

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

24-Apr-1996 05:08pm

TO: Elizabeth E. Drye

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: new acir

Not sure it's so horrible for my 2 items, but we would need advice from the agencies to be certain; I assume I am not at liberty to ask them at this point?

The most worrisome item: On IDEA, it refers to requirements that are "unrelated to the education of the child." I'm not sure what these would be -- they would presumably be open to interpretation. What occurs to me is reporting requirements of various sorts, but this is probably trouble. We should ask ACIR what they mean by this.

On both IDEA and ADA, the new recommendations drop the old structure of "increase Federal funding OR do something horrible", and simply recommend increased Federal funding. Not sure what position we would take on that.

The other items are hard to argue with:

- o On "support increased mediation," in IDEA, I think Education could argue we are already doing that in our proposal to reauthorize IDEA. As I recall, we have proposed to require states to offer mediation to parents.

- o On "support increased TA and info to help states and locals comply; better coordinate federal enforcement and assistance" on the ADA: it's hard to be too opposed.

But on all of these, I wouldn't feel comfortable saying these are OK until I checked with the lawyers at Education and DOJ.

25-Apr-1996 12:56pm

TO: Elizabeth E. Drye

FROM: Diana M. Fortuna
Domestic Policy Council

SUBJECT: acir: reactions from agencies

Here is what I have heard from DOJ and Education:

1. ADA : It is probably OK except for the first sentence, which makes too explicit a link between a civil rights law and federal funds. DOJ/Liz Savage will send me an alternative.

2. IDEA: Judy Heumann was more anti-this than I expected.
Sentence by sentence:

1. On raising federal funding to 40%, she thinks it is dumb to be at all positive on this, since it is so unrealistic; she says we would instead say that we are working to reduce the burden of paperwork instead as a way of reducing the burden. (She also mentions better "coordination of services", which I think means trying to shift the costs of special ed onto other programs like medicaid; not sure we would highlight that.)

2. As I predicted, big problem with relieving requirements UNRELATED to education of a child. They say nothing is unrelated, so this is guaranteed to be something bad. So we could ask ACIR what they mean by this, but there is no answer Education would like.

3. On increased use of mediation, we agree and say we have proposed it in our bill already.

Overall, she said Education/Riley have taken the position that IDEA should not even be part of ACIR's report since it's civil rights. (Same logic would apply to ADA.) If we can't take that position, she thinks just mediation should be left standing.

Is Riley being asked his opinion too? Are we coordinating?

CONFIDENTIAL

The Role of FEDERAL MANDATES in Intergovernmental Relations

An ACIR Report
Based on Section 302, Public Law 104-4

July 1996
US Advisory Commission on Intergovernmental Relations
Washington, DC 20575

July -
- civil rights law
- more rights of access
- no national state compliance
- hold up pending legislation
includes SDWA
"On Suburban"
for each state?
- civil rights
- FCS
- IDEA
- CWA
- OSHA
- CAA

Preface

The *Unfunded Mandates Reform Act* (Public Law 104-4) directs the Advisory Commission on Intergovernmental Relations (ACIR) to conduct four studies: 1) a baseline study of costs and benefits related to federal mandates; 2) a review of federal mandates and their impact on intergovernmental relations; 3) a review of the role of unfunded state mandates imposed on local governments; and, 4) an annual review of federal court cases in which a state, local, or tribal government was a party and in which the court order expanded the duties of those governments. ACIR was directed to include in its studies consideration of the competitive balance between state, local, and tribal governments and the private sector and the views of working men and women.

The Commission was forced to limit the studies it conducted and to simplify work plans because only one-third of the \$1 million authorized for the studies was appropriated to ACIR. No study funds were appropriated in Fiscal Year 1995 and \$334,000 was appropriated for the studies in Fiscal Year 1996. With the available appropriations, ACIR contracted with George Washington University National Law Center for the production of a 1994 court rulings report. The report, *Federal Court Rulings Involving State, Local, and Tribal Governments, Calendar Year 1994*, was published in July 1995. ACIR also conducted a modified study of existing federal mandates and their impact on intergovernmental relations. In January 1996, ACIR released the preliminary report, *The Role of Federal Mandates in Intergovernmental Relations* for public comment.

After holding a "thinkers session" on options for conducting the baseline cost/benefit study, ACIR concluded that it did not have the resources to conduct such an analysis in a meaningful way. So, no further action was taken on this directive. Likewise, it was determined that insufficient resources were available to conduct a review of unfunded state mandates imposed on local governments. Lastly, no funds were available to complete the required second annual review of federal court cases imposing mandates on state, local, and tribal governments.

For its study on existing federal mandates, ACIR relied on information from various sources. In particular, ACIR used information from a National Governors' Association survey, a National Rural Development Partnership survey, and letters or telephone calls from state and local government officials and the general public. In addition, ACIR participated in numerous meetings with federal, state, and local officials and other parties interested in issues related to federal mandates. On March 6-7, 1996, ACIR held a national conference on mandates. On March 26, 1996, ACIR held a public hearing on the preliminary report in Washington, DC. Finally, the Commission solicited and accepted public comments on the preliminary report between January 17 and March 29, 1996.

Over 500 public comments were received on the preliminary report, more than 40 persons submitted testimony during the public hearing, and over 250 persons participated in the conference on mandates. Both supporting and opposing comments were received on all 14 individual mandates discussed in the preliminary report. In addition, comments were received on mandates in general or on the six common issues mentioned in the report. Unfortunately, due to resource constraints, ACIR was unable to systematically solicit the views of working men and women on mandate issues as required by the *Unfunded Mandates Reform Act*. However, ACIR

worked closely with Department of Labor staff on labor related mandates and did give full consideration to comments received from working men and women and labor organizations. Lack of resources also made it impossible for the Commission to analyze the relationship of federal mandates to the competitive balance between state, local, and tribal governments and the private sector.

This final report on existing federal mandates focuses on intergovernmental issues associated with federal mandates. The report discusses and makes recommendations on six common issues related to existing federal mandates and on 14 individual mandates selected by ACIR for specific review. The recommendations on both the common issues and the 14 individual mandates reviewed are based on material gathered during the production of the preliminary report and during the public comment period.

As directed by Section 302 of the *Unfunded Mandates Reform Act*, therefore, ACIR is hereby submitting its final report on existing federal mandates to the President and the Congress.

William F. Winter

Chairman

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ACIR REPORT ON FEDERAL MANDATES

Approved for Submission to the President and the Congress
by the US Advisory Commission on Intergovernmental Relations
_____, 1996

INTRODUCTION

The *Unfunded Mandates Reform Act of 1995* (P.L. 104-4) represents a bipartisan agreement to strengthen the partnership between the federal, state, local, and tribal governments. Section 302 of the law directs the Advisory Commission on Intergovernmental Relations (ACIR) "to investigate and review the role of federal mandates in intergovernmental relations" and to make a final report to the President and Congress on the findings, conclusions, and recommendations of the Commission. This report responds to the law's directive and presents ACIR's findings, conclusions, and recommendations for changes in existing federal mandates to improve intergovernmental relations while maintaining a commitment to national interests.

CHANGES IN THE FEDERAL SYSTEM

The mandate issues examined in this report arose in part because the American federal system is no longer characterized by clearly defined responsibilities for federal, state, and local governments. One result of this lack of defined roles has been increased federal involvement in activities historically considered to be state and local affairs. Often federal involvement began with financial aid to achieve national goals. In recent years, however, federal involvement sometimes has taken a variety of forms including direct orders with no federal financial assistance. The extensive and complex nature of federal involvement in state and local affairs is illustrated by the following points:

- More than 200 separate mandates were identified to ACIR by state and local governments, involving about 170 federal laws.
- The ACIR report *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994*, identified 3,500 decisions involving state and local governments, relating to more than 100 federal laws.
- To receive any non-construction federal assistance, state and local officials must certify that they are in compliance with 27 specific federal laws, 5 executive orders, any nondiscrimination provisions in statutes related to the statute under which the federal assistance is being provided, and all applicable requirements of all other federal laws, executive orders, regulations, and policies governing the program under which federal assistance is being sought.

DEFINITION OF MANDATE FOR ACIR STUDY PURPOSES

Title III of the *Unfunded Mandates Reform Act* recognized the diverse nature of federal involvement in state and local government activities by broadly defining "mandate" for the purposes of ACIR's studies. Section 305 defines the term "federal mandate" for ACIR's purposes as "any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program." [Underlining added.]

Section 4 of the *Unfunded Mandates Reform Act* excludes civil rights and other laws from certain aspects of the Act. These exclusions apply to "any provision in a bill, joint resolution, amendment, motion, or conference report before Congress and any provision in a proposed or final regulation." The exclusions relate to activities described in Title I regarding proposed legislation and in Title II regarding proposed and final regulations. The exclusions do not relate to ACIR's review of mandate provisions in existing federal statutes as required by Title III of the Act. }

DETERMINING THE APPROPRIATE FEDERAL ROLE

From the beginning of US history, debate has raged about the meaning of a federal union among the states, and more specifically, about the appropriate roles of federal versus state or local governments. The United States has continued to define and redefine how federalism can best work in a changing world. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Supreme Court concluded that clear lines defining the appropriate scope of federal activities could not be drawn once for all times. In the court's opinion, the lines between federal, state, and local activities are developed through the political process and can be expected to change at different times in the nation's history.

At various points in our nation's history, the political process has determined which government activities are so important to national interests that a federal role is generally accepted as necessary. Among the most obvious are national defense, foreign affairs, and the protection of civil rights granted by the Constitution. In an earlier period, the economic emergency of the 1930s produced federal programs to alleviate national economic and social problems. In other instances, national policy is necessary because the problems transcend state lines, such as when dirty air or dirty water from one state intrude on another state. As a result, some federal government mandates on state and local governments are generally accepted as necessary.

The challenge facing the federal government is to exercise power to resolve national needs while, at the same time, honoring state and local governments' responsibility for their own affairs and their own budget priorities. The value of the ambiguity in the situation is to serve as a protection for the citizens of the United States against the potential dangers of a too-powerful central government. In Federalist Paper No. 51, James Madison wrote:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each. Hence a double security arises to

the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

KEY QUESTIONS ON MANDATE ISSUES

The wide diversity of federal mandates makes it difficult to establish uniform ways to determine whether a mandate is proper or improper from an intergovernmental perspective. Nevertheless, ACIR has been charged with making determinations about existing mandates as they affect state and local governments. In reaching its conclusions, the Commission considered several key questions:

- Does the national purpose justify federal involvement in state or local affairs?
- Are the costs of implementing the mandate appropriately shared among governments?
- Is maximum flexibility given to state and local governments in implementing the mandate?
- Are there changes that can be made in the mandate to relieve intergovernmental tensions while maintaining a commitment to national goals?

THE ACIR REVIEW OF EXISTING MANDATES

As required by the *Unfunded Mandates Reform Act*, ACIR began its review process by adopting and publishing two sets of criteria. The first set of criteria was used to identify mandates of significant concern. The second set of criteria identified specific characteristics of mandates to serve as the basis for the Commission's recommendations. These criteria were published in the *Federal Register* on July 6, 1995 (See Appendix A).

The first set of criteria identified mandates of significant concern as those that: (1) require state or local governments to expend substantial amounts of their own resources without regard for state and local priorities; (2) abridge historic powers of state and local governments without a clear showing of national need; (3) impose requirements that are difficult or impossible to implement; and (4) are the subject of widespread objections.

The second criteria identified a number of specific conditions for which ACIR should make relief recommendations. The specific conditions included: requirements not based on a need for national action or, if needing national action, not federally funded; unnecessarily rigid requirements; unnecessarily complex or prescriptive procedures; unclear goals or standards; contradictory or inconsistent provisions; duplicative provisions; obsolete provisions; requirements lacking an adequate scientific or economic basis; provisions lacking in practical value; or, requirements that create undue financial difficulties for state or local governments.

After issuing the criteria for its study of existing federal mandates, ACIR solicited information about mandates from state and local governments, federal agencies, and the public. ACIR also relied on a variety of efforts by others to help in identifying mandates needing attention. For example:

- The National Governors' Association requested each governor's office to list the mandates of most concern in their states.

- A general appeal was made in the magazines and newsletters of national and state groups representing state and local governments.
- A survey of small rural governments was conducted by the National Rural Development Partnership.
- Officials attending national and state association meetings were asked to identify troubling mandates.

Through this process, information was received from over half the states, eight municipal leagues, four state associations of counties, the national associations representing state and local governments and their officials, and directly from a variety of local government officials. More than 200 federal mandates on state and local governments were identified to ACIR. The Commission selected 14 of the mandates for analysis as part of this report. The 14 mandates selected for review all meet one or more of the criteria ACIR adopted for identifying mandates of significant concern.

The selection of the 14 mandates was based on:

- (1) The criteria published by the Commission on July 6, 1995;
- (2) The preponderance of communications identifying the mandates as troubling to state and local governments; and,
- (3) The significance and diversity of issues posed for intergovernmental relations.

