

# How to Make Our Roadways More Efficient and Safer, Too!

*It's already the law, all we have to do is apply it.  
Foundations for a Court Challenge to Make it Happen.*

By Chad Dornsife,  
Best Highway Safety Practices Institute  
July, 15 2006

When President Eisenhower had the foresight to establish the interstate highway system our nation truly became united. Every aspect of our society became stronger. It changed the very fabric of our lives. The need to have uniform traffic control became an organized effort in the 1920's but the interstate system made it clear this safety initiative was yet to be realized. Despite the early efforts we still had tens of thousands of entities, each with their own systems. As a nation we had to act. For safety to be served, uniformity of appearance and expectation became a national safety imperative. An imperative we hold is still true today.

In 1966, President Johnson and Congress came to together and adopted a rare law that relied on professional standards and knowledge rather than political conjecture as its foundation. For safety to be served this new law required our highway safety standards to be based only on best practices because it applied to all roadways open to public travel equally.

The Highway Safety Act of 1966 was Congress' one nation, one traffic control authority. In this act, all traffic control standards were turned over to the engineers' and their institutions to make sure that only those practices that are found to improve efficiency and safety are adopted. In 1971 the look and shape of all devices had to comply, and in 1988 this authority was expanded to include engineering studies, standards and practices.

Any statute or regulation adopted absent these legacy minimum statutory federal requirements/foundations would be void.

In spite of Congress' mandate, the USDOT has now purported to authorize widespread noncompliance with the US Code of Federal Regulations and their own charter as an agency. We have irrefutable evidence that this is an unlawful act in violation of Congress' uniformity and safety mandates, all to the clear detriment of public safety. This dereliction of responsibility and genuflecting has been directly responsible, each year, for the unnecessary deaths of thousands, and mayhem for ten of thousands more.

The USDOT's refusal to oversee Congress' mandate has also allowed complete anarchy in application and expectation to go unchecked. Virtually every major traffic law in every state has been promulgated in violation of the governing law, and these errant practices continue unabated. The more notorious unlawful uses of state power includes the under posting of speed limits with unlawfully established safety values, inadequate yellow intervals to sustain automated enforcement. This is also the real killer too, because to facilitate these inexcusable practices they eliminated the only program that truly saves lives, mandatory periodic engineering studies. Likewise, they have also turned a total blind eye to other extremely unsafe practices and uncontrolled access management policies so as to not upset shortsighted local political self-interest and whim.

Engineering studies are periodic safety audits to assure that traffic control is set to meet the needs of traffic and to identify problem areas that may have become apparent where mitigation may be warranted. Traffic access management plans look at the roadways primary function then sets forth guidelines to maintain optimum flow and minimize conflicts. Everybody wins, commerce, quality of life, property values, reduced accidents and lower pollution, too.

Here you will find the basis to restore safety, improved efficiency, reduced pollution, the promise of The Highway Safety Act of 1966 and cause the USDOT to return to policies that enhance the public's general welfare rather than their own self-interest. The thirty thousand foot view;

**Federal Law Mandates Uniform Standards:**

One appearance, application and expectation regardless of entity type or jurisdiction or state lines.

“The U.S. Secretary of Transportation, under authority granted by the Highway Safety Act of 1966, decreed that traffic control devices on all streets and highways open to public travel in accordance with 23 U.S.C. 109(d) and 402(a) in each State shall be in substantial conformance with the Standards issued or endorsed by the FHWA.”

23 CFR 655.603 adopts the MUTCD as the national standard for any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. 109(d) and 402(a).

Standard:

Traffic control devices shall be defined as all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, or bikeway by authority of a public agency having jurisdiction.

23 CFR 655.603(b)(1)

(b) State or other Federal MUTCD.

(1) Where State or other Federal agency MUTCDs or supplements are required, they shall be in substantial conformance with the national MUTCD. Changes to the national MUTCD issued by the FHWA shall be adopted by the States or other Federal agencies within 2 years of issuance.

#### Section 1A.06 Uniformity of Traffic Control Devices

Support: Uniformity of devices simplifies the task of the road user because it aids in recognition and understanding, thereby reducing perception/reaction time. Uniformity assists road users, law enforcement officers, and traffic courts by giving everyone the same interpretation. Uniformity assists public highway officials through efficiency in manufacture, installation, maintenance, and administration. Uniformity means treating similar situations in a similar way. The use of uniform traffic control devices does not, in itself, constitute uniformity. A standard device used where it is not appropriate is as objectionable as a nonstandard device; in fact, this might be worse, because such misuse might result in disrespect at those locations where the device is needed and appropriate.

