morning by witnesses is the fact that all of these units of government by statutes must adopt balanced budgets. As a result, when you're hit by something midyear, you have to do a lot of things to get through that year in a balanced form as you're required to do by law. There is a double whammy, if you will. In areas having restrictions, you might try to do something next year to offset the higher costs *Garcia* will cause, either through tax increases or other revenue devices. If there are ceilings on these revenue options, however, your caught both this year and next. Almost all local jurisdictions will have a problem implementing this decision immediately because they're in the midst of a fiscal year and they must balance at the end of it.

Senator WILSON. You have noted in your testimony, Mr. Howard, that the State of Maryland chose voluntarily to implement the FLSA. Did Virginia?

Mr. HOWARD. I'm sorry, although I'm a resident of Virginia, I cannot answer that question with absolute assurance. My impression is that it did not, but that is only personal impression.

Senator WILSON. That is my impression too. I am curious as to whether or not the District of Columbia is exempt from the provisions of FLSA.

Mr. HOWARD. I cannot comment. I do not know.

Senator WILSON. Well, it may be of interest since Congressmen pay taxes on homes in the District of Columbia and in the State of Virginia and in the State of Maryland. It may give them some in-

terest beyond that required by their duty to pay attention to State and local governments which, as you point out, they don't seem to be doing very much.

I am persuaded—and I hope I am not too cynical about it—that one of the reasons for the loss of influence or the apparent loss of influence, one on which you commented, is that, to be frank, the cities and counties and school districts and States do not make political campaign contributions.

My own experience, first as a State legislator, was that the League of California Cities was one of the best staffs supplying tremendous resources to legislators, was not listened to or heeded nearly as much as might have been expected because they didn't seem to have the access that I thought they should enjoy. And the only explanation I could find for that, which I found by talking to my colleagues in the legislature, was that some of them really didn't have time to listen to city and county lobbyists because they were too busy listening to others. And I think there is a parallel at the Federal level.

Gentlemen, you have provided some very, very useful information. Mr Welch, your observations as to the economics of this labor relationship I think are particularly pertinent. I think that they provide an analytical assessment that tends to confirm the gut reaction of a number of us who have been charged with local governmental administration, and that is that this is not going to benefit the employees any more than it would benefit the taxpayers who are paying for their services.

A fundamental point made earlier in Ms. Russell's testimony and commented upon by others is that the basic purpose of this legislation was to spread the work to ensure that low income employees would be able to find employment, and in both respects that basic purpose is not applicable to the situation of local government.

In the first place, we are not talking about minimum wage earners. We're talking about people who are earning considerably more than that in most instances and, beyond that, its basic purpose of spreading the work ironically is going to be very much impeded by the fact that this is more likely by far to reduce the amount of employment available.

Gentlemen, time requires that I bring this hearing to a close, but if I may, I would like to express the view that we would like to be in touch with you further. It is my intention to pursue this matter further and I would very much like your assistance in doing so. Thank you for being here today. We are most grateful. You have made a very valuable contribution. Thank you.

This hearing is now adjourned.

[Whereupon, at 12:30 p.m., the subcommittee adjourned, subject to the call of the Chair.]

# APPENDIX

**National Conference of State Legislatures**

Office of State Federal Relations

444 North Capitol Street, N.W. Suite 203 Washington, D.C. 20001 202/624-5400

President
John T. Bragg
Deputy Speaker
House of Representatives
State of Tennessee

Executive Director
Earl S. Mackey

STATEMENT OF

SENATOR JOSEPH W. HARRISON
MAJORITY LEADER INDIANA SENATE
CHAIRMAN, NCSL PENSIONS COMMITTEE

ON BEHALF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES

SUBMITTED TO THE JOINT ECONOMIC COMMITTEE

JUNE 25, 1985

REGARDING

THE SUPREME COURT DECISION IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND THE APPLICATION OF THE FAIR LABOR STANDARDS ACT TO STATE AND LOCAL GOVERNMENTS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, I WANT TO EXPRESS OUR APPRECIATION FOR THIS OPPORTUNITY TO SUBMIT A STATEMENT FOR THE RECORD REGARDING THE IMPACT OF THE GARCIA DECISION ON STATE AND LOCAL GOVERNMENTS.