Due to time and resource constraints, ACIR was unable to review more than the 14 selected mandates. *Nevertheless, many more of the over 200 mandates identified need to be evaluated and the Commission urges that a review of additional existing federal mandates be authorized as soon as possible.*

COMMISSION ACTION ON THE PRELIMINARY REPORT

The preliminary report on ACIR's review of existing mandates was developed through a series of Commission meetings held on June 13, September 15, and December 19, 1995. Written and oral communications on issues to be included in the preliminary report were exchanged between Commission members or their staff representatives and ACIR staff between formal meetings. Also, working sessions involving Commission members or their staff representatives were held to refine the preliminary report format, language, and concepts.

On December 13, 1995, a draft preliminary report was distributed to Commission members and, on December 19, 1995, a Commission meeting was held to discuss the draft preliminary report. Following the December 19 meeting, the draft preliminary report was amended in accordance with directions from Commission members attending the meeting. On December 28, 1995, a copy of the revised draft was sent to each Commission member along with a ballot to approve or disapprove release of the preliminary report for public comment. It should be particularly noted that the Commission members were voting on the release of the preliminary report for public comment and not on the acceptability of the individual recommendations, per se. *good*

Commissioners, however, were encouraged in the balloting process to express any concerns or suggested changes they may have with language or other issues in the preliminary report.

A majority of Commission members approved release of the preliminary report, as distributed. A *Federal Register* notice announcing the availability of the preliminary report, *The Role of Federal Mandates in Intergovernmental Relations*, was published on January 17, 1996. Also, the release of the preliminary report for public comment was announced at a January 24, 1996, press briefing.

PUBLIC COMMENTS AND TESTIMONY ON PRELIMINARY REPORT

Both the January 17 *Federal Register* Notice and the January 24 press briefing materials on the preliminary report said public comments would be accepted through March 15, 1996. On March 5, 1996, ACIR announced in the *Federal Register* an extension of the public comment period through March 29, 1996. Moreover, as directed by the *Unfunded Mandates Reform Act* and as announced in the February 27 and March 5 *Federal Register*, ACIR conducted a public hearing to accept testimony on specific issues in the preliminary report. The public hearing was held in Washington DC on March 26, 1996.

During the public comment period, ACIR was contacted by federal agencies and other officials in the federal executive branch, state and local government officials, Members of Congress, public interest organizations, and private citizens. ACIR received 538 public comments, 47 testimonies, and several packages of additional mandate information. Both supporting and opposing comments were received on all 14 individual mandates discussed in the preliminary report. Also, comments were received on mandates in general or on the six common issues mentioned in the report. The public comments, testimony, and other materials received are available for public review in the ACIR offices, upon request.

FOCUS ON INTERGOVERNMENTAL ISSUES

The *Unfunded Mandates Reform Act*, directs ACIR to focus its attention on "the role of federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, ..." In view of this directive, the Commission considered the fundamental intergovernmental issues associated with each mandate selected for review, as separate and distinct from the national policy goals, general purposes, or implementation issues related to each mandate.

Moreover, ACIR focused its attention on intergovernmental issues because state and local concerns usually relate to aspects of a mandate that are damaging to intergovernmental comity, not to the national policy goal or general purpose of a mandate. ACIR and state and local governments recognize that most federal laws and their national policy goals have, and are worthy of, broad public support. Furthermore, it would be inappropriate, if not impossible, for ACIR, or any other group doing an overview study of federal mandates, to duplicate the work of federal agencies and congressional committees on individual mandate requirements. *In general, therefore, ACIR recommends that mandate relief studies and related efforts focus on how to restructure federal laws to restore comity between the governments in the American federal system, not on the elimination or repeal of federal laws.*

Also, it should be noted that mandate issues are more than disagreements about which government has the right to make a decision or take an action. Mandate issues relate to the nuts and bolts of government operations—policy-making and service delivery. This is the reason that much of the current proposed legislative changes and regulatory reform actions are specifically aimed at improving relations between the federal government and state, local, and tribal governments. *ACIR encourages all such efforts and urges even more widespread adoption of federal policies that enhance intergovernmental relations.*

COMMON ISSUES: DISCUSSION AND RECOMMENDATIONS

ACIR's review of existing mandates found six common issues in federal mandates that are complicating intergovernmental relations. These issues and ACIR's proposed recommendations to address are listed below.

1. Detailed procedural requirements. State and local governments often are not given flexibility to meet national goals in ways that fit their resources and needs. The imposition of detailed procedural requirements for implementing federal statutes, in many instances, merely increases costs and delays achievement of the national goals. *In general, state and local governments should be permitted, through statutory language, flexibility in choosing the methods used to comply with a federal mandate. Federal agencies should assist state and local governments by providing research and technical advice on implementation approaches and methods to save the state and local governments design and adaptation costs, whenever possible. The focus of federal statutes, regulations, and policies should be on results, not process.* ok

2. Lack of federal concern about and funding of mandate costs. Prior to passage of the *Unfunded Mandates Reform Act*, the federal government often imposed mandates without considering the full magnitude of the mandate cost, including the cost to state and local governments and with little or no federal funding commitment. As a consequence, the federal government had little incentive to weigh costs against benefits or to allow state and local governments to determine the least costly alternatives for reaching national goals. *As required by the Unfunded Mandates Reform Act, the federal government should take federal, state and local costs of policy implementation into consideration before enacting a law containing a federal mandate on state and local governments. In addition, the federal government should assume some share of mandate costs as an incentive to restrain the extent of the mandate and to aid in seeking the least costly alternatives.*

3. Federal failure to recognize state and local governments as governments. State and local governments often are treated as interest groups, as private entities, or as administrative arms of the federal government. Federal policies tend not to recognize state and local governments as government entities subject to public accountability through elections and through the policy processes of a state legislature, county commission, or city council. Views of private entities and non-governmental advocacy groups sometimes have been given more attention than those of state and local governments. *Federal laws and regulatory policies should recognize that state, local, and tribal governments are co-makers of national policy who, in contrast to interest* ?

groups and private entities, are led by elected officials who must account to the voters within their respective jurisdictions just as do the President and the Members of the US Congress.

4. Authorization of lawsuits against state and local governments to enforce federal law.

Several federal laws authorize individuals or groups to sue state or local governments. Such private rights of action augment the resources of federal agencies and provide an alternative mechanism to enforce compliance for persons dissatisfied with federal agency efforts. These policies, however, create intergovernmental tensions and may weaken federal agency efforts to enforce federal laws. Such provisions allow federal agencies to rely on individual suits rather than their own monitoring and oversight efforts to achieve compliance with federal laws. Moreover, when the federal government is not directly involved in litigation concerning a federal law, it has little incentive to propose amendments to clarify the law or to otherwise reduce the number of costly lawsuits. In effect, provisions authorizing private rights of action shift cost related to federal law enforcement to private individuals or state and local governments.

*Banged
enforced?*

Also, as indicated by the Supreme Court opinion. *Seminole Tribe of Florida v. Florida et al.*, No. 94-12, issued on March 27, 1996, the issue of federal statutes permitting private rights-of-action against state governments raises potential constitutional questions. The court's decision is based, among other things, on issues related to Congress' power to abrogate the states' Eleventh Amendment immunity. According to one point made in the court opinion:

The Eleventh Amendment presupposes that each State is a sovereign entity in our federal system and that " ' [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a State's] consent.' " *Hans v. Louisiana*, 134 US 1, 13.

The federal government should commission a study to examine the constitutional and intergovernmental issues raised by laws authorizing private rights of action against state and local governments. Such a study should be concluded prior to enactment of any more statutory language authorizing private rights of action against state or local governments and prior to any reauthorization of existing statutes with such language.

★

5. Inability of very small local governments to meet mandate standards and timetables. The requirements for many federal mandates are based on the assumption that all local governments have the financial, administrative, and technical resources that exist in large governments. In reality, many very small local governments have part-time staffs with little technical capability and very limited resource bases. Some federal laws and regulatory policies have provisions that allow deadline extensions or requirement modifications for very small governments. Such provisions are especially useful in situations where minimal adverse effects on the achievement of overall national goals would result from a deadline extension or requirement modification. *The federal government should increase the number of laws and regulations that allow for deadline extensions or requirement modifications for very small governments that cannot meet existing time limitations or cannot afford full compliance with national standards.*

ok

6. Insufficient communication on or ineffective coordination of federal policies. Confusion, uncertainty, and frustration is often created among state and local officials by the lack of good communication on or by ineffective coordination of federal policies between federal and state or

local agencies or among federal agencies. There are large information gaps about the details of some federal mandates and, even where technical assistance and information resources may be available from federal agencies or private entities, state and local governments are often unaware of how to obtain such assistance or information. Difficulties also arise when the same federal agency is charged with implementation and enforcement responsibilities and it is unclear which role the agency is in when it responds to questions raised by state and local governments. The situation is aggravated further when multiple federal agencies are responsible for implementing or enforcing a mandate and no single federal agency is empowered to make binding decisions about the mandate's requirements. Finally, when state laws are intertwined with federal requirements, the situation becomes even more complex. *The federal government should establish a coordination mechanism to assist state and local governments through the federal policy maze. The coordination mechanism should be designed to avoid the conflicts of interest that arise in a lead agency process because a lead agency usually has program as well as coordination responsibilities. Desk officers could be assigned for each state as a single point of contact or ombudsperson for questions on federal policies and common rules could be drafted to implement mandates under the jurisdiction of multiple federal agencies. In addition, an arbitration process could be developed to make binding decisions on issues related to federal mandates that arise among federal agencies or between the federal government and state or local governments.* ?

INDIVIDUAL MANDATES: DISCUSSION AND RECOMMENDATIONS

Fair Labor Standards Act

*- statutory mandate
- enforce
- viewed as minimum std.*

RECOMMENDATION: *Retain state and local government coverage under the FLSA but amend the Act to allow state and local government compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.*

Description

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) was enacted in 1938. The law sets minimum wage requirements and mandates overtime payments for certain employees who work more than 40 hours a week. It also contains requirements governing child labor conditions and other issues related to employer and employee relationships. Nearly every workplace in the United States is covered by the provisions of the FLSA.

Background

The FLSA was enacted to correct or eliminate labor conditions detrimental to the general well-being of workers. In 1974, amendments to the FLSA extended the applicability of the law to state and local governments and to the executive branch of the federal government. In 1995, the Congressional Accountability Act extended the applicability of the FLSA to the legislative branch of the federal government.

The amendments bringing the public sector under FLSA coverage treat state and local governments the same as private entities while the federal government is handled somewhat differently. For example, the FLSA makes state and local governments and private entities

subject to Department of Labor oversight and requires them to have employment policies that are equal to or more generous than Department of Labor (DOL) regulations. In contrast, the Office of Personnel Management (OPM) is granted independent FLSA regulatory and enforcement responsibilities within the executive branch and the Office of Congressional Compliance is granted independent FLSA authority within the legislative branch of the federal government. Also, while federal employment policies are required to be consistent with the FLSA, they do not have to be equal to or more generous than DOL regulations as is required of state and local governments.

Furthermore, the executive branch of the federal government is granted numerous exceptions to FLSA requirements through the provisions of Title 5, United States Code. For example, Title 5 allows federal agencies to limit overtime compensation rates for higher pay grades and to limit maximum earnings per pay period. Also, Title 5 allows federal agencies to require employees above certain pay grades to accept compensatory time rather than cash for overtime and allows policies precluding such employees from being compensated when they forfeit compensatory hours. No such limits or requirements may be set by state and local governments under the current provisions of the FLSA.

Intergovernmental Concerns

Questions on applicability of FLSA to state and local governments are not raised out of disputes with the basic goals of the law. Rather, the intergovernmental concerns refer to the appropriateness of having federal mandates on employment policies related solely to state and local government employees (i.e. persons paid through state and local taxes or other resources.) The issue becomes more than philosophical, however, when application of FLSA policies to state and local governments results in conflicts with state laws and employee litigation against state and local governments results in multi-million dollar settlement issues.

For example, state laws requiring annual or sick leave to be accounted for on an hour-for-hour basis, when combined with FLSA policies, often creates a situation where nearly all employees, including those in the highest salaries levels of state or local government, qualify for overtime compensation. Many such state or local employees have won substantial retroactive pay settlements due to a court's interpretation of FLSA overtime compensation requirements. The situation is further aggravated, from a state and local government perspective, because court ordered retroactive pay settlements are usually unanticipated and not accounted for during a state's budget negotiations. Moreover, even if a state or local government successfully defends its employment policies and avoids retroactive pay settlements, substantial costs may have been incurred in the litigation process.

Recommendation Rationale

ACIR recommends retaining basic FLSA protections for state and local public employees; but, suggests amending the law to recognize state and local governments as governments and to provide mandate relief on certain points in the law. The proposed amendments could be implemented by creation of a separate title of the law for state and local governments. The separate title could be written to allow states to develop employment policies that are consistent with either FLSA or Title 5, USC. Such amendments would recognize state and local governments as distinct from private entities and would grant states flexibility similar to that currently granted to the federal government. Moreover, such revisions would provide mandate relief by allowing states to establish employment policies that vary from DOL regulations so

long as variances were consistent with the FLSA or the exceptions granted to the executive branch of the federal government in Title 5, USC. The Secretary of Labor, in consultation with the Director of the Office of Personnel Management, could be required to certify that state policies are consistent with FLSA or Title 5, USC provisions. 7

Family and Medical Leave Act

RECOMMENDATION: *Retain state and local government coverage under the FMLA.*

Description

The *Family and Medical Leave Act* (FMLA) (29 U.S.C. 2601 et seq.) was enacted in 1993. The law requires employers to provide employees up to 12 weeks of unpaid leave each year to care for a newborn, adopted, or foster child. Leave also must be granted for care of a seriously ill child, parent, or spouse. In addition, employees may use unpaid family and medical leave for personal illnesses. Medical insurance benefits must be continued during the leave and employees must be reinstated into the same or an equivalent position after leave.

