Congressional Research Service

MEMORANDUM March 17, 2009

To: Hon. Lindsey Graham
Attention: Laura Bauld

From: Kenneth R. Thomas
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American Law Division

Subject: **Analysis of § 1607 of the American Recovery and Reinvestment Act of 2009**

This memorandum has been prepared in response to your request to analyze the language contained in §1607 of the American Recovery and Reinvestment Act of 2009 (Recovery Act),[1] which provides that federal funds can be made available to a state by the federal government either after certification by a governor that such money will be requested and spent or after the adoption of a concurrent resolution by a state legislature. You requested an analysis as to whether, under this language, a state legislature can, by concurrent resolution, provide for the acceptance of federal funds.

Background

Section 1607 may be a congressional response to statements by several state governors who indicated a disinclination to have entities in their state seek and receive funds provided under the Recovery Act.[2] The Act requires that, in order to be eligible for such funds, a governor must first either certify that such funds will be requested, or, if that does not occur, then a state legislature may fulfill the same condition by passing a concurrent resolution (which does not generally require a governor's signature).[3] Specifically, § 1607 of the Recovery Act provides that:

[1] Pub. L. 111-5.

[2] Melinda Deslatter, *Some US governors may turn down stimulus money*, Associated Press Wire (February 19, 2009) ("A handful of Republican governors are considering turning down some money from the federal stimulus package . . .").

[3] CRS Report 98-728, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements, and Uses*, by Richard S. Beth at 2. At the federal level, this legislative vehicle is used principally for internal procedural matters such as adjournment sine die, to provide for joint session or joint committee, or to express a "sense of Congress." The exception to this is a concurrent resolution, passed by two-thirds of both houses, which is used to send a constitutional amendment to the states. U.S. Const. Article V. CRS Report 98-706, *Bills and Resolutions: Examples of How Each Kind Is Used*, by Richard S. Beth at 2. It is beyond the scope of the memorandum to survey the use of concurrent resolutions at the state level.

> (a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the State will request and use funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.
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> (b) Acceptance by State Legislature- If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State.
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> (c) Distribution- After the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public private entities within the State either by formula or at the State's discretion.

The language of § 1607 contains significant ambiguities, and the terms used may not be easily reconciled with either other portions of the Act or with existing statutory law. Section 1607(a) for instance, requires a governor to, within 45 days, "certify" that the state will, at some unspecified future time, request and use funds provided by this act to create jobs and promote economic growth. The language does not specify to whom such certification shall be made;[4] nor does it specify whether, in making the certification, the state will be accepting all the funds that the state is eligible for under the Act, or only some portion of the funds. Further, this subsection does not specify whether a governor's office will be the political entity requesting the funds at some time in the future, or whether such a request will come from a state agency, a local government, councils of government, or public private entities within a state.

Section 1607(b) provides that if funds "in any division of the Act" are not "accepted" for use by a governor, then it "shall be sufficient to provide funding to the state" for a state legislature to "accept[]" such funds by a concurrent resolution. However, the term "concurrent resolution" is not defined, and some states do not appear to have this legislative vehicle.[5] Further, "accepting" funds is not a precise term of art, and it would appear to be a description of only a portion of the process usually used to allocate federal funds. Finally, it is not clear if the language which provides that a concurrent resolution shall "be sufficient" to provide funding to the state is intended only to fulfill the "certification" requirement of § 1607(a), or whether it is intended to be: 1) a waiver of all the requirements for receiving grant monies, such as making a grant application or providing supporting data or required assurances, and 2) a direction to state and local officials to accept and spend these monies.

Finally, section 1607(c) provides that, after the adoption of a state legislature's concurrent resolution, funding to the state "will be for distribution to local governments, councils of government, public entities, and public private entities within the State either by formula or at the State's discretion." Federal funds may be distributed by formula or at a state's discretion, depending upon the criteria specified in federal law governing a particular grant program. It is not clear if this language is intended to supplant existing federal and state law regarding the application for and distribution of federal funds, or merely to indicate that this process may move forward after a state's adoption of a concurrent resolution.

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[4] Certification by the state of Texas was apparently made by a letter from Governor Rick Perry to President Obama, which provided "On behalf of the people of Texas, please allow this letter to certify that we will accept the funds in H.R.1 and use them to promote economic growth and create jobs in a fiscally responsible manner that is in the best interest of Texas." Dave Montgomery & Kevin Lyon, *Perry says Texas will take stimulus money*, Fort Worth Star-Telegram, February 18, 2009 (available at http://www.star-telegram.com/804/story/1212448.html).