THE SUPREME COURT'S DECISION IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY SUBJECTED STATE AND LOCAL GOVERNMENTS TO THE FEDERAL FAIR LABOR STANDARDS ACT (FLSA). THE NATIONAL CONFERENCE OF STATE LEGISLATURES RESPONDED TO THE DECISION BY ADOPTING A POLICY RESOLUTION AT OUR MAY 10TH MEETING WHICH PROVIDES THAT "IMPOSITION OF FLSA STANDARDS ON STATES AND LOCALITIES IS AN UNWARRANTED INTRUSION ON THE RIGHT OF EACH STATE LEGISLATURE TO DEFINE FOR ITSELF THE RIGHTS OF STATE AND LOCAL PUBLIC EMPLOYEES." THE RESOLUTION GOES ON TO URGE CONGRESS TO PROVIDE AN EXEMPTION OR LIMITATION ON FLSA COVERAGE OF STATES AND LOCALITIES.

NCSL ADOPTED THIS STRONGLY-WORDED POLICY RESOLUTION BECAUSE WE ARE CONCERNED ABOUT THE COSTS AND BURDENS IMPOSED BY THE FLSA ON STATES AND LOCALITIES; AND BECAUSE WE ARE CONCERNED ABOUT THE EFFECT THAT GARCIA WILL HAVE ON CONSTITUTIONAL PRINCIPLES OF FEDERALISM.

WE BELIEVE THAT THE TENTH AMENDMENT WAS DESIGNED TO PROTECT THE ESSENTIAL ELEMENTS OF STATE SOVEREIGNTY. WE FURTHER BELIEVE THAT THE SUPREME COURT, IN ACCORDANCE WITH ITS HISTORIC ROLE AS ARBITER OF THE FEDERAL SYSTEM, MUST DETERMINE UNDER THE TENTH AMENDMENT THE BOUNDARIES OF POWER BETWEEN STATE AND NATIONAL GOVERNMENTS.

BECAUSE OF OUR UNDERSTANDING OF THE TENTH AMENDMENT, THE MEMBERS OF NCSL REGARDED THE COURT'S 1976 OPINION IN NATIONAL LEAGUE OF CITIES V. USERY, BARRING THE APPLICATION OF FLSA STANDARDS TO THE TRADITIONAL GOVERNMENTAL ACTIVITIES OF STATES AND LOCALITIES, TO BE A LANDMARK DECISION OFFERING HOPE FOR A REVITALIZED CONSTITUTIONAL DOCTRINE OF FEDERALISM. THE COURT IN NATIONAL LEAGUE OF CITIES FOR THE FIRST TIME IN FORTY YEARS FOUND ASPECTS OF A FEDERAL LAW TO BE UNCONSTITUTIONAL VIOLATIONS OF STATE SOVEREIGNTY.

OUR HOPES WERE DASHED WHEN THE COURT IN GARCIA FLATLY OVERRULED NATIONAL LEAGUE OF CITIES AND HELD THAT THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE FLSA APPLY TO STATE AND LOCAL GOVERNMENTS, EVEN IN AREAS OF TRADITIONAL GOVERNMENTAL RESPONSIBILITY. JUSTICE BLACKMUN'S OPINION FOR THE MAJORITY ARGUED THAT THE NATIONAL LEAGUE OF CITIES STANDARD WAS UNWORKABLE AND THAT CONGRESS, RATHER THAN THE COURT, SHOULD SERVE AS THE PRIMARY EFFECTIVE MEANS OF PROTECTING CONSTITUTIONAL FEDERALISM.

WE AT NCSL, WITH ALL DUE RESPECT, FIND JUSTICE BLACKMUN'S ANALYSIS HARD TO UNDERSTAND. SURELY, IF, AS JUSTICE POWELL SAID IN HIS ELOQUENT DISSENT, "THE STATES' ROLE IN OUR SYSTEM OF GOVERNMENT IS A MATTER OF CONSTITUTIONAL LAW, NOT OF LEGISLATIVE GRACE," THEN THE COURT WILL SUBJECT FEDERAL STATUTES ABRIDGING THE STATES' CONSTITUTIONAL ROLE TO JUDICIAL REVIEW. BUT, THE DECISION IN GARCIA APPEARS AS A PRACTICAL MATTER TO CLOSE THE DOOR ON SUCH JUDICIAL REVIEW AND BY SO DOING THE DECISION, IN JUSTICE POWELL'S WORDS, "SUBSTANTIALLY ALTERS THE FEDERAL SYSTEM EMBODIED IN THE CONSTITUTION."