Background

The FMLA was enacted to promote family stability and economic security among working men and women. The effectiveness of the FMLA was confirmed in an April 1996 report to Congress issued by the Commission on Leave. The Commission on Leave was established by Title III of the FMLA and was charged with examining the impact of the FMLA and other family and medical leave policies on workers and employers across the country. Their final report, *A Workable Balance: Report to Congress on Family and Medical Leave Policies*, was transmitted to Congress on April 30, 1996. In the Executive Summary, the report makes the following statement.

The Family and Medical Leave Act has had a positive impact on employees overall. It has succeeded in replacing the piecemeal nature of voluntary employer leave policies and state leave statutes with a more consistent and uniform standard. The FMLA has not been the burden to business that some had feared. For most employers, compliance is easy, the costs are non-existent or small and the effects are minimal. Most periods of leave are short, most employees return to work and reduced turnover seems to be a tangible positive effect. . . .

It should be noted, however, that the Commission on Leave studied implementation of the FMLA in private business settings. While the findings may also apply to public sector settings, there has not been a specific review of the act's implementation in the public sector.

Intergovernmental Concerns

State and local governments are not opposed to the FMLA's purposes or goals. Rather, the concerns raised refer to contradictions with state or local laws, potential conflicts with collective bargaining negotiations, inflexibility in DOL implementation policies, and costs associated with the extension of medical benefits and other aspects of the law's implementation. To some extent, state and local concerns are corroborated by comments in the Commission on Leave report which

indicate that larger employers, which would include most state governments, are most likely to experience an increase in costs related to FMLA implementation. According to the Leave Commission report, "this, in part, is due to the fact that they are more likely to have leave-takers and to have larger numbers of leave-takers."

Also, as is true under the FLSA, the FMLA treats state and local governments the same as private entities while granting the federal government independent regulatory and enforcement authority. As a result, state and local governments have less flexibility in designing FMLA policies than the federal government. Again, state and local government policies must be equal to or more generous than DOL regulatory policies while federal policies have to be consistent with the law; but, not equal to or more generous than the DOL policies. In addition, the provisions of the law covering the federal government vary slightly from the provisions covering state and local governments. For example, there is no provision in the FMLA to allow federal employees to pursue a right of action against their employer (i.e. the federal government) even though the provisions covering state or local governments authorize such employee suits.

Recommendation Rationale

ACIR recommends retaining FMLA protections for state and local public employees. This recommendation recognizes the positive contribution the FMLA has made towards the support of family values in our nation. The recommendation also retains the current assurance that state or local government employment policies, at a minimum, will meet DOL family and medical leave requirements. Although, as indicated by comments in the Commission on Leave report: further study of FMLA implementation in state and local government settings may be warranted, there does not seem to be substantial fiscal or other concerns with the law's implementation in the state and local public sector at the present time.

Occupational Safety and Health Act

RECOMMENDATION: *Make no change in OSHA language regarding state and local government compliance; but, increase DOL consultation activities with state and local governments and increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.*

Bill memo - -

Description

The *Occupational Safety and Health Act* (OSHA) (29 U.S.C. 651-678) was enacted in 1970. It establishes standards for safe, healthy, and productive work environments. State governments and their political subdivisions, as well as the United States government, are specifically excluded from the definition of "an employer" under the act. So, state governments and their political subdivisions are not subject to OSHA requirements unless a state volunteers to administer the federal OSHA program within their jurisdiction. When a state volunteers to administer the federal OSHA program, it is required to extend OSHA requirements to all public employees in the state. Such states are required to submit a state plan of operations to the Department of Labor (DOL) for approval prior to taking over administration of the federal OSHA program. If the state plan is approved, the Secretary of Labor is authorized to provide a

federal assistance grant of up to 50 percent of costs for administration and enforcement. No funding is provided for program compliance (e.g., training programs, equipment, or facilities modification).

In comparison, for the federal government, the law requires the head of each federal agency to establish and maintain an occupational safety and health program consistent with OSHA requirements. DOL has authority to review the agency occupational health and safety activities; but has no enforcement authority over the federal agency programs. The legislative branch of the federal government is exempt from compliance with OSHA until January 1, 1997. At that time, according to the Congressional Accountability Act of 1995, each employing office in the legislative branch of the federal government is required to comply with certain OSHA provisions.

Background

OSHA provisions are designed to reduce or eliminate work-related accidents, illnesses, and deaths. Reduction of work accidents, illness, and deaths will enhance the productivity of our nation's workers and will improve the nation's economy. According to DOL, OSHA's protective standards and enforcement program are largely responsible for the 57 percent decline in workplace fatalities over the last 25 years. Each day, however, DOL statistics indicate that more than 6,000 workers still lose time from their jobs as a result of a work related injury. Besides the personal and family tragedies, DOL estimates that job-related injuries cost the economy over \$100 million a year and occupational illnesses cost many times more than injuries.

Although most states operate occupational health and safety programs, state and local government employees are not covered by federal OSHA requirements unless their state government volunteers to administer the federal OSHA program in their state. At the current time, public sector employees in 23 states are covered by federal OSHA requirements because their state has assumed responsibility for operating the federal OSHA program and the employees in two additional states are covered by DOL approved OSHA plans for state and local government employees only. States usually do not choose to administer the federal OSHA program solely to gain coverage for their public sector employees. Rather, states choose to assume OSHA responsibilities because they see it as a way to continue using a state occupational safety and health staff established before the 1970 enactment of OSHA. they feel it will allow them to maintain closer relationships with businesses and workers in their state than would be possible with federal government administration of OSHA, or they sense that a state administered OSHA program has more ability than a federally administered program to deal with local conditions.

Intergovernmental Concerns

State and local government concerns with OSHA requirements included the lack of federal funds for compliance costs, the perception that the program is more focused on monitoring measures and the collection of fiscal sanctions than on compliance assistance, and the lack of credible information on the rationale for or the scientific basis of many OSHA standards and requirements. In addition, OSHA's credibility is compromised by the perceived or real complexity of the programs requirements especially for recordkeeping and reporting purposes. Intergovernmental tensions grow when such concerns are combined with the realization that state and local priorities cannot be met because state and local resources have been used to pay for

federal OSHA requirements whose purposes are misunderstood or insufficiently supported by good rationale.

The numerous comments received by ACIR from both participating and non-participating OSHA states attest to widespread misunderstanding about the law's coverage. The comments also indicated that there is pervasive misunderstanding as to what is a federal requirement and what is a state or local government policy decision.

Recommendation Rationale

ACIR recommends no changes in OSHA related to coverage of state and local employees. At the same time, the ACIR recommendation recognizes the need for greater communication and interaction between state governments and DOL on OSHA issues to improve understandings about OSHA requirements. Also, there is a need for increased federal technical assistance and fiscal support with the implementation of OSHA requirements in the state and local government sector.

OSHA
rec'd
summary

Drug and Alcohol Testing of Commercial Drivers

RECOMMENDATION: *Amend the law to permit alternative testing requirements or program certification in lieu of testing requirements for small governments. In addition, the federal government should increase technical assistance to state and local governments on transportation safety requirements including the control and monitoring of drug and alcohol abuse by drivers.*

Description

The *Omnibus Transportation Employee Testing Act of 1991* (P.L. 102-143, Title V) directs the Department of Transportation (DOT) to issue regulations establishing a program which "requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use . . . of alcohol or a controlled substance."

Background

The primary objective of the rules is to improve transportation safety by deterring misuse of drugs and alcohol by drivers of large vehicles. Benefits derived from alcohol and drug testing include the prevention of transportation accidents, improved worker productivity, decreased health care expenses, and reduced worker absenteeism.

To implement the law, DOT has issued rules requiring alcohol and drug testing for all drivers who are required by federal and state motor vehicle laws to carry commercial drivers licenses (CDLs) and who drive large trucks or passenger vehicles. The rules apply to private companies, state and local governments, and other organizations DOT's random testing requirements provide for the use of certain procedures, devices, and certified personnel to test employees on a regular basis. Although law enforcement officers and emergency response workers are exempt from the drug and alcohol testing requirements, the requirements still cover a substantial number of state and local government employees. Such employees are required to undergo random drug and alcohol testing by certain deadlines.

Intergovernmental Concerns

Concerns expressed by state and local officials, especially as applied to small towns with few employees included disproportionately high costs relative to potential findings and the sense that methods other than random testing would be as effective in controlling and monitoring drug and alcohol abuse. Each year, the number of random alcohol tests conducted by the employer must equal at least 25 percent of all safety-sensitive employers (50 percent for drug tests). Such testing requirements seem particularly inappropriate, and more costly than beneficial, in small towns where only one or two long-time employees are subject to the testing requirements.

Recommendation Rationale

ACIR recommends amending the drug and alcohol testing requirements for commercial drivers to permit alternative testing requirements or program certification in lieu of testing requirements for small governments. ACIR also urges the federal government to increase its technical assistance to state and local governments on transportation safety requirements including the control and monitoring of drug and alcohol abuse by drivers. Providing small towns with alternative means for compliance with the law would be similar to exceptions already made in the Act for law enforcement officers and emergency response workers. Alternative programs and enhanced technical assistance from the federal government may allow small or remote rural areas to make more efficient use of their limited resources while maintaining a national commitment to transportation safety policies.

Metric Conversion for Plans and Specifications

RECOMMENDATION: *Congress and the President are commended for extending the deadline for metric conversion of plans and specifications to the year 2000.*

Description

The *Omnibus Trade and Competitiveness Act of 1988* requires each federal agency to use the metric system of measurement in its procurement, grants, and other business-related activities, except to the extent that such use is impractical. The act permits the continued use of traditional weights and measures in non-business activities. The *National Highway System Designation Act of 1995* extended the deadline for such conversion to October 1, 2000.

Background

Metric conversion requirements were enacted into federal law because it was recognized that world trade is geared towards metric and US industries may be at a disadvantage if our nation continues to use the English system as its standard form of measurement. Also, it was estimated that cost savings to industries and governments would result from conversion to metric measurements.

To encourage voluntary shifts to the metric system by private businesses, the *Omnibus Trade and Competitiveness Act* required the application of metric measurements to non-business activities related to federal grants to state and local governments. Based on this law, the Department of Transportation (DOT) requires state and local governments to convert local highway

construction plans and specifications to the metric system. To accommodate difficulties experienced by state and local governments, DOT has a waiver process to provide exceptions to the metric requirements. Other federal agencies also have metric conversion policies, but, the DOT policies have been the subject of the most intergovernmental concerns.

A number of areas throughout the nation have already taken significant steps towards metric conversion. Further, ACIR received comment from several areas indicating that they intend to continue conversion efforts on a faster schedule than assumed by the recently extended October 2000 deadline. Such activities are encouraging and will add positive support to metric conversion efforts.

Intergovernmental Concerns

The *Unfunded Mandates Reform Act of 1995* required ACIR to include in its review of federal mandates concerns related to metric utilization requirements. The Commission, therefore, indicated a special interest in metric issues when it solicited comments on existing federal mandates. Responses on this issue came primarily from local governments who are required to use metric measurements in the design and construction of federally aided highway projects. Comments from state governments generally indicated support for metric conversion requirements or indicated an unawareness of the requirements.

The concerns cited by local governments included the inability to procure supplies in metric units at the local sites. Also, mentioned was the potential for mistakes in the bidding and construction process because of the unfamiliarity of local contractors and suppliers with metric measurements. In addition, concerns were raised that the use of the metric system could create problems for property owners seeking or providing right-of-way acquisitions, for surveyors, and for local deed registries.

Recommendation Rationale

ACIR commends the Congress and the President for enacting an extended deadline for metric conversion of plans and specifications. The extension acknowledges the value of converting to the metric system of measurement, while providing mandate relief to areas unable to meet the original deadline. DOT's approval of more than 2,200 waivers of metric requirements attests to the difficulties some areas are having with the conversion process. The recently enacted extended deadline retains the requirement for eventual conversion of plans and specifications to the metric system; but facilitates compliance on a more gradual basis in areas of the country that would have had difficulty meeting the 1996 deadline.

Medicaid: Boren Amendment

RECOMMENDATION: *Repeal the language of the Boren Amendment and insert language specifying that rate determinations are the sole responsibility of each participating state and that such rates must be established to assure that health and nursing home care is provided in conformity with applicable federal and state laws and regulations related to quality of care and safety standards.*

Chris?

Description

The *Boren Amendment* requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons eligible for assistance through the Medicaid program. The law specifies that the reimbursement rates be “reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards”

Background

The intent of the *Boren Amendment* was to give states a means of controlling costs related to reimbursement claims from providers of Medicaid services. Instead of basing reimbursements on a cost-related payment requirement for hospitals and nursing home services, the amendment allows states to pay for services based on a predetermined reimbursement rate, giving states a basis for denying reimbursement for costs determined to be in excess of that necessary to provide “efficiently and economically” delivered services. The language of the law, however, left state rate determinations open to challenge on several grounds.