[5] Nebraska, for instance, has a unicameral legislature, and consequently is unlikely to have a legislative vehicle referred to as a "concurrent resolution."

Alternative Interpretations

Although many of the terms and phrases used above are imprecise, perhaps the most significant ambiguity is the meaning of the phrase in § 1607(b) that "acceptance . . . shall be sufficient to provide funding." Without considering the context of the rest of the Act, the language in §1607(b) might at first appear to authorize the state legislature, by concurrent resolution, to waive all federal requirements which would otherwise need to be followed for a state or local entity to apply for and receive federal funds. As noted, it might even be argued that this language could be interpreted to require state entities to receive and spend such monies consistent with a state legislature's concurrent resolution. As will be explored below, however, this more expansive interpretation is difficult to reconcile with the rest of the Recovery Act, with canons of statutory interpretation, or with constitutional doctrine.

A more likely interpretation of this language is that an "acceptance . . .[which] shall be sufficient to provide funding" would only trigger the authority of federal agencies to grant federal funds, but would not otherwise reallocate power within the state. Under this interpretation, "acceptance" by a state legislature by concurrent resolution under § 1607(b) is merely the functional equivalent of the "certification" that can be made by a governor under § 1607(a). Either of these actions would appear to be nothing more than preliminary conditions which must be met before a state becomes eligible to apply for and receive federal funds under the Recovery Act. In effect, §1607(a) gives a governor the opportunity to exercise a veto over receipt of federal funding under the Act by failing to make such certification within 45 days, but then § 1607(b) gives the state legislature the opportunity to act to negate the effect of this veto.

The problems with the more expansive interpretation of the phrase "acceptance . . .[which] shall be sufficient to provide funding" become more clear when the language is considered in conjunction with other provisions of the Recovery Act. Provisions of the Act which would be useful to analyze would include those where: 1) funds allocated by a formula are to be made available only upon application of a governor, 2) discretionary state grant funding is available only upon application of a governor, and 3) local grant funding is made available upon application by a subordinate government agency.

Authority under Title § 14001(d) To Receive Allocated Stabilization Funds

For instance, one can evaluate how the broader interpretation of the phrase "acceptance . . . [which] shall be sufficient to provide funding" would be reconciled with Title XIV of the Recovery Act. Under § 14001(d) of the Act, the United States Department of Education is given authority over a "State Fiscal Stabilization Fund" (Stabilization Fund) of $53.6 billion. After providing for certain reserve funds, the Secretary of Education is directed to determine how much of these funds will be allocated to each state based on a population-related formula.[6]

Section 14005(a) & (b) provide that, in order for a state to receive its allocation from the Stabilization Fund, a state governor must do, among other things, the following:

[6] The formula for allocation is (1) 61 percent on the basis of their relative population of individuals aged 5 through 24, and (2) 39 percent on the basis of their relative total population. Recovery Act, § 14001.

- Submit an application to the Department of Education, containing such information as the Secretary of the Department may reasonably require.[7] In that application, a governor shall provide assurances regarding "maintenance of effort" for elementary and higher education schools,[8] address the issue of inequitable distribution of high quality teachers,[9] establish a longitudinal data system,[10] and enhance the quality of academic assessments.[11]
- Provide baseline data that demonstrates the state's current status in each of the areas described in such assurances;[12]
- Describe how the state intends to use its allocation, including whether the state will use such allocation to meet maintenance of effort requirements under the Elementary and Secondary Education Act[13] and Individuals with Disabilities Education Act[14] and, in such cases, what amount will be used to meet such requirements.

Thus, the question arises as to whether, under the broader interpretation of the phrase "acceptance by the State legislature . . .shall be sufficient to provide funding to such State" would give a state legislature the authority to "accept" the allocations from the Stabilization Fund, even if a governor did not make the necessary application complying with the statutory requirements.[15] The term "acceptance" does not appear to be defined in the statute, nor does it appear to be a term of art in the context of federal funding. Under contract law, however "acceptance" is generally considered to be the final approval necessary to make a binding contract after a completed offer has been made. By analogy, the meaning of the term would suggest that under Title XIV, a state legislature, without the cooperation of a governor, would be allowed to accept a completed offer by the federal government of federal funds.