#### **States Rights:**

Accepting the benefit of a federal program bars any claims that it is unconstitutional.

Pennhurst v. Halderman, 451 U.S. 1, 17 (1981). Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492, 501-502 (1955).

States accept benefits/supremacy of federal regulations in exchange for federal highway funds each time they accept a payment.

US 23 CFR 630.112(a)

Sec. 630 .112 Agreement provisions.

(a) The State, through its transportation department, accepts and agrees to comply with the applicable terms and conditions set forth in title 23, U.S.C., the regulations issued pursuant thereto, the policies and procedures promulgated by the FHWA relative to the designated project covered by the agreement, and all other applicable Federal laws and regulations. (Emphasis added)

### **Supremacy Clause:**

"The Supremacy Clause of Art VI of the Constitution provides Congress with the power to pre-empt state law. Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, \* \* \* when there is outright or actual conflict between federal and state law, \* \* \* where compliance with both federal and state law is in effect physically impossible, \* \* \* where there is implicit in federal law a barrier to state regulation, \* \* \* where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, \* \* \* or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Louisiana Public Service Comm. v. FCC, 476 U.S. 355, 368-69, 106 S Ct 1890, 90 L Ed 2d 369 (1986).

"Where a state statute conflicts with, or frustrates, federal law, the former must give way." U.S. Const., Art. VI, cl. 2; Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

### **Arbitrary and Capricious:**

There are nationally recognized prescribed procedures to determine the safety value of a posted limit or to assure the timing of a traffic signal meets the needs of traffic or if the signal or stop sign was warranted in the first place et al. Any value established by conjecture absent this on its face is arbitrary and capricious.

ARBITRARY AND CAPRICIOUS - Absence of a rational connection between the facts found and the choice made. Natural Resources. v. U.S., 966 F.2d 1292, 97, (9th Cir.'92). A clear error of judgment; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of

discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. 5 USC. 706(2)(A) (1988).

**ARBITRARY:**

1: depending on individual discretion (as of a judge) and not fixed by standards, rules, or law

2 a: not restrained or limited in the exercise of power

b: marked by or resulting from the unrestrained exercise of power

3 a: based on preference, bias, prejudice, or convenience rather than on reason or fact

b: existing or coming about seemingly at random or by chance or as an unreasonable act of individual will without regard for facts or applicable law

**CAPRICIOUS:**

1: governed or characterized by impulse or whim: as

a: lacking a rational basis

b: likely to change suddenly

2: not supported by the weight of evidence or established rules of law

**Commerce Clause:**

Under the Commerce Clause, a state cannot adopt regulations substantially affecting interstate traffic without compelling research that supports that regulation.

450 U.S. 662; *Kassel v. Consolidated Freightways Corp.*, No, 79-1320

Therefore, a regulation adopted by the legislature or purported authority to use a federal device, or an ordinance, statute or regulation by a state or local authority that affects interstate commerce absent a sustainable foundation, is void. In my opinion, any regulation that would justify a traffic stop, an act that puts the occupants of vehicles in

serious immediate jeopardy, substantially affects interstate traffic, meeting the threshold. Moreover, since 1979, when the Supreme Court came to this decision interstate travel within the United States has become omnipresent and individuals now can easily transit through many states and hundreds of discreet jurisdictions in a single day. Without uniformity of meaning, expectation and factual foundations, no reasonable person could ever be expected to comprehend or know each township, city, county, reservation, state or county, federal or state park law's unique expectations and or arbitrary regulations that they may have enacted.

**Traffic Control laws Must Have Factual Foundations:**

All laws have unintended consequences, and because the MUTCD is the minimum engineering, application and safety standard for traffic control on that applies to all highways open to public travel equally, regardless of type or class or the public agency having jurisdiction, any practice or standard that is not consistent with its uniformity and safety mandates is, on its face, unlawful. The authority to compel compliance or remedy errant practices that may have been purportedly authorized by the USDOT is founded in section 5 U.S.C. § 706. The Highway Safety Act of 1966 et al as adopted by Congress created a new paradigm for the Nation's traffic laws and its mandates encompass all of us; individuals, law enforcement, public entities, the courts and the USDOT, too!