Intergovernmental Concerns

Intergovernmental concerns with the *Boren Amendment* stem, in part, from the fact that the law gives state governments and the federal government shared responsibility for determining the reimbursement rates. While the state is to determine rates in accordance with methods and standards developed by the State, the federal government is required to approve the rates so established. Federal government approval of a state’s rate determination process or established rates, however, does not give a state immunity from litigation over the adequacy of their reimbursement rates or their methods for determining the reimbursement rates.

This lack of immunity, combined with the 1990 Supreme Court ruling in *Wilder v. Virginia Hospital Association*, (496 US 498), has created numerous intergovernmental tensions related to the Boren Amendment. In the *Wilder* case, the Supreme Court declared medical providers (instead of the individuals receiving health care) to be the intended beneficiaries of the *Boren Amendment*. This ruling allows medical facilities and nursing home to obtain judicial review of state reimbursement rates under Section 1983 of the *Civil Rights Act*. In other words, the Supreme Court ruling allows medical facilities and nursing homes to claim that a state is violating their civil rights by failing to pay a certain reimbursement rate.

While some state governments have not had problems related to the *Boren Amendment*, other states have been sued by medical providers or nursing homes in their state and have been found liable for significant sums of money to cover retroactive rate increases ordered by a court. In some cases, retroactive payments are not be eligible for cost-sharing from the federal government even though the federal government may have approved the rate process or the rates used. Retroactive payments must be determined within a certain time period to qualify for cost-sharing from the federal government.

Recommendation Rationale

ACIR recommends repeal of the *Boren Amendment* and adoption of statutory language making it clear that rate determinations are the sole responsibility of each participating state. To acknowledge the relationship between reimbursement rates and the quality care given to

individuals participating in the Medicaid program. ACIR suggests that the amended law specify that state determined rates must take into consideration a state's responsibility for assuring that the services provided by medical facilities and nursing homes is in conformity with applicable federal or state statutes and policies related to quality of care and safety standards.

The Clean Water Act

RECOMMENDATION: *Increase federal funding for states and local governments to support construction of municipal wastewater facilities and amend the Act to give EPA specific authority to extend deadlines for compliance on a case-by-case basis.*

Description

The *Clean Water Act (CWA)* provides a comprehensive national program to protect water quality. The Act requires states to designate the uses of water, to develop water quality criteria to protect those uses, to monitor the condition of waters, and to report on water quality every two years. States may administer a permit program for industrial and municipal pollution discharges and develop programs for the control of pollution from diffuse or nonpoint sources. Local governments are required, either directly by the federal government or indirectly through state implementation of federal laws, to treat sewage to national standards and to control discharges from combined sewers and stormwater drains.

Background

The *Water Pollution Control Act of 1948* was the first federal recognition of water pollution as a national problem. It provided research and technical assistance to state and local governments, but explicitly preserved and protected "the primary responsibilities and rights of the states in controlling water pollution." Eight years later, the condition of the nation's rivers and lakes had not noticeably improved, and in some cases had deteriorated. The *Water Pollution Control Act Amendments of 1956* provided grants to states and interstate agencies for expanded water pollution control projects. While the law reaffirmed the primary responsibility of states over water pollution, it introduced a weak form of federal enforcement through federally-called conferences on pollution. These conferences could ultimately lead to federal court actions against individual polluters.

Municipal interest groups continued to press for more federal funding for sewage treatment plants, and they were successful in the *Water Quality Act of 1965* and the *Clean Water Restoration Act of 1966*. In addition to providing \$3.55 billion of grant funds, these laws formally established a national policy for controlling pollution. The concept of "clean waters" was established as federal policy with the directive that interstate waters would be kept "as clean as possible." Most importantly, the Department of Health and Human Services¹ was authorized to apply water quality standards to interstate waters and to enforce them if states failed to set their own standards.

The *Federal Water Pollution Control Act Amendments of 1972* included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in

¹ Formerly the Department of Health, Education and Welfare (HEW)

permits as needed to meet state standards, and significant grant assistance to support construction of municipal sewage treatment facilities. In effect, states and local governments ceded control over water pollution controls to the federal government in return for federal financial aid. ✓

In 1977, some additional amendments were made to the *Federal Water Pollution Control Act* including a provision specifying that law may be referred to as the *Clean Water Act*. Some changes in the law were made in 1981 including changes related to grant assistance for sewage treatment facilities provisions. Then, in the *Clean Water Act Amendments of 1987*, federal financial assistance was changed from direct grants to capitalization of state loan funds. Under the State Water Pollution Control Revolving Funds program, money used for wastewater treatment construction is repaid by loan recipients to the states to be used for future construction loans to other communities. Although states were to have greater flexibility in exchange for a phase-out of federal assistance, the 1987 amendments added several requirements, including requirements for state programs to control nonpoint sources of pollution and requirements for municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs.

Substantial progress has been made under the CWA in preserving and enhancing the nation's water quality. National minimum guidelines are an important means of reducing the chance that downstream communities are not saddled with pollution from upstream communities which may be in another state. } benefits

Intergovernmental Concerns

State and local government concerns include issues related to the progressively more stringent requirements on municipalities to meet the statutory goal of zero discharge of pollutants and the adequacy of federal financial assistance for municipal wastewater treatment construction. Although local governments pay a considerable share of the cost for municipal water quality infrastructure, states and localities contend that without increased federal funding small communities will not be able to make needed investments in pollution control to meet the tighter federal standards. It is also argued that ~~that~~ a continued federal funding role is necessary to assure that overall clean water standards are maintained.

In addition, despite strong support for the program, some states have encountered administrative problems with the State Revolving Fund program and some small communities have found it difficult to participate in the program. Also, intergovernmental tensions increase when there are gaps between authorized funding levels and state needs. These tensions are aggravated when federal funding to aid in water pollution cleanup decreases at the same time that federal requirements—such as those dealing with stormwater drainage—are becoming more stringent and more expensive to implement. Sustained financial assistance and implementation flexibility for small communities will be needed to continue meaningful progress towards compliance with federal stormwater and nonpoint source pollution controls and other water quality requirements.

Recommendation Rationale

ACIR recommends retaining a national clean water program while recognizing that increased federal financial assistance and increased authority for EPA to approve alternative program methods, schedules, or standards would facilitate achievement of national goals in many areas unable to meet current law requirements. Adjustment of the implementation provisions of the *Clean Water Act* would give the EPA greater flexibility in addressing priorities. Also, increased

federal financial assistance for clean water programs would preserve the partnership between federal, state, and local governments in this important national policy area. State and local governments traditionally have been concerned about reducing pollution and have demonstrated their willingness to work constructively with federal officials to design realistic programs that can be completed within their technical and budgetary constraints.

Plone-
Woolson
Sado?

Individuals with Disabilities Education Act

Bus June

RECOMMENDATION: *Increase federal funding to 40% of the excess costs of special education as is authorized by the Individuals with Disabilities Education Act and amend the Act to relieve state and local governments of prescriptive administrative and recordkeeping requirements unrelated to the education of individuals with disabilities. Also, amend the Act to foster increased use of mediation and other forms of alternative dispute resolution.*

- Proposed some
relief in
Jul. bill

Description

The *Individuals with Disabilities Education Act (IDEA)* (P.L. 101-476) requires local school systems to provide a free appropriate public education for children with disabilities in the least restrictive educational setting, to the maximum extent possible with students without disabilities. The act specifies that a free appropriate public education must be directed at the particular needs of the disabled child through an individualized educational program. The law provides that federal aid to states for elementary and high school education will be available only after a state has a federally approved plan for educating children with disabilities. In addition, IDEA requires participating states to establish specific administrative procedures by which parents or legal guardians may challenge the identification, evaluation, or educational placement of the children. Requirements of the law are conditions of federal assistance or duties arising from participation in this voluntary federal program. All states have participated in the IDEA program since its inception in 1975.

Background

In 1972, a federal court decision in a "right to education" case, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* [343 F. Supp. 279 (3d Cir. 1972)] required equal protection and due process rights to children with disabilities. In response to this case, Congress passed the *Education for All Handicapped Children Act* in 1975, determining that state and local educational agencies were responsible for educating all students with disabilities, that state and local governments lacked the financial resources to do this, and that the federal government had a national interest to assist in meeting the educational needs of students with disabilities in order to assure equal protection under the law.

The Supreme Court, in 1984, further acknowledged the intergovernmental partnership in the area of special education. *Smith v. Robinson* [468 US 992 (1984)] reiterated that the Act was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. . . . The [IDEA] was an attempt to relieve the fiscal burden placed on States and localities by their responsibility to provide education for all handicapped children. . . . The responsibility for providing the required education remains on the States."

Since its enactment, the benefits of IDEA have been significant. Through IDEA programs, millions of students with disabilities have been helped to become fully participating, working members of society rather than being dependent on public funds. Before the IDEA, approximately one million children with disabilities were totally excluded from the public school system, and another four million did not receive appropriate educational services to enable them to have full equality of opportunity. Since 1976, the number of disabled children served has increased dramatically.

Intergovernmental Concerns

Despite the success of educating millions of children with disabilities, IDEA has raised administrative and financial concerns among state and local governments. There is concern about the costs associated with administering the program and with complying with the paperwork requirements of this complicated and highly process-oriented law. Prior to the 1975 enactment of IDEA, Congress gave considerable thought to the amount of the federal contribution to be authorized. As enacted, the law authorizes the federal government to reimburse states for 40% of excess cost of special education based on a national average per pupil expenditure. The intergovernmental tensions over IDEA have arisen, in part, because the annual federal appropriation for IDEA has never been sufficient to fund the maximum grants authorized under the law's allocation formula. The federal funding share has never exceeded 12 percent of costs related to special education and the Fiscal Year 1995 appropriation only covered 7 percent of the excess costs of special education.

When IDEA was originally enacted, states were making an effort to comply with the judicial mandates providing for a right to education, but often lacked the financial resources to fully implement them. Congressional intent to provide funding assistance is clear from records on the legislative debate. The House committee report for P.L. 94-142 highlighted this by point by saying:

The Committee would fail to meet its obligation if it did not assess the full cost of educating a handicapped child and assign some share of the cost as an equitable portion to be borne by the Federal government in carrying out the national policy and objectives of the legislation. To have failed to set any dollar amount to be paid for each handicapped child would have provided no guidance whatsoever to the budget and appropriations committees. The Committee has in fact exhaustively studied the educational needs of handicapped children and has made an informed determination of what should be an appropriate contribution to State and local educational agencies to help meet those needs. In making this determination, the Committee has considered the urgent needs of handicapped children and the large burden borne by State and local educational agencies in meeting those needs.

If a state accepts an IDEA grant, numerous administrative and procedural conditions are attached. States and local governments argue that the requirements under the Grants to States program do not provide enough flexibility and require states to accomplish more than they are able, given the amount of aid provided. States and school districts argue that they have no practical choice but to accept IDEA grants because they need the fund; but, then, they find themselves obligated to serve disabled students according to extensive and detailed specifications. In response to state and local government concerns, the Department of Education

has made efforts to consult with parents, educators, and administrators and to solicit proposals for changes as a part of the reauthorization of IDEA.

Finally, the private right of action and due process procedures in IDEA have been cited by states and local education agencies as creating a time-consuming and adversarial atmosphere that draws funds from educational programs and results in school district decision-making that is based on avoidance of costly legal process rather than appropriate education. Currently, local agency decisions may be challenged in either state or federal court, and, in some cases, parents bringing actions on behalf of their children may be entitled to reimbursement for their costs, including attorney and court fees. Mediation, or other types of alternative dispute resolution could have major effects in reducing the adversarial condition of the process, facilitating better communication between the parties, and promoting cooperation.

Recommendation Rationale

ACIR recommends the full amount of funding authorized by IDEA, 40% of the excess costs of special education, be made available to state and local governments. Also, ACIR recommends IDEA be amended to relieve state and local governments of prescriptive administrative and recordkeeping requirements, especially the costly requirements not directly related to the education of individuals with disabilities. Finally, ACIR recommends IDEA be amended to foster increased use of mediation and other forms of alternative dispute resolution. The goal of the amendments should be to reduce the need for due process hearings and court actions and to help state and local governments focus on providing education, rather than issues related to litigation.

Americans with Disabilities Act

RECOMMENDATION: *Provide increased technical assistance and educational information to state and local governments, as well as increased funding for compliance with mandated ADA requirements. Amend ADA to require the federal government to coordinate enforcement and technical assistance in areas where there are cross-agency issues.*

Description

Title I of the *Americans with Disabilities Act of 1990* (ADA) (P.L. 101-336) compels employers, including state and local governments, to make "reasonable accommodations" for disabled workers, but not changes that would involve "undue hardship."

Title II of the law provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or subjected to discrimination by any such entity. In other words, Title II requires state and local governments to assure "program accessibility" to all persons with disabilities.