IN LIGHT OF GARCIA, OUR FINAL APPEAL IS TO YOU AS MEMBERS OF CONGRESS. THE COURT IN GARCIA CITED JAMES MADISON'S ASSERTION EXPRESSED IN THE FEDERALIST

PAPERS THAT THE COMPOSITION OF CONGRESS AND PARTICULARLY OF THE SENATE WAS DESIGNED TO IMBUE THE NATIONAL LEGISLATURE WITH "THE SPIRIT OF THE STATES" AND TO MAKE IT "DISINCLINED TO INVADE THE RIGHTS OF THE INDIVIDUAL STATES OR THE PREROGATIVES OF THEIR GOVERNMENTS." THE JUSTICES, THEREFORE, CONCLUDED THAT CONGRESS MUST SERVE AS "THE FUNDAMENTAL LIMITATION THAT THE CONSTITUTION IMPOSES ON THE COMMERCE CLAUSE TO PROTECT THE STATES AS STATES." WE AT NCSL THEREFORE STRONGLY URGE THE MEMBERS OF THIS COMMITTEE TO FULFILL THIS HISTORIC ROLE IN YOUR DELIBERATIONS ON THE FAIR LABOR STANDARDS ACT.

ALTHOUGH THE LONG-TERM EFFECT OF GARCIA WILL BE TO LEAVE THE STATES WITHOUT EFFECTIVE CONSTITUTIONAL DEFENSES AGAINST FEDERAL REGULATORY INTRUSIONS, THE IMMEDIATE EFFECT IS TO SUBJECT STATES TO THE COSTS AND BURDENS OF THE FLSA. THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION ESTIMATES THAT ADDITIONAL OVERTIME PAY MANDATED BY THE FLSA FOR POLICE, FIREFIGHTERS AND LOW-LEVEL PROFESSIONALS ALONE COULD COST $1.5 BILLION, AND THIS MAY BE A CONSERVATIVE ESTIMATE.

UNDER THE FAIR LABOR STANDARDS ACT, IT IS ALMOST IMPOSSIBLE FOR EMPLOYERS TO PROVIDE COMPENSATORY TIME OFF FOR OVERTIME HOURS WORKED. THE ACT, INSTEAD, REQUIRES IN MOST CASES THE PAYMENT OF TIME-AND-A-HALF FOR OVERTIME. THIS WILL HAVE A DEVASTATING EFFECT ON PUBLIC BUDGETS AND ON SENSIBLE PERSONNEL PRACTICES.

THE FLSA DOES NOT TAKE INTO ACCOUNT THE UNIQUE CHARACTERISTICS OF PUBLIC EMPLOYMENT THAT REQUIRE FLEXIBLE WORK SCHEDULES. FOR EXAMPLE, TRANSIT WORKERS TRADITIONALLY WORK SPLIT SHIFTS, FIREFIGHTERS USUALLY WORK 24 HOURS ON AND 48 HOURS OFF, AND POLICE MUST FREQUENTLY WORK UNSCHEDULED OVERTIME TO MEET EMERGENCY SITUATIONS AND TO ACCOMODATE THE UNPREDICTABLE TIMING OF COURT APPEARANCES.

THE FAIR LABOR STANDARDS ACT IGNORES THE UNIQUE CHARACTERISTICS OF PUBLIC EMPLOYMENT AND WILL CONSEQUENTLY INCREASE THE COST OF PROVIDING PUBLIC SERVICES. THE RESULT WILL BE A REDUCTION IN THOSE SERVICES. STATES AND LOCALITIES MUST BALANCE THEIR BUDGETS AND THE PUBLIC WILL NOT PAY HIGHER TAXES. SO, THE MANDATED COSTS OF THE FLSA CAN BE ACCOMODATED ONLY BY REDUCING SERVICES IN ORDER TO REDUCE THE NUMBER OF PERSONS ON THE PUBLIC PAYROLL AND TO REDUCE THE NUMBER OF HOURS THAT THEY WORK. THE RESULT WILL BE FEWER POLICE OFFICERS ON THE STREET TO STOP CRIME, FEWER SOCIAL SERVICE WORKERS AVAILABLE TO CARE FOR THE HELPLESS, AND FEWER CORRECTIONAL OFFICERS AVAILABLE TO CONTROL DANGEROUS INMATES.