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Source (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

### **Due Process:**

There has been a concerted effort by the stakeholders in the prosecution of traffic fines to remove due process and exculpatory evidence from being used in an accused defense. In most jurisdictions traffic offenses are now infractions or civil offenses that are not subject to discovery et al. Worse, the federal Uniform Vehicle Code has been promulgated by the sponsors and beneficiaries of the citation industry to include new guilty with no real defense model laws. They advocate the removal altogether of problematic due process issues from their automated traffic fine collection schemes. Thereby removing any pretext of a link between the state's professed safety objectives and their desire to increase efficiencies in the collection of traffic fines for themselves or their constituents.

Automated traffic law enforcement model law

<http://www.ncutlo.org/autoenforce622.htm>

“The model law imposes only a civil fine for traffic law violations enforced via an automated traffic law enforcement system and relies on an initial presumption of guilt. This approach is not new as it is typically utilized for the enforcement of parking law violations. As with parking violations, traffic law violations resulting from automated traffic law enforcement are not recorded in drivers' licensing files for possible point assessment or licensing action. Indeed, any attempt to unfavorably influence persons' driving privileges, through the use of this system, could raise due process of law concerns.”

Rather than a single expectation, the FHWA's refusal to intervene and enforce Congress' uniformity mandates has left us with tens of thousands of entities each applying their own

definitions and expectations regarding traffic control. If all local, city, county and state vehicle codes and local ordinances were to be printed out, it would fill rooms, with most of it established outside the federal statutory minimums. When confronted with a non-compliance violation, rather than remedy it, the FHWA has unlawfully eliminated the requirements time and time again, leaving the overwhelming majority of traffic control laws in our nation based solely on local conjecture with no factual foundation whatsoever. It has thereby violated the very essences of due process that a person has a clear informed nature and cause for the charges being levied against them, and that those charges are founded in fairness. In addition, that the laws being enforced were lawfully established. Neither is true for most traffic citations (tens of millions) anywhere in the country.

**DUE PROCESS** - The idea that laws and legal proceedings must be fair. The Constitution guarantees that the government cannot take away a person's basic rights to 'life, liberty or property, without due process of law.' Courts have issued numerous rulings about what this means in particular cases.

The Sixth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, see *In re Oliver*, 333 U.S. 257, 273-74 (1948), guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges against him. In order to determine whether a defendant has received constitutionally adequate notice, the court looks first to the information. *James v. Borg*, 24 F.3d 20, 24 (9th Cir.), cert. denied, 115 S. Ct. 333 (1994). 'The principal purpose of the information is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense.' *Id.*

Due process is best defined in one word--fairness. Throughout U.S. history, its constitutions, statutes and case law have provided standards for fair treatment of citizens by federal, state and local governments. These standards are known as due process. When a person is treated unfairly by the government, including the courts, he is said to have been deprived of or denied due process.

#### **Authorized Traffic Control Decisions:**

MUTCD was established as the nation's vetted engineering standard that applies to all roadways and bike paths open to public travel. Therefore any practice that is adopted that supplants prior established best practice that has not been properly vetted as for efficacy, or conflicts with one-nation one-standard or is known to be less safe practice is repugnant to Congress' uniformity and safety oversight mandate contained in Title 23 et al.



Engineering Judgment cannot be asserted when it is being applied to an arbitrary and capriciously determined value or a personal opinion. To be a valid engineering judgment the engineer must be able to articulate which nationally recognized standards, research or practices they have applied.

Under Congress' uniformity and safety mandate only a licensed engineer can express an engineering opinion, and that opinion must be consistent with nationally recognized best practices. Whereas, a political body or any other political entity cannot express an engineering judgment nor can they order or authorize the use of a traffic control device on a roadway or bike path open to public travel except as provided for by federal law.

Purported federal authority to authorize non-complying legacy state and local practices is repugnant on its face to Congress' mandate of one nation, one standard.

Chad Dornsife, Director  
Best Highway Safety Practices Institute

2879 Champlain Drive  
Portland, OR 97205-5833  
[www.BHSPI.org](http://www.BHSPI.org)

503.223.5447 Portland Office  
775.721.2423 Reno Office  
858.673.1926 San Diego Office  
800.708.5723 Fax  
775.721.2423 Cell

California Office  
PO Box 270708  
San Diego, CA 92198  
858.673.1926