Title II also seeks to ensure that people with disabilities have access to transportation by requiring that all new buses are accessible and that transit authorities provide supplementary paratransit services or other special transportation services for individuals with disabilities who cannot use fixed-route services. In the area of rail transportation, the ADA requires that all new

rail vehicles and all new rail stations be accessible, and existing rail systems have one accessible car per train.

Background

ADA was enacted to expanded civil rights protection to about 49 million Americans with mental and physical disabilities. Besides enabling many person with disabilities to more fully participate in mainstream of American life, the law has provided important and necessary social benefits that allow persons with disabilities to become self-sufficient and productive members of our nation's society.

Discrimination against disabled persons has been prohibited in state or local government activities using federal funds since the enactment of the *Rehabilitation Act of 1973*. Discrimination in housing programs has been precluded since the enactment of the *Fair Housing Act of 1988*. So, a number of state and local government activities have been subject to non-discrimination provisions similar to the ADA requirements since 1973. ADA, however, significantly extended the requirements by applying non-discrimination standards to all state and local government programs and services.

Furthermore, unlike the provisions in Title I of the law regarding employer responsibilities or the provisions in Title II of the law regarding paratransit, the ADA statutory language concerning program accessibility contains no "reasonable accommodation" or "undue hardship" clauses. Thus, state and local governments essentially have no flexibility in their ADA implementation efforts to assure program accessibility to person with disabilities. The Department of Justice regulations alleviate this situation to some extent; but, the language of the law itself has no provision for exceptions.

Intergovernmental Concerns

Most state and local government concerns with ADA implementation relate to the Title II requirements concerning program accessibility and paratransit issues. Funding and time limit deadlines are the main issues of concern, not the purposes or general goals of the law.

Although various sources of federal funding can be used for ADA compliance activities, virtually no federal funding has been directly appropriated to cover state and local governments ADA compliance costs which can be quite substantial. For example, the American Public Transit Association estimates that total ADA costs exceed \$1.4 billion annually, including some \$1.1 billion in paratransit costs, creating capacity constraints on existing systems and limiting public transportation service in some cases. This situation has given rise to intergovernmental concerns in many areas especially those that are struggling with state or local budget constraints.

As noted above, federally imposed time limits for ADA compliance are also a source of intergovernmental concern. Changes to existing facilities to meet program accessibility requirements were to be made by January 26, 1995. Many state and local governments were not able to meet this deadline and are now out of compliance with the law.

Moreover, numerous misunderstandings exist about ADA requirements. Despite the efforts of the federal government to disseminate information about ADA, there is still confusion between the federal government and the states and localities about what is required under the Act. The lack of information sometimes causes state and local governments to make costly changes in

programs, services, and facilities that are not actually required. Often the changes are made to avoid the threat of potentially expensive litigation under the federal statute.

There are also large gaps in information about assistance available to comply with the ADA. Some educational and technical resources exist in nonprofit service agencies and from private for-profit legal and technical consultants, but obtaining federal technical support has been difficult for small governments. According to the National Council on Disability, without increases in information dissemination and technical assistance services, the demand for assistance and guidance will continue to overwhelm government resources.

Finally, federal enforcement of ADA is sometimes uncoordinated, with eight federal departments having some enforcement power. The Justice Department and the Equal Employment Opportunity Commission have prime responsibility for processing complaints under ADA. The Federal Communications Commission manages telecommunications issues. The National Council on Disability is an independent federal agency that identifies emerging issues and recommends disability policy to the President and Congress. The Architectural and Transportation Barriers Compliance Board (Access Board) provides some educational and technical assistance guidelines regarding accessibility. In summary, there is not a single, clearly designated, primary regulatory and enforcement agency. This creates problems for states and local governments in complying with the law and aggravates intergovernmental concerns. So, clearly there is a need to identify and address ADA definitions and policy conflicts, the limited federal enforcement capabilities, and backlogged federal complaint processing situation.

Recommendation Rationale

The Commission's recommendation supports ADA's policy goals and recognizes the regulatory efforts made to provide flexibility to state and local governments in meeting the program accessibility requirements of the law. ACIR recommends increased technical assistance and educational information to state and local governments on ADA requirements and increased federal funding for compliance. Also, ACIR recommends that the federal government be required to improve the coordination of enforcement and technical assistance in areas where multiple federal agencies are involved in ADA activities. Such changes in the law continue to recognize the rights of persons with disabilities; and, yet, recognize that state and local governments need greater federal support in their compliance efforts.

The Safe Drinking Water Act

RECOMMENDATION: *Enact amendments to the Safe Drinking Water Act similar to those approved by the Senate in S.1316 (104th Congress) including language permitting states increased flexibility for implementation of national standards.*

Description

The *Safe Drinking Water Act* (SDWA), enacted in 1974, regulates drinking water standards for 58,530 waterworks serving 25 or more persons on a regular basis. The law directs the Environmental Protection Agency (EPA) to establish maximum levels for chemical, radiological, and microbiological contaminants in public water systems. The law also establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and

establishes enforcement and public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.

Background

Federal involvement in the safety of drinking water gives greater recognition to the national policy concerns related to the public health aspects of drinking water for residents of communities and to persons visiting or traveling through communities. Prior to the 1974 enactment of the SDWA, the US Public Health Service (PHS) was responsible for developing and setting drinking water standards which could be used by the state and local governments. This situation is not unlike the situation today for restaurant inspections and other public health and safety issues which remain primarily a state or local government responsibility with PHS guidance.

The direct involvement of the federal government in drinking water issues began after a 1969 PHS study found that many of its drinking water standards were based on insufficient data and did not cover many known contaminants. Also, a nationwide study of community water systems revealed widespread water quality and health risk problems resulting from poor operating procedures, inadequate facilities, and poor management of public water supplies in communities of all sizes. These developments provided a basis for the enactment of the 1974 law.

In 1986, the law was amended to identify 83 specific contaminants for which EPA was to set standards and it mandated EPA regulations governing filtration for surface water supplies and disinfecting for systems using surface or ground water. The law requires that 25 additional new contaminants be regulated every three years.

Intergovernmental Concerns

Because the safety of drinking water has long been a state or local government responsibility, these governments generally do not object to assuming the costs of providing safe drinking water. Rather, their concerns over the SDWA hinge on what constitutes safe drinking water and how to achieve it in the most cost-effective way.

The high cost associated with SDWA compliance requirements lead some state and local officials to suggest that local areas should have flexibility to select contaminants to regulate and to set water quality standards. Others argue that requirements to implement the SDWA should focus efforts on the highest priority threats to public health and should encourage cost-effective measures to gain the greatest risk reduction for drinking water dollars invested. The Congressional Budget Office (CBO) reports that "\$1.4 billion to \$2.3 billion per year should be viewed as a range of estimates of the total cost that water systems will bear to comply with SDWA regulations that went beyond pre-SDWA standards."

Intergovernmental tensions also are raised significantly when federal financial support fails to keep up with the increasing cost to comply with federal drinking water requirements. The lack of federal financial assistance for compliance is particularly troublesome for small systems as is the lack of adequate implementation flexibility. State and local officials allege that, in defining what level of drinking water protection is affordable nationally, the SDWA looks to the capability of the larger systems, which serve 80% or more of the American people on public water supplies. It is noted by those making such arguments that tests which have nominal costs per customer for large systems may, in some instances, be extremely costly per customer for small systems and may be beyond a small system's technical capacity to comply. According to EPA estimates,

small systems will require investments of nearly \$3 billion through the end of the century to comply with all regulations and an additional \$20 billion to repair, replace, and expand the basic infrastructure to deliver drinking water. While variances and exemptions are permitted in some circumstances, the procedures required to obtain such variances or exemptions may be difficult for some communities to meet.

Recommendation Rationale

ACIR's recommendation encourages the Congress and the President to enact SDWA amendments similar to those approved by the Senate in the first session of the 104th Congress (S. 1316). Such amendments, in ACIR's opinion, will alleviate or repeal the provisions of the current law creating the most intergovernmental tensions. Among other things the amendments should reduce the number of mandatory tests for contaminants, eliminate test requirements for contaminants not a threat in certain local areas, and an ease of provisions for treatment of surface water supplies. In addition, as included in S. 1316, ACIR encourages the Congress and the President to approve funding appropriations for state capitalization loan funds to subsidize financing costs on loans taken out by state or local governments to fund SDWA compliance efforts.

S. 1316 reflects a bipartisan effort to reduce regulations imposed on states and public water systems, to increase state authority and flexibility, and to provide federal financial assistance for an unfunded mandates within the SDWA. In addition to directing EPA to consider costs and benefits when setting standards, the legislation gives EPA increased flexibility to target contaminants of particular concern and to provide funds to advance environmental concerns.

In particular, ACIR commends to the Congress and the President the following items in S. 1316. The drinking water State Revolving Fund to help community water systems finance projects to comply with federal mandates. The replacement of the requirement that EPA regulate 25 contaminants every 3 years with a process for identifying contaminants for regulation. The authority given to states to implement alternative monitoring programs. The provisions authorizing EPA to set standards that balance competing health risks and to allow the use of affordable technologies for systems serving fewer than 10,000 persons. The programs for technical assistance, operator training, restructuring, and capacity building for small water systems. The program, based on voluntary partnerships between state and local governments, to protect drinking water sources. The increased flexibility given the federal and state agencies.

Endangered Species Act

RECOMMENDATION: *Amend the law to give state and local governments an official role in the management and planning decisions affecting the listing process, beyond the traditional consultation and full notice and comment requirements currently in effect.*

Description

The *Endangered Species Act of 1973* (P.L. 97-304) requires every federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed threatened and endangered species or the destruction or adverse modification of critical habitat. The environmentally protective features of this law are activated by a "listing" of an

Dunne

endangered species, which may be based on any one of a number of statutory factors. The "critical habitat" for a listed endangered species is defined to include areas "essential for the conservation of the species," a designation that protects the habitat as well as the species. The critical habitat standards apply to specific areas "which may require special management consideration or protection." Under the law, state, local, and tribal governments may not obtain a federal permit, license, or grant if the project does not comply with federal standards for protecting endangered species. There is an exemption process allowing consideration of economic factors, but these provisions are rarely utilized.

The heads of federal agency are directed by the law to cooperate with the states in conserving protected species and, if the state endangered species programs meet certain federal standards, the heads of federal agencies must enter into cooperative agreements to assist states in their endangered species programs. After a cooperative agreement is signed, the states may receive federal funds to implement their endangered species program, but the states must normally provide a minimum 25% matching amount.

Background

Federal involvement in endangered species began with a 1966 law that called for saving US wildlife, but provided the federal government little power to take specific actions. Three years later, an international focus on endangered species looked at the problem of preventing extinction worldwide. During the early 1970s, concern with environmental issues swept the country and prompted the federal government to pass the *Endangered Species Act* (ESA). Since its inception, ESA has been credited with helping preserve such nationally symbolic animals as the bald eagle and the grizzly bear. The law is also credited with helping the populations of an estimated 500 species to rebounded. The federal government's list of endangered and threatened animal and plant species now numbers approximately 1,500 and another 3,700 species are being considered for the list.

In 1978, the Supreme Court in *Tennessee Valley Authority v. Hill*, (437 US 153), found that the provisions and restrictions in ESA concerning protection of species are absolute. The Court found an "explicit congressional decision" to afford "first priority" to saving endangered species and a "conscious decision" by the Congress to give endangered species priority over the "primary missions" of federal agencies (i.e. over activities such as programs for economic growth and development.) Shortly after this decision, the law was amended to authorize the consideration of factors other than conservation of endangered species if the federal agency or the state or local government involved in the decision-making process can show that the value of the project jeopardizing an endangered species outweighs the concerns for protection of the species or that modification or dismantling the project would cause undue social and economic hardship. An Endangered Species Committee is charged with reviewing and acting upon the exemption requests; but it has rarely been called on to do so.

Intergovernmental Concerns

Intergovernmental tensions arise in relation to ESA issues because state and local governments often feel they have an inadequate share of decision-making authority in the management and planning decisions affecting the listing of threatened and endangered species. The listing process is perceived as rigid and the Act's provisions concerning exemptions to meet local conditions is thought to be quite limited.

Also, there is concern that valuable public and private economic development activities are being impaired by strict federal regulation. Critics argue that such impairment is causing widespread economic and social hardship in communities throughout the nation. Some state, local, and tribal governments argue that, for the law to work effectively and efficiently, they need incentives to provide habitat for endangered species and the freedom to administer and enforce standards to achieve this goal. State and local governments are pleading for a compromise between economic activity interests and species conservation needs.

Substantial reform efforts are currently underway in both the administration and the Congress to resolve some problems with the ESA. The Department of Interior is building a partnerships with states in endangered species candidate conservation and recovery programs, is implementing uniform "peer review" procedures to ensure that every listing and recovery program is reviewed by independent scientific experts, and developing regulatory relief for small landowners. Proposed legislation amends ESA extensively by, among other things, tightening standards for listing petitions, increasing state involvement at various stages, reviewing various scientific issues under the Act, giving agency heads greater authority in reconciling conflicts between ESA and other laws, and requiring agencies to minimize adverse impacts on private property.