GIVEN THE SERIOUS PROBLEMS THAT STATES AND LOCALITIES FACE IN FIGHTING CRIME, CARING FOR THE NEEDY, AND MEETING THEIR OTHER RESPONSIBILITIES, THIS IS NOT THE TIME TO REDUCE SERVICES. THEREFORE, IF THE CONGRESS TAKES NO ACTION AND AS RESULT STATES ARE FORCED TO BEAR THE COST OF TIME-AND-A-HALF FOR OVERTIME HOURS WORKED, THEN THE CONGRESS SHOULD SEND ADDITIONAL FUNDS TO THE STATES IN THE ALTERNATIVE, THE FLSA SHOULD BE AMENDED TO EXEMPT STATES AND LOCALITIES FROM THE OVERTIME PROVISIONS OF THE ACT. THIS WOULD ALLOW STATES AND LOCALITIES TO RETURN TO THE SENSIBLE AND ECONOMICAL "COMP-TIME" SYSTEM.

A RETURN TO A "COMP-TIME" SYSTEM MAKES SENSE. IT WOULD ALLOW US TO AVOID MOST OF THE UNNECESSARY COSTS OF FLSA IMPLEMENTATION. THE MINIMUM WAGE REQUIREMENTS ARE REALLY NOT AN ISSUE FOR STATE AND LOCAL GOVERNMENTS. WE ARE GOOD EMPLOYERS WHO PAY OUR WORKERS AT THE MARKET RATE OR ABOVE. THE JOB SECURITY, BENEFITS, AND PENSIONS THAT WE OFFER ARE GENERALLY SUPERIOR TO WHAT THE PRIVATE SECTOR OFFERS. WE HAVE USED "COMP-TIME" RATHER THAN OVERTIME BECAUSE OF THE FLEXIBILITY IT OFFERS TO MEET THE UNIQUE CHARACTERISTICS OF PUBLIC SECTOR WORK.

PRIOR TO THE GARCIA DECISION, "COMP-TIME" AND RELATED POLICIES WERE ACCEPTED BY BOTH PUBLIC EMPLOYEES AND TAXPAYERS. PUBLIC EMPLOYEES OFTEN PREFERRED "COMP-TIME" ESPECIALLY IF THEY WORKED IN STRESSFUL PUBLIC SAFETY OR SOCIAL SERVICE POSITIONS. SIMILARLY, TAXPAYERS WERE ALSO BENEFITTED. THERE IS A NEED TO MAINTAIN PROFESSIONALISM AND CONTINUITY IN THE PUBLIC SERVICE THROUGH YEAR-ROUND EMPLOYMENT WHILE AT THE SAME TIME MANY JOBS SUCH AS SNOW-REMOVAL OR FOREST FIRE FIGHTING ARE SEASONAL IN NATURE. COMP-TIME RECONCILES THESE COMPETING INTERESTS AT MINIMUM COST TO THE TAXPAYER.

THE COMP-TIME SOLUTION IS TYPICAL OF STATE AND LOCAL GOVERNMENTS' APPROACH TO LABOR RELATIONS. IT IS FLEXIBLE, ADAPTED TO LOCAL NEEDS AND SENSITIVE TO TAXPAYER CONCERNS. THERE IS NO NEED FOR FEDERAL REGULATION IN THIS AREA. WHENEVER WAGE AND HOUR PROBLEMS ARISE, THEY ARE SOLVED AT THE STATE AND LOCAL LEVEL BY STATE LEGISLATORS AND CITY COUNCIL MEMBERS WHO REPRESENT THE LOCAL TAXPAYERS AND WHO ARE VERY RESPONSIVE TO LEGITIMATE CONCERNS OF THE VERY-WELL-ORGANIZED PUBLIC WORKERS.