Under this interpretation, a completed offer of funds to be allocated under the Stabilization Fund will be made by passage of the Recovery Act and by the Secretary's determination of a state's allocation. Under this interpretation, the phrase "acceptance by the state legislature . . . shall be sufficient to provide funding to such State" would have to be interpreted as waiving both the application requirements and other

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[7] Recovery Act, § 14005(a).

[8] Recovery Act, § 14005(b) & (d)(1) require that states "maintain State support for elementary and secondary education at least at the level of such support in fiscal year 2006" and "maintain State support for public institutions of higher education (not including support for capital projects or for research and development or tuition and fees paid by students) at least at the level of such support in fiscal year 2006."

[9] "The State will take actions to improve teacher effectiveness and comply with section 1111(b)(8)(C) of the ESEA (20 U.S.C. § 6311(b)(8)(C)) in order to address inequities in the distribution of highly qualified teachers between high- and low-poverty schools, and to ensure that low-income and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers." Recovery Act, § 14005(b) & (d)(2).

[10] This data system must include the elements described in section 6401(e)(2)(D) of the America COMPETES Act, 20 U.S.C. § 9871. Id. at § 14005(b) & (d)(3).

[11] Id. at § 14005(b) & (d)(4)

[12] Recovery Act, § 14005(b)(2).

[13] 20 U.S.C. § 6301, *et. seq.*

[14] 20 U.S.C. § 1400, e*t. seq*.

[15] It should be noted that nothing in Title XIV appears to authorize a Governor to "accept" its allocation from the "Stabilization Fund." Rather, Title XIV speaks to a relatively elaborate application process which must be completed prior to federal funds being disbursed. Thus, a Governor who does not wish to receive Title XIV funds would not generally refuse to "accept" funds - rather, he would just not apply. It is unclear, under the more expansive interpretation of §1607, when the state legislature's power (which can be implemented only after a Governor refuses funds) could be exercised.

statutory conditions and requirements such as the provision of necessary data and assurances.[16] While it may be possible to make this argument in instances where funds have already been allocated, this interpretation becomes more unlikely under other provisions of the Recovery Act where monies are not allocated ahead of time.

Authority under § 14006 To Receive State Incentive Grants

The Secretary is directed, under § 14001(c), to reserve certain funds from the Stabilization Fund for "State Incentive Grants" to the states. In order to receive a state incentive grant, a governor must submit an application which documents the status of the state's progress in a variety of different areas.[17] A governor must also describe the status of the state's progress in implementing various existing federal standards.[18] Finally, a governor must submit a plan for evaluating the state's progress in closing achievement gaps.[19] At that point, the Secretary will determine which states receive grants and the amount of those grants on the basis of information provided by the states and such other criteria as the Secretary determines appropriate.[20]

The argument that the term "acceptance by the State legislature . . . shall be sufficient to provide funding to such State" actually means "waiver of the application and other statutory conditions and requirements" appears less likely in this context. For instance, it is not clear how grants could be made when the Secretary only has the authority to make grants based on specified criteria and assurances to be provided by a governor. Absent a governor making a grant application, the Secretary would have no basis under which it could distribute the state incentive grants. So, the ability of a state legislature to "accept" funds could not logically mean "waiver of the application and other statutory conditions and requirements," since those requirements must be fulfilled in order for the Secretary to make a determination of the amount of funds to be made available to the states.

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[16] Another possible interpretation would be that any concurrent resolution passed by a state legislature will include a completed grant application and all supporting data, which is required to be provided to the federal government. This does not appear to be a reasonable interpretation § 1607(b), as the phrase "shall be sufficient to provide funding to the state" would seem to imply that the federal agency will have no discretion in allocating these funds. Consequently, any application and supporting documentation provided in the concurrent resolution would be superfluous, and thus this interpretation would disfavored.

[17] These areas include, under §§ 14005(c) and 14006, "maintenance of effort," inequitable distribution of high quality teachers, development of a longitudinal data system, and the quality of academic assessments.

[18] For instance, the Governor must ensure that students in the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (20 U.S.C. § 6311(b)(2)(C)(v)(II)) who have not met the State's proficiency targets continue making progress toward meeting the State's student academic achievement standards; describe the achievement and graduation rates (as described in section 1111(b)(2)(C)(vi) of the ESEA (20 U.S.C. § 6311(b)(2)(C)(vi)) and as clarified in section 200.19(b)(1) of title 34, Code of Federal Regulations) of public elementary and secondary school students in the State, and the strategies the State is employing to help ensure that all subgroups of students identified in section 1111(b)(2) of the ESEA (20 U.S.C. § 6311(b)(2)) in the State continue making progress toward meeting the State's student academic achievement standards; and describe how the State would use its grant funding to improve student academic achievement in the State, including how it will allocate the funds to give priority to high-need local educational agencies.

[19] Recovery Act, Section 14005(c)(5).

[20] Recovery Act, Section 14006(b).

Authority under § 14007 To Receive Innovation Fund Awards

Finally, in some instances, an expansive interpretation of the language in § 1607 would appear to run counter to existing facts. For instance, § 1607(b) envisions exercise of the state legislature's authority regarding "any division of this Act . . . not accepted for use by the Governor." However, a governor does not appear to have underlying authority to "not accept" funds under all divisions of the Act. For instance, under § 14007 the Secretary is given the authority to reserve up to $650,000,000 to establish an Innovation Fund, which shall consist of academic achievement awards. These awards may only go to a local educational agency or a partnership between a nonprofit organization and either one or more local educational agencies or a consortium of schools.[21] These awards will go to entities that have made gains in closing certain specified achievement gaps.[22]

Although this section does not specify an application process, it would not appear that a governor of the state would either make the application for, or provide supporting data to justify, such awards. Further, it may be the case that, under state law, a governor has no role in determining whether the local education agency will apply for or accept such awards.[23] Only under § 1607(a) does a governor appear to have the authority to control, through certification, whether federal funds would be provided under this portion of the Act. Since the authority of the state legislature to accept funds under "all divisions" would seem to only be possible if a governor had the power to reject the funds in "all divisions" (a power only found in § 1607(a)), the expansive interpretation of § 1607 would again be disfavored.

Tenth Amendment Concerns

Even if the term "acceptance by the state legislature . . . shall be sufficient to provide funding to such State" were to be interpreted broadly as to provide for a waiver of requirements regarding applications and other statutory conditions, this might not be effective in providing that the federal monies actually be spent by a state. For instance, in some cases, a governor might have direct control over the administrative apparatus under which a federal grant might be administered, and might decline to spend any monies received. In other instances, a governor may have significant indirect control over many aspects of state agencies, mostly exercised by his power to appoint or dismiss persons of authority in the Executive Branch, by which he could dissuade state officials from spending such monies. Finally, many local governments, councils of government, public entities, and public private entities which accept and utilize federal funds might have independent authority to decline to spend any monies received.

In order for the state legislature to actually force these entities to spend federal monies, one would need to interpret the phrase "acceptance . . . shall be sufficient to provide funding to such state" to essentially authorize the state legislature, by concurrent resolution, to direct the activities of local governments, councils of government, public entities, and public private entities. On its face, §1607(b) is not consistent with such an interpretation, as the language addresses "provid[ing] funding" (which is done by federal agencies), not spending monies (which would be done by state entities). But even more importantly, an

[21] Recovery Act, § 14007(a)(1).

[22] Recovery Act, § 14007(b).

[23] Cynthia Dickers, *Stimulus Plan Ties the Hands of Reluctant Governors, MinnPost.com* (available at http://www.minnpost.com/stories/2009/02/19/6785/stimulus_plan_ties_the_hands_of_reluctant_governors) (noting that some federal programs allow cities to apply directly for federal money).

interpretation of § 1607 which provided that a state legislature could, by concurrent resolution, direct the activities of a governor, state, and local entities would appear to violate the Tenth Amendment.

The Tenth Amendment 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." In *New York v. United States*,[24] Congress had attempted to regulate in the area of low-level radioactive waste. In a 1985 statute, Congress provided that states must either develop legislation on how to dispose of all low-level radioactive waste generated within the state, or the state would be forced to take title to such waste, which would mean that it became the state's responsibility. The Court found that although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly. Here, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the state to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to "commandeer" the legislative process of the states. In the New York case, the Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.

A later case presented the question of the extent to which Congress could regulate through a state's Executive Branch officers. This case, *Printz v. United States*,[25] involved the Brady Handgun Act. The Brady Handgun Act required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase. This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.

In the instant case, if the statutory language in question were interpreted to mean that state or local public entities could be directed by the state legislature to accept and utilize federal funds, this would arguably be a commandeering of those entities for a federal purpose, which would violate the principles of the cases cited above. One might argue that since the directions were not coming from the federal government, but from the state legislature, that federalism concerns were diminished. However, this distinction would not appear relevant if the power being exercised by the state legislature arose out of the Recovery Act, and not state law.[26] If Congress does not have the power to require a state to spend federal funds in furtherance of a federal program, then it would not appear to have the authority to delegate such power to others.

Statutory Interpretation

As noted, a broad interpretation of the phrase "acceptance by the State legislature. . . .shall be sufficient to provide funding to such State" might imply that Congress intends that all statutory requirements for the receipt of federal funds, such as submitting an application and complying with grant conditions, can be

[24] 505 U.S. 144 (1992).

[25] 521 U.S. 898 (1997).

[26] Generally, a legislature would not be authorized by a state constitution to exercise significant legislative authority by a concurrent resolution.

waived by a state legislature. The Recovery Act, however, provides funding both in the forms of funds allocated by formula and by the application of state grants.[27] As noted above, the phrase under consideration could only logically be implemented in the case of allocated funds, since waiving the requirement of application and provision of necessary data in the context of discretionary grants would leave no basis for funds to be allocated. Thus, in order for the language of § 1607 to take on the broader meaning in the context of allocated funds, the language "shall be sufficient to provide funding under this Act" would have to mean something different in relation to state grants. However, under general rules of statutory construction, the same words of a statute cannot be interpreted differently in different contexts.[28]

Instead, a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.[29] As noted, the narrower interpretation suggested for § 1607(b) appears to complement the gubernatorial certification scheme established in § 1607(a). Further, this interpretation would allow the terms in question ("acceptance," "sufficient to provide funding") to take on a natural meaning closer to apparent meaning of the terms used.

And finally, to the extent that one interpretation of a statute were to raise constitutional concerns, this interpretation would generally be disfavored.[30] An interpretation of § 1607(b) that authorized a state legislature to use federal law to commandeer state or local entities to administer federal funds would appear to violate the Tenth Amendment. Consequently, such an interpretation would be unlikely to be adopted by a court.

Conclusion

Section 1607(a) of the Recovery Act provides that, in order for a state to be eligible for the federal funds in the Recovery Act, a governor must certify that (1) a state will request and use funds in the future, and (2) the funds will be used to create jobs and economic growth. This language does not appear to bind a governor to request or accept any particular level of governmental funding, nor does it appear that the

[27] Section § 1607 specifically provides that the language of § 1607(b) shall apply to "funds provided to any State in any division of this Act."

[28] Where the same term is used several places in statutory text, it is generally presumed to have the same meaning in every instance, Ratzlaf v. United States, 510 U.S. 135, 143 (1994). See also Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995); Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 225 (1992). This presumption is particularly strong when the term is used within the same sentence, Brown v. Gardner, 513 U.S. 115, 118 (1994); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 329-30 (2000), and this conclusion seems inevitable when the different meanings are sought in the same word.

[29] United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (citations omitted)). United States v. Boisdoré's Heirs, 49 U.S. (8 How.) 113, 122 (1850) (opinion of Court)("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"). A related canon of statutory construction is that statutes should be construed "so as to avoid rendering superfluous" any statutory language. Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991). See, e.g., Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation").

[30] Under the doctrine of constitutional doubt, courts will construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

certification must be based on the governor's future acceptance of funds, as such request or acceptance can sometimes be made by state or local officials.

Forty-five days after passage of the Recovery Act, if a governor has not provided the necessary certification, then § 1607(b) would appear to provide a state legislature the authority to step in to "accept" state funds by concurrent resolution, achieving the same result as would have been achieved by the certification. However, it seems clear that such acceptance, while "sufficient" to trigger the availability of federal funds under the Recovery Act, does not free a state from any other conditions of receiving funds, such as filling out applications, justifying needs, and providing assurance of compliance with program requirements.

Although the language of § 1607 is arguably ambiguous, it does not appear likely that it was intended to significantly reallocate powers between a state legislature and a state executive branch. Thus, once either a governor's certification or the legislature's acceptance has been made, § 1607 would have little or no apparent effect on the power of a governor, state or local official to choose whether or not to seek and administer these funds. The language of § 1607(b), while adding an additional requirement to the federal funding process, does not otherwise appear to supplant or replace existing federal requirements, nor does it appear to change the allocation of power within a state to make decisions regarding the application, acceptance and use of such federal funds. Any interpretation of this language which did provide authority to a state legislature, by concurrent resolution, to direct the acceptance and spending of federal monies, would likely raise Tenth Amendment issues. Consequently, such an interpretation would be disfavored.