Recommendation Rationale

ACIR recommends the ESA be amended to give state and local governments an official role in the management and planning decisions affecting the listing process, beyond the traditional consultation and full notice and comment requirements currently in effect. State and local governments should be recognized in the law as co-makers of national policy on endangered species protection efforts and authority for species protection should be a shared responsibility between the federal government and state and local governments. In addition, the law should provide flexibility for states to implement their own conservation plans for specific species within their state boundaries. Broader participation by state, local, and tribal governments will improve the data collection process and allow biological science, economic constraints, and available management resources to be taken into account on a regional basis.

The Clean Air Act

RECOMMENDATION: *Make no change in existing federal standards but increase federal aid and technical assistance to help states comply.*

Description

The *Clean Air Act (CAA)* (P.L. 95-95) enacted a series of related programs designed to protect health and the public welfare from emissions polluting ambient air. The CAA requires states to submit for federal approval a state implementation plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The act specifies how to measure different types of pollution, the standards that must be met for each type of pollution, the specific compliance measures that may be taken, and the deadlines for those actions. Some federal financial assistance for planning and implementation is authorized in the law, but each state must provide assurances that "the State or general purpose local governments will have adequate personnel, funding, and authority under state and, as appropriate, local law to carry out such implementation plan."

Background

The first national air pollution legislation came in 1955 as a reaction to killer smog in Donora, Pennsylvania; New York City; and London, England. Before then, the efforts to control air pollution were made primarily by cities. The first state law was enacted in 1952. Cities experiencing difficulties enforcing local air pollution laws supported national air pollution legislation because local polluting industries threatened to move to other less regulated areas. The federal government was reluctant to enter the pollution control field because such regulation was seen as protecting the health, safety, and welfare of the people, a proper traditional function for the states under their police powers. The committee report on the 1955 bill noted, "The bill does not propose any exercise of police power by the federal government and no provision in it invades the sovereignty of states, counties, or cities." It did provide for research, training, demonstration projects, and grants-in-aid to local governments.

The *Clean Air Act of 1963* signaled the beginning of change in the pattern of federal-state-local relations by authorizing national air quality criteria and permitting federal intervention in the state if the state could not deal appropriately with the problems. It also provided grants to states and recognized their need to develop statewide control laws. With the passage of the *Air Quality Act of 1967*, states were required to develop, set, and implement plans to achieve national air quality standards. Increased federal grants accompanied the new requirements. By 1970, however, only 21 states had developed air pollution control plans and a general consensus grew for an expanded federal government role in the control of air pollution. The growing support for federal involvement in air pollution control culminated in the enactment of the *Clean Air Act* (CAA) of 1977.

By 1990, though, there was still public concern that expected benefits of federal clean air requirements had not been achieved. As a result, the *CAA Amendments of 1990* were enacted. The 1990 amendments required state and local air quality agencies to help implement the act through development and revision of state implementation plans and enactment of state laws to implement required federal programs. Air pollution sources were required to respond to new and more stringent requirements and obtain permits, conduct monitoring, and add pollution controls or change production processes to further reduce emissions. The *CAA Amendments of 1990* also targeted smaller pollution sources, including facilities owned by local governments. Governments in areas with moderate carbon monoxide pollution were required to adopt vehicle inspection and maintenance programs and to use cleaner oxygenated fuels. Areas with moderate ozone pollution were required to set up similar programs and to require use of gasoline-pump devices to capture vapors. As a negative compliance incentive, the CAA allows federal highway construction assistance funds to be withheld from states that fail to implement the law's requirements.

Intergovernmental Concerns

Although the *Clean Air Act* has been effective at bringing nonattainment areas into compliance with national ambient air quality standards, states have expressed concerns regarding the implementation of certain air pollution control programs. A major point of contention has been the degree flexibility that EPA has allowed the states in the development of air pollution control programs. State and local governments have considered some federal requirements more costly and burdensome than necessary to achieve air pollution control goals.

In response to the concerns of state and local officials, the federal government has relaxed rules in several programs, notably those involving employee commute options and inspection and maintenance requirements for auto emission control systems. Nevertheless, state and local officials argue that further flexibilities could be allowed in the CAA requirements and in future state implementation plans while still assuring improvement in air quality.

Recommendation Rationale

ACIR recommends retaining existing federal clean air standards as well as incentives for compliance with the standards. Also, ACIR recommends increased federal fiscal assistance to implement air pollution controls and increased federal consultation with, or technical assistance to, state and local governments. These recommendations would facilitate state and local government compliance with federal air pollution standards and would expedite achievement of national goals for air pollution control.

Davis-Bacon Related Acts

RECOMMENDATION: *Amend the related laws to exempt projects below a higher dollar threshold than exists in most laws and consider exempting projects in which federal participation is a low percentage of total project costs.*

Description

The *Davis-Bacon Act* (40 U.S.C. 276a-7), was enacted in 1931. The act applies to 100 percent federally-funded contracts over \$2,000 for construction, alteration, and/or repair work. The law requires such contracts to specify the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. The minimum wages must be based on wage rates determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on similar contracts in the city, town, village, or other civil subdivision of the state in which the work is to be performed.

State and local construction projects are not covered by the *Davis-Bacon Act* itself. However, about 60 other federal laws (known as Davis-Bacon Related Acts) make compliance with *Davis-Bacon Act* provisions a condition-of-aid for grants to state and local governments. For example, laws authorizing grants for construction programs related to low-income housing, highways, and waste water treatment facilities often include a provision requiring compliance with *Davis-Bacon Act* provisions such as the prevailing wage requirements.

Background

The *Davis-Bacon Act* was enacted during the great depression to bring stability to the construction industry by placing a floor under wages for certain types of construction jobs. The law prevents contractors from underbidding other contractors on projects funded with federal dollars by hiring workers willing to accept wages lower than the prevailing wage in the area of a construction project. Davis-Bacon requirements are meant to guarantee that the federal government's vast purchasing power, coupled with a requirement to award contracts to the lowest bidder, will not undercut construction wages in local labor markets or undermine local economies.

The effectiveness of *Davis-Bacon Act* requirements is the subject of considerable debate with both positive and negative opinions being strongly held by various parties. For example, some parties claim repeal of the *Davis-Bacon Act* will save money while others argue that a repeal will make little or no difference in the cost of construction projects. Likewise, some parties claim that Davis-Bacon requirements are still appropriate to assist local economies while other parties allege that Davis-Bacon requirements hinder the growth of local economies by forcing state and local governments to divert resources from their construction priorities to cover the cost of projects subject to Davis-Bacon requirements.

Intergovernmental Concerns

As noted above, state and local governments are only subject to *Davis-Bacon Act* requirements if they receive federal financial assistance through a Davis-Bacon Related Act (i.e. a law that includes language making receipt of federal funds contingent upon compliance with *Davis-Bacon Act* requirements.) When Davis-Bacon requirements are made applicable to a federally-assisted state or local government construction project, the state and local government concerns include the same arguments noted above concerning the effectiveness of the law in federal construction projects. For example, some state and local governments claim that Davis-Bacon requirements increase the cost of projects by mandating wages higher than would otherwise be paid in the area of the construction projects. Also, concerns are expressed about the recordkeeping and reporting requirements related to documentation of *Davis-Bacon Act* compliance.

Intergovernmental issues are aggravated when Davis-Bacon Related Acts apply federal construction requirements with no special exceptions to recognize the nature of the state or local construction project or the percentage of federal funds compared to total project cost. Intergovernmental concerns are relieved in some Davis-Bacon Related Acts with language making the applicability of the requirements subject to certain conditions. For example, in the Housing and Community Development Act of 1974 for the Community Development Block Grant program, the Secretary of Housing and Urban Development (HUD) is authorized to waive *Davis-Bacon Act* provisions in connection with grants to Indian tribes.[Section 107(e)(2)]. In other laws within HUD's jurisdiction *Davis-Bacon Act* requirements do not apply to projects involving less than 8 housing units.

Also, Davis-Bacon Related Acts usually fail to acknowledge that many states have their own version of Davis-Bacon requirements which are applicable to construction projects funded with state money. In these situations, the application of the federal Davis-Bacon requirements may conflict with state requirements and create a situation inappropriately detrimental to intergovernmental comity while not necessarily benefiting working men and women any more than would be true under the state law.

Recommendation Rationale

ACIR recommends that the Davis-Bacon Related Acts be amended to exempt state and local projects with a cost below a higher dollar threshold than exists in most laws. Also, ACIR urges the Congress and the President to consider exempting state and local projects in which the federal funding share is a low percentage of total cost. These recommendations recognize the national interests, which led to making Davis-Bacon compliance a condition-of-aid in 60 plus federal laws, while also recognizing the concerns of local and state governments regarding

Review

Davis-Bacon Related Act requirements. The goal of amendments to Davis-Bacon Related Acts should be to allow state and local governments greater flexibility in federally assisted construction projects to apply state laws concerning working men and women and to use total funding available for a project in a manner which best achieves the state and local governments priorities.

Required Use of Recycled Crumb Rubber (Repealed)

RECOMMENDATION: *Commend the Congress and the President for repealing this federal mandate.*

Description

Section 1038 of the *Intermodal Surface Transportation Efficiency Act of 1991* (ISTEA) (P.L. 102-240) required states to satisfy a minimum tonnage utilization requirement for asphalt pavement containing recycled rubber on federal-aid projects. The requirement was 5 percent for 1994, 10 percent for 1995, 15 percent for 1996, and 20 percent thereafter. The Secretary of Transportation (DOT) could waive the penalty for any three-year period on evidence of health, environment, and performance problems associated with asphalt pavements containing rubber. Individual state exceptions could also be made if there was an insufficient supply of scrap tires. Section 205(b) of the *National Highway System Designation Act of 1995* repealed this mandate.

Background

This provision was adopted to encourage states to build better, longer lasting roads and to reduce used tire stockpiles.

Although this mandate has been repealed, ACIR has retained a discussion of this mandate in this report on federal mandates because it presents an outstanding example of a mandate that should have been given greater consideration from an intergovernmental perspective prior to enactment.

Intergovernmental Concerns

State and local government concerns with the requirement for including recycled crumb rubber in asphalt pavement on federally aided highway projects varied according to conditions in individual states. In some cases, it was argued that the material was inappropriate for use in the state's roads because of weather and other conditions. In other cases, it was noted that there was no need to recycle crumb rubber in asphalt because other markets exist for the use of crumb rubber. In one instance, a state reported the needed to import old tires into the state just to meet the crumb in asphalt requirements.

Besides the general sense that the law inappropriately infringed on traditional state or local regulated activities, intergovernmental tensions were raised by the law's provision allowing the withholding of highway funds if a state failed to comply with the recycled crumb rubber requirements. The federal intrusion into this area of state operations, along with the withholding of grant money for non-compliance, demonstrate the breakdown intergovernmental comity surrounding this particular issue.

State and local government concerns were corroborated by construction industry concerns about both the integrity of the pavements and the life-cycle maintenance costs of crumb-rubber-mix

asphalt. Research had not completely shown any improved life of asphalt pavements using crumb rubber, while the costs doubled in many instances. According to the American Association of State Highway and Transportation Officials (AASHTO), costs vary regionally and from product to product but could result in 20-100 percent higher paving costs for construction of short life and poor quality roads. It was also contended that the law mandated an engineering approach that is still experimental and has unresolved environmental, health, and safety issues.

Recommendation Rationale

ACIR commends the Congress and the President for repealing the mandate requiring the use of recycled crumb rubber in asphalt. The repeal recognizes that most state and local governments and highway user interest groups do not believe there is sufficient benefit in using waste tire rubber in hot-mix asphalt to justify the costs or the need for a federal mandate to create a national policy on this issue.

FUTURE ACTIONS RELATED TO FEDERAL MANDATES AND THEIR IMPACT ON INTERGOVERNMENTAL RELATIONS

Enactment of the *Unfunded Mandates Reform Act of 1995* was the beginning, not the end, of a process to provide mandate relief for state and local governments. The legislative debate preceding enactment of the Act resulted in a compromise regarding prospective vs. retrospective applicability of the law. Under the compromise, Titles I and II of the statute established mechanisms to provide relief from future mandates—as exhibited in the January 1996 legislative debate on the telecommunications bill—but, they provided no relief from existing federal mandates. For existing federal mandates, Title III of the statute directed ACIR to review the impact of federal mandates on state and local governments and to submit a report to Congress and the President with recommendations. Essentially, the law postponed the discussion of existing mandates for one year.

During the course of the study, over 200 mandates—mandates being broadly defined under Title III of the Act—were identified to ACIR by state and local governments and other organizations (An inventory of these mandates can be found in ACIR's *Catalogue of Federal Mandates on State and Local Governments*). This report concentrates on 14 specific mandates of concern. Other mandates are also in need of thorough review. For example, requirements for identification, management, and disposal of solid and hazardous waste materials under the *Resource Conservation Recovery Act (RCRA)* and the Superfund program were cited by state and local governments as needing review. Also, components of Medicaid caseload eligibility regulations, job training services, and "Motor Voter" requirements are causing significant concerns for state and local governments. *A review of some of these additional mandates should be authorized as soon as possible.*

The review of existing mandates has already contributed positively to improvements in intergovernmental relations. Advocacy groups on all sides of various mandate issues have started to rethink their positions, to better articulate their concerns, and to discuss issues face-to-face with one another. In addition, several of ACIR's recommendations mirror similar proposals and

Source for
analysis

Title
III
provided
relief

events unfolding in the executive, legislative, and judicial branches of the federal government. The Administration's Fiscal Year 1997 budget calls for repeal of the *Boren Amendment*. Amendments to the *Safe Drinking Water Act* have passed the Senate with bipartisan support and may be enacted during 1996. A recent Supreme Court decision in *Seminole Tribe of Florida vs. Florida* challenges the power of Congress to create a private right of action against a state if the state has violated a federal right flowing from a federal statute. Further study is needed to examine the issues raised by federal statutes authorizing private rights of action against state and local governments.

Further changes proposed by ACIR in national intergovernmental policy may be realized in the near future. For example, the Department of Interior publicly recognized the need for changes in the *Endangered Species Act* to give it more flexibility in working with state and local governments. The Department of Education is proposing to reduce record-keeping requirements in the *Individuals with Disabilities Education Act* to relieve some of the more onerous provisions of the Act not related to the education of a child with a disability. Numerous changes in the *Fair Labor Standards Act* are being proposed which will relieve mandate burdens on state and local governments. The need for change is evidenced by the actual and potential liabilities of state and local governments soaring into the millions of dollars as a result of lawsuits under the FLSA. It is up to the appropriate federal agencies and Congressional committees to evaluate and propose statutory language related to specific provisions in the various federal laws reviewed by ACIR.

For the *Unfunded Mandates Reform Act* to be truly successful, further study is required on the provisions of the Act that ACIR was not able to accomplish due to resource constraints. Efforts must be made to examine the measurement and definition issues involved in calculating the total costs and benefits to state, local, and tribal governments of compliance with federal laws. In addition, it is imperative to include a discussion of the role of state mandates imposed on local governments in any future discussion of mandate reform. Also, ACIR was not able to evaluate the application of mandates to the private sector or to consider the views of and the impact of these mandates on working men and women. The issues and options related to solutions for private sector mandate relief are significantly different from those related to solutions for public sector relief, and should be examined accordingly. Moreover, ACIR's court ruling report, which also was done in response to a directive of the Act, revealed that there were 3,500 judicial decisions in 1994 involving federal laws and state or local governments. The results of ACIR's studies provide a dramatic picture of the complex relationship between the federal government and state and local governments.

As is now the case with future mandates, the federal government should take a second look at existing federal mandates and the state and local government costs of implementing these mandates. In the future, the challenge facing the federal government will be to exercise its power to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own priorities. It is not too late to use this same power to correct some of the problems of the past.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

06-Jun-1996 12:36pm

TO: Elizabeth E. Drye

FROM: Diana M. Fortuna
 Domestic Policy Council

CC: Carol H. Rasco

SUBJECT: Latest ACIR draft

You had asked me to comment on the IDEA and ADA sections of the latest ACIR draft on mandates.

Unfortunately, it still seems really problematic to me.

1. On the ADA: They recommend amending the ADA. This is something we should not endorse unless there was a very compelling reason. ACIR's reason is that more than one Federal agency has responsibility for enforcing the ADA (DOJ, EEOC, FCC, Transportation), and this has created "coordination" problems. So their amendment would require the Federal government to coordinate enforcement and TA.

I have never heard there is any need for this. The different Federal agencies have very clearly defined responsibilities: if it's employment, it's EEOC; if it's a public accommodation, it's DOJ; etc. I can't imagine, if there is a problem here, that it would rise to the level of warranting an amendment to this law. And advocates would feel (with justification) that opening the law to amendments could be very dangerous.

2. On IDEA: It is less an issue of the recommendations than of tone. It doesn't reflect any understanding of what the battle to get disabled kids educated has been all about, and that this is a civil rights issue. It suggests states and school districts are perfectly happy to have this responsibility but because we won't come up with the money they are stuck with this big unfair burden. Sample problematic quote, with particular problems in caps:

- "States and local governments argue that the requirements [of IDEA] do not provide enough flexibility and require states to accomplish MORE THAN THEY ARE ABLE, GIVEN THE AMOUNT OF AID provided. State and school districts argue that they have no practical choice but to accept IDEA grants because they need the funds; but, then, THEY FIND THEMSELVES OBLIGATED TO SERVE DISABLED STUDENTS according to extensive and detailed specifications."

The views of states and locals is not balanced with the views of parents.

I would have to talk to Education to find out if the technical language of their recommendations is OK -- it might be.

I think ACIR should just drop these 2 issues altogether. They have nothing to say that is not either problematic or meaningless.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

21-Mar-1996 08:00am

TO: Jefferson B. Hill
TO: Sally Katzen
TO: Michael A. Fitzpatrick
TO: Lisa M. Jones

FROM: Paul Bugg
 Office of Mgmt and Budget, OIRA

SUBJECT: STEVENS, DOLE OFFER BILL TO ENFORCE TENTH AMENDMENT

STEVENS, DOLE OFFER BILL TO ENFORCE TENTH AMENDMENT

Senate Majority Leader Bob Dole (R-Kan), Sen. Ted Stevens (R-Alaska), and 22 other senators March 20 introduced a bill designed to strengthen the Tenth Amendment, which delegates to the states powers not reserved for the federal government.

The bill will be the subject of a hearing March 21 by the Senate Governmental Affairs Committee.

According to a summary of the bill, the ``Tenth Amendment Enforcement Act of 1996,'' the bill would enforce the amendment in five ways:

- o By stating a ``congressional finding that the Tenth Amendment means what it says;''
- o By stating that federal laws may not interfere with state or local powers unless Congress declares its intent to do so;
- o By giving members the ability to raise a point of order against legislation lacking such a declaration;
- o By requiring that federal agency rules not interfere with state or local powers without Constitutional authority cited by Congress; and
- o By directing courts to operate with a presumption in favor of state authority and against federal preemption.

Medicare

Draft: May 30, 1996

worked closely with Department of Labor staff on labor related mandates and did give full consideration to comments received from working men and women and labor organizations. Lack of resources also made it impossible for the Commission to analyze the relationship of federal mandates to the competitive balance between state, local, and tribal governments and the private sector.

This final report on existing federal mandates focuses on intergovernmental issues associated with federal mandates. The report discusses and makes recommendations on six common issues related to existing federal mandates and on 14 individual mandates selected by ACIR for specific review. The recommendations on both the common issues and the 14 individual mandates reviewed are based on material gathered during the production of the preliminary report and during the public comment period.

As directed by Section 302 of the *Unfunded Mandates Reform Act*, therefore, ACIR is hereby submitting its final report on existing federal mandates to the President and the Congress.

William F. Winter

Chairman

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ACIR REPORT ON FEDERAL MANDATES

Approved for Submission to the President and the Congress
by the US Advisory Commission on Intergovernmental Relations
_____, 1996

INTRODUCTION

The *Unfunded Mandates Reform Act of 1995* (P.L. 104-4) represents a bipartisan agreement to strengthen the partnership between the federal, state, local, and tribal governments. Section 302 of the law directs the Advisory Commission on Intergovernmental Relations (ACIR) "to investigate and review the role of federal mandates in intergovernmental relations" and to make a final report to the President and Congress on the findings, conclusions, and recommendations of the Commission. This report responds to the law's directive and presents ACIR's findings, conclusions, and recommendations for changes in existing federal mandates to improve intergovernmental relations while maintaining a commitment to national interests.

CHANGES IN THE FEDERAL SYSTEM

The mandate issues examined in this report arose in part because the American federal system is no longer characterized by clearly defined responsibilities for federal, state, and local governments. One result of this lack of defined roles has been increased federal involvement in activities historically considered to be state and local affairs. Often federal involvement began with financial aid to achieve national goals. In recent years, however, federal involvement sometimes has taken a variety of forms including direct orders with no federal financial assistance. The extensive and complex nature of federal involvement in state and local affairs is illustrated by the following points:

- More than 200 separate mandates were identified to ACIR by state and local governments, involving about 170 federal laws.
- The ACIR report *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994*, identified 3,500 decisions involving state and local governments, relating to more than 100 federal laws.
- To receive any non-construction federal assistance, state and local officials must certify that they are in compliance with 27 specific federal laws, 5 executive orders, any nondiscrimination provisions in statutes related to the statute under which the federal assistance is being provided, and all applicable requirements of all other federal laws, executive orders, regulations, and policies governing the program under which federal assistance is being sought.

DEFINITION OF MANDATE FOR ACIR STUDY PURPOSES

Title III of the *Unfunded Mandates Reform Act* recognized the diverse nature of federal involvement in state and local government activities by broadly defining "mandate" for the purposes of ACIR's studies. Section 305 defines the term "federal mandate" for ACIR's purposes as "any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program." [Underlining added.]

Section 4 of the *Unfunded Mandates Reform Act* excludes civil rights and other laws from certain aspects of the Act. These exclusions apply to "any provision in a bill, joint resolution, amendment, motion, or conference report before Congress and any provision in a proposed or final regulation." The exclusions relate to activities described in Title I regarding proposed legislation and in Title II regarding proposed and final regulations. The exclusions do not relate to ACIR's review of mandate provisions in existing federal statutes as required by Title III of the Act.

DETERMINING THE APPROPRIATE FEDERAL ROLE

From the beginning of US history, debate has raged about the meaning of a federal union among the states, and more specifically, about the appropriate roles of federal versus state or local governments. The United States has continued to define and redefine how federalism can best work in a changing world. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Supreme Court concluded that clear lines defining the appropriate scope of federal activities could not be drawn once for all times. In the court's opinion, the lines between federal, state, and local activities are developed through the political process and can be expected to change at different times in the nation's history.

At various points in our nation's history, the political process has determined which government activities are so important to national interests that a federal role is generally accepted as necessary. Among the most obvious are national defense, foreign affairs, and the protection of civil rights granted by the Constitution. In an earlier period, the economic emergency of the 1930s produced federal programs to alleviate national economic and social problems. In other instances, national policy is necessary because the problems transcend state lines, such as when dirty air or dirty water from one state intrude on another state. As a result, some federal government mandates on state and local governments are generally accepted as necessary.

The challenge facing the federal government is to exercise power to resolve national needs while, at the same time, honoring state and local governments' responsibility for their own affairs and their own budget priorities. The value of the ambiguity in the situation is to serve as a protection for the citizens of the United States against the potential dangers of a too-powerful central government. In Federalist Paper No. 51, James Madison wrote:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each. Hence a double security arises to

the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

KEY QUESTIONS ON MANDATE ISSUES

The wide diversity of federal mandates makes it difficult to establish uniform ways to determine whether a mandate is proper or improper from an intergovernmental perspective. Nevertheless, ACIR has been charged with making determinations about existing mandates as they affect state and local governments. In reaching its conclusions, the Commission considered several key questions:

- Does the national purpose justify federal involvement in state or local affairs?
- Are the costs of implementing the mandate appropriately shared among governments?
- Is maximum flexibility given to state and local governments in implementing the mandate?
- Are there changes that can be made in the mandate to relieve intergovernmental tensions while maintaining a commitment to national goals?

THE ACIR REVIEW OF EXISTING MANDATES

As required by the *Unfunded Mandates Reform Act*, ACIR began its review process by adopting and publishing two sets of criteria. The first set of criteria was used to identify mandates of significant concern. The second set of criteria identified specific characteristics of mandates to serve as the basis for the Commission's recommendations. These criteria were published in the *Federal Register* on July 6, 1995 (See Appendix A).

The first set of criteria identified mandates of significant concern as those that: (1) require state or local governments to expend substantial amounts of their own resources without regard for state and local priorities; (2) abridge historic powers of state and local governments without a clear showing of national need; (3) impose requirements that are difficult or impossible to implement; and (4) are the subject of widespread objections.

The second criteria identified a number of specific conditions for which ACIR should make relief recommendations. The specific conditions included: requirements not based on a need for national action or, if needing national action, not federally funded; unnecessarily rigid requirements; unnecessarily complex or prescriptive procedures; unclear goals or standards; contradictory or inconsistent provisions; duplicative provisions; obsolete provisions; requirements lacking an adequate scientific or economic basis; provisions lacking in practical value; or, requirements that create undue financial difficulties for state or local governments.

After issuing the criteria for its study of existing federal mandates, ACIR solicited information about mandates from state and local governments, federal agencies, and the public. ACIR also relied on a variety of efforts by others to help in identifying mandates needing attention. For example:

- The National Governors' Association requested each governor's office to list the mandates of most concern in their states.

- A general appeal was made in the magazines and newsletters of national and state groups representing state and local governments.
- A survey of small rural governments was conducted by the National Rural Development Partnership.
- Officials attending national and state association meetings were asked to identify troubling mandates.

Through this process, information was received from over half the states, eight municipal leagues, four state associations of counties, the national associations representing state and local governments and their officials, and directly from a variety of local government officials. More than 200 federal mandates on state and local governments were identified to ACIR. The Commission selected 14 of the mandates for analysis as part of this report. The 14 mandates selected for review all meet one or more of the criteria ACIR adopted for identifying mandates of significant concern.

The selection of the 14 mandates was based on:

- (1) The criteria published by the Commission on July 6, 1995;
- (2) The preponderance of communications identifying the mandates as troubling to state and local governments; and,
- (3) The significance and diversity of issues posed for intergovernmental relations.

Due to time and resource constraints, ACIR was unable to review more than the 14 selected mandates. *Nevertheless, many more of the over 200 mandates identified need to be evaluated and the Commission urges that a review of additional existing federal mandates be authorized as soon as possible.*

COMMISSION ACTION ON THE PRELIMINARY REPORT

The preliminary report on ACIR's review of existing mandates was developed through a series of Commission meetings held on June 13, September 15, and December 19, 1995. Written and oral communications on issues to be included in the preliminary report were exchanged between Commission members or their staff representatives and ACIR staff between formal meetings. Also, working sessions involving Commission members or their staff representatives were held to refine the preliminary report format, language, and concepts.

On December 13, 1995, a draft preliminary report was distributed to Commission members and, on December 19, 1995, a Commission meeting was held to discuss the draft preliminary report. Following the December 19 meeting, the draft preliminary report was amended in accordance with directions from Commission members attending the meeting. On December 28, 1995, a copy of the revised draft was sent to each Commission member along with a ballot to approve or disapprove release of the preliminary report for public comment. It should be particularly noted that the Commission members were voting on the release of the preliminary report for public comment and not on the acceptability of the individual recommendations, per se.

Commissioners, however, were encouraged in the balloting process to express any concerns or suggested changes they may have with language or other issues in the preliminary report.

A majority of Commission members approved release of the preliminary report, as distributed. A *Federal Register* notice announcing the availability of the preliminary report, *The Role of Federal Mandates in Intergovernmental Relations*, was published on January 17, 1996. Also, the release of the preliminary report for public comment was announced at a January 24, 1996, press briefing.

PUBLIC COMMENTS AND TESTIMONY ON PRELIMINARY REPORT

Both the January 17 *Federal Register* Notice and the January 24 press briefing materials on the preliminary report said public comments would be accepted through March 15, 1996. On March 5, 1996, ACIR announced in the *Federal Register* an extension of the public comment period through March 29, 1996. Moreover, as directed by the *Unfunded Mandates Reform Act* and as announced in the February 27 and March 5 *Federal Register*, ACIR conducted a public hearing to accept testimony on specific issues in the preliminary report. The public hearing was held in Washington DC on March 26, 1996.

During the public comment period, ACIR was contacted by federal agencies and other officials in the federal executive branch, state and local government officials. Members of Congress, public interest organizations, and private citizens. ACIR received 538 public comments, 47 testimonies, and several packages of additional mandate information. Both supporting and opposing comments were received on all 14 individual mandates discussed in the preliminary report. Also, comments were received on mandates in general or on the six common issues mentioned in the report. The public comments, testimony, and other materials received are available for public review in the ACIR offices, upon request.

FOCUS ON INTERGOVERNMENTAL ISSUES

The *Unfunded Mandates Reform Act*, directs ACIR to focus its attention on "the role of federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, ..." In view of this directive, the Commission considered the fundamental intergovernmental issues associated with each mandate selected for review, as separate and distinct from the national policy goals, general purposes, or implementation issues related to each mandate.

Moreover, ACIR focused its attention on intergovernmental issues because state and local concerns usually relate to aspects of a mandate that are damaging to intergovernmental comity, not to the national policy goal or general purpose of a mandate. ACIR and state and local governments recognize that most federal laws and their national policy goals have, and are worthy of, broad public support. Furthermore, it would be inappropriate, if not impossible, for ACIR, or any other group doing an overview study of federal mandates, to duplicate the work of federal agencies and congressional committees on individual mandate requirements. *In general, therefore, ACIR recommends that mandate relief studies and related efforts focus on how to restructure federal laws to restore comity between the governments in the American federal system, not on the elimination or repeal of federal laws.*

local agencies or among federal agencies. There are large information gaps about the details of some federal mandates and, even where technical assistance and information resources may be available from federal agencies or private entities, state and local governments are often unaware of how to obtain such assistance or information. Difficulties also arise when the same federal agency is charged with implementation and enforcement responsibilities and it is unclear which role the agency is in when it responds to questions raised by state and local governments. The situation is aggravated further when multiple federal agencies are responsible for implementing or enforcing a mandate and no single federal agency is empowered to make binding decisions about the mandate's requirements. Finally, when state laws are intertwined with federal requirements, the situation becomes even more complex. *The federal government should establish a coordination mechanism to assist state and local governments through the federal policy maze. The coordination mechanism should be designed to avoid the conflicts of interest that arise in a lead agency process because a lead agency usually has program as well as coordination responsibilities. Desk officers could be assigned for each state as a single point of contact or ombudsperson for questions on federal policies and common rules could be drafted to implement mandates under the jurisdiction of multiple federal agencies. In addition, an arbitration process could be developed to make binding decisions on issues related to federal mandates that arise among federal agencies or between the federal government and state or local governments.*

INDIVIDUAL MANDATES: DISCUSSION AND RECOMMENDATIONS

Fair Labor Standards Act

RECOMMENDATION: *Retain state and local government coverage under the FLSA but amend the Act to allow state and local government compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.*

Description

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) was enacted in 1938. The law sets minimum wage requirements and mandates overtime payments for certain employees who work more than 40 hours a week. It also contains requirements governing child labor conditions and other issues related to employer and employee relationships. Nearly every workplace in the United States is covered by the provisions of the FLSA.

Background

The FLSA was enacted to correct or eliminate labor conditions detrimental to the general well-being of workers. In 1974, amendments to the FLSA extended the applicability of the law to state and local governments and to the executive branch of the federal government. In 1995, the Congressional Accountability Act extended the applicability of the FLSA to the legislative branch of the federal government.

The amendments bringing the public sector under FLSA coverage treat state and local governments the same as private entities while the federal government is handled somewhat differently. For example, the FLSA makes state and local governments and private entities

subject to Department of Labor oversight and requires them to have employment policies that are equal to or more generous than Department of Labor (DOL) regulations. In contrast, the Office of Personnel Management (OPM) is granted independent FLSA regulatory and enforcement responsibilities within the executive branch and the Office of Congressional Compliance is granted independent FLSA authority within the legislative branch of the federal government. Also, while federal employment policies are required to be consistent with the FLSA, they do not have to be equal to or more generous than DOL regulations as is required of state and local governments.

Furthermore, the executive branch of the federal government is granted numerous exceptions to FLSA requirements through the provisions of Title 5, United States Code. For example, Title 5 allows federal agencies to limit overtime compensation rates for higher pay grades and to limit maximum earnings per pay period. Also, Title 5 allows federal agencies to require employees above certain pay grades to accept compensatory time rather than cash for overtime and allows policies precluding such employees from being compensated when they forfeit compensatory hours. No such limits or requirements may be set by state and local governments under the current provisions of the FLSA.

Intergovernmental Concerns

Questions on applicability of FLSA to state and local governments are not raised out of disputes with the basic goals of the law. Rather, the intergovernmental concerns refer to the appropriateness of having federal mandates on employment policies related solely to state and local government employees (i.e. persons paid through state and local taxes or other resources.) The issue becomes more than philosophical, however, when application of FLSA policies to state and local governments results in conflicts with state laws and employee litigation against state and local governments results in multi-million dollar settlement issues.

For example, state laws requiring annual or sick leave to be accounted for on an hour-for-hour basis, when combined with FLSA policies, often creates a situation where nearly all employees, including those in the highest salaries levels of state or local government, qualify for overtime compensation. Many such state or local employees have won substantial retroactive pay settlements due to a court's interpretation of FLSA overtime compensation requirements. The situation is further aggravated, from a state and local government perspective, because court ordered retroactive pay settlements are usually unanticipated and not accounted for during a state's budget negotiations. Moreover, even if a state or local government successfully defends its employment policies and avoids retroactive pay settlements, substantial costs may have been incurred in the litigation process.

Recommendation Rationale

ACIR recommends retaining basic FLSA protections for state and local public employees; but, suggests amending the law to recognize state and local governments as governments and to provide mandate relief on certain points in the law. The proposed amendments could be implemented by creation of a separate title of the law for state and local governments. The separate title could be written to allow states to develop employment policies that are consistent with either FLSA or Title 5, USC. Such amendments would recognize state and local governments as distinct from private entities and would grant states flexibility similar to that currently granted to the federal government. Moreover, such revisions would provide mandate relief by allowing states to establish employment policies that vary from DOL regulations so

long as variances were consistent with the FLSA or the exceptions granted to the executive branch of the federal government in Title 5, USC. The Secretary of Labor, in consultation with the Director of the Office of Personnel Management, could be required to certify that state policies are consistent with FLSA or Title 5, USC provisions.

Family and Medical Leave Act

RECOMMENDATION: *Retain state and local government coverage under the FMLA.*

Description

The *Family and Medical Leave Act* (FMLA) (29 U.S.C. 2601 et seq.) was enacted in 1993. The law requires employers to provide employees up to 12 weeks of unpaid leave each year to care for a newborn, adopted, or foster child. Leave also must be granted for care of a seriously ill child, parent, or spouse. In addition, employees may use unpaid family and medical leave for personal illnesses. Medical insurance benefits must be continued during the leave and employees must be reinstated into the same or an equivalent position after leave.

Background

The FMLA was enacted to promote family stability and economic security among working men and women. The effectiveness of the FMLA was confirmed in an April 1996 report to Congress issued by the Commission on Leave. The Commission on Leave was established by Title III of the FMLA and was charged with examining the impact of the FMLA and other family and medical leave policies on workers and employers across the country. Their final report, *A Workable Balance: Report to Congress on Family and Medical Leave Policies*, was transmitted to Congress on April 30, 1996. In the Executive Summary, the report makes the following statement.

The Family and Medical Leave Act has had a positive impact on employees overall. It has succeeded in replacing the piecemeal nature of voluntary employer leave policies and state leave statutes with a more consistent and uniform standard. The FMLA has not been the burden to business that some had feared. For most employers, compliance is easy, the costs are non-existent or small and the effects are minimal. Most periods of leave are short, most employees return to work and reduced turnover seems to be a tangible positive effect. . . .

It should be noted, however, that the Commission on Leave studied implementation of the FMLA in private business settings. While the findings may also apply to public sector settings, there has not been a specific review of the act's implementation in the public sector.

Intergovernmental Concerns

State and local governments are not opposed to the FMLA's purposes or goals. Rather, the concerns raised refer to contradictions with state or local laws, potential conflicts with collective bargaining negotiations, inflexibility in DOL implementation policies, and costs associated with the extension of medical benefits and other aspects of the law's implementation. To some extent, state and local concerns are corroborated by comments in the Commission on Leave report which

indicate that larger employers, which would include most state governments, are most likely to experience an increase in costs related to FMLA implementation. According to the Leave Commission report, "this, in part, is due to the fact that they are more likely to have leave-takers and to have larger numbers of leave-takers."

Also, as is true under the FLSA, the FMLA treats state and local governments the same as private entities while granting the federal government independent regulatory and enforcement authority. As a result, state and local governments have less flexibility in designing FMLA policies than the federal government. Again, state and local government policies must be equal to or more generous than DOL regulatory policies while federal policies have to be consistent with the law; but, not equal to or more generous than the DOL policies. In addition, the provisions of the law covering the federal government vary slightly from the provisions covering state and local governments. For example, there is no provision in the FMLA to allow federal employees to pursue a right of action against their employer (i.e. the federal government) even though the provisions covering state or local governments authorize such employee suits.

Recommendation Rationale

ACIR recommends retaining FMLA protections for state and local public employees. This recommendation recognizes the positive contribution the FMLA has made towards the support of family values in our nation. The recommendation also retains the current assurance that state or local government employment policies, at a minimum, will meet DOL family and medical leave requirements. Although, as indicated by comments in the Commission on Leave report, further study of FMLA implementation in state and local government settings may be warranted, there does not seem to be substantial fiscal or other concerns with the law's implementation in the state and local public sector at the present time.

Occupational Safety and Health Act

RECOMMENDATION: *Make no change in OSHA language regarding state and local government compliance; but, increase DOL consultation activities with state and local governments and increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.*

Description

The *Occupational Safety and Health Act* (OSHA) (29 U.S.C. 651-678) was enacted in 1970. It establishes standards for safe, healthy, and productive work environments. State governments and their political subdivisions, as well as the United States government, are specifically excluded from the definition of "an employer" under the act. So, state governments and their political subdivisions are not subject to OSHA requirements unless a state volunteers to administer the federal OSHA program within their jurisdiction. When a state volunteers to administer the federal OSHA program, it is required to extend OSHA requirements to all public employees in the state. Such states are required to submit a state plan of operations to the Department of Labor (DOL) for approval prior to taking over administration of the federal OSHA program. If the state plan is approved, the Secretary of Labor is authorized to provide a

federal assistance grant of up to 50 percent of costs for administration and enforcement. No funding is provided for program compliance (e.g., training programs, equipment, or facilities modification).

In comparison, for the federal government, the law requires the head of each federal agency to establish and maintain an occupational safety and health program consistent with OSHA requirements. DOL has authority to review the agency occupational health and safety activities; but has no enforcement authority over the federal agency programs. The legislative branch of the federal government is exempt from compliance with OSHA until January 1, 1997. At that time, according to the Congressional Accountability Act of 1995, each employing office in the legislative branch of the federal government is