THE PEACEFUL CONDITION OF STATE AND LOCAL LABOR RELATIONS HAS NOW BEEN DISRUPTED BY THE UNELECTED FEDERAL JUDICIARY. THE DISRUPTIVE EFFECT IS HEIGHTENED BECAUSE, ACCORDING TO THE LABOR DEPARTMENT, STATES AND LOCALITIES IMMEDIATELY BECAME LIABLE FOR FLSA VIOLATIONS AT THE TIME APPEALS OF GARCIA WERE EXHAUSTED. THE 1974 AMENDMENTS TO THE FLSA AT LEAST PROVIDED FOR A PHASE-IN PERIOD. NOW, A DECADE LATER, WITH A SUBSTANTIAL GROWTH IN STATE AND LOCAL GOVERNMENT EMPLOYMENT AND WITH A SUBSTANTIAL GROWTH IN THE OBLIGATIONS OF STATES AND LOCALITIES, IMMEDIATE COMPLIANCE WILL BE EXTREMELY DIFFICULT AND PROBABLY IMPOSSIBLE. NO PHASE-IN PERIOD HAS BEEN PROVIDED. AT THE VERY LEAST, CONGRESS SHOULD PROVIDE A PHASE-IN PERIOD TO ALLOW STATES AND LOCALITIES TO VOLUNTARILY COME INTO COMPLIANCE WITH THE ACT WITHOUT FEAR OF SUITS.

TODAY, STATES AND LOCALITIES FACE THE THREAT OF LAW SUITS INITIATED BY THE DEPARTMENT OF LABOR OR PRIVATE PARTIES. SUCH SUITS MAY RESULT NOT ONLY IN INJUNCTIVE RELIEF FOR PLAINTIFFS, BUT ALSO JUDGMENTS FOR BACK PAY, LIQUIDATED DAMAGES, ATTORNEYS FEES AND COURT COSTS. LITIGATION COSTS COULD SPIN OUT OF CONTROL. THEREFORE, CONGRESS SHOULD CONSIDER EXEMPTING STATES AND LOCALITIES FROM THE BACK PAY, DAMAGES, AND ATTORNEYS FEES SECTIONS OF THE FLSA. PROSPECTIVE INJUNCTIVE RELIEF WILL BE SUFFICIENT TO INSURE COMPLIANCE.

ANOTHER SERIOUS THREAT POSED BY THE FLSA IS THAT IT MAY FORCE MANY OF OUR WHITE-COLLAR PROFESSIONALS INTO THE RIGID AND INAPPROPRIATE MODEL OF CLOCK-WATCHING, TIME-CARD PUNCHING INDUSTRIAL WORK. THE SCOPE OF THE PROFESSIONAL EXEMPTION FOR STATE AND LOCAL GOVERNMENT WORKERS UNDER THE FLSA HAS YET TO BE DEFINED WITH PRECISION. BUT THERE IS A REAL DANGER THAT SOCIAL WORKERS, POLICY ANALYSTS, MENTAL HEALTH WORKERS AND OTHER PROFESSIONALS WILL BE FORCED TO ACCEPT RIGID WAGE AND HOUR REGULATIONS THAT WERE DESIGNED TO PROTECT VICTIMIZED INDUSTRIAL WORKERS OF THE 1930S AND THAT ARE TOTALLY INAPPROPRIATE FOR GOVERNMENT PROFESSIONALS IN THE 1980S. THEREFORE, CONGRESS SHOULD CONSIDER AN AMENDMENT TO THE FLSA THAT CLARIFIES THE EXEMPTION FOR STATE AND LOCAL PROFESSIONALS.

MR. CHAIRMAN, YOU AND THE OTHER MEMBERS OF THIS COMMITTEE ARE LEADERS OF THE NATIONAL GOVERNMENT. BUT YOU ALSO REPRESENT YOUR STATES AND NOW AFTER GARCIA ARE IN A VERY REAL SENSE THE ULTIMATE PROTECTORS OF YOUR STATES. THE INTRUSION ON STATE SOVEREIGNTY REPRESENTED BY THE FAIR LABOR STANDARDS ACT IS SIGNIFICANT. IT MANDATES UNIFORM WAGE AND HOUR RULES FOR EVERY CITY, COUNTY AND STATE THROUGHOUT THE LAND. I AGAIN URGE YOU TO FULFILL YOUR HISTORIC ROLE AND LIMIT THIS INTRUSION ON STATE SOVEREIGNTY AND TO RESTORE SOME COMMON SENSE TO STATE AND LOCAL LABOR RELATIONS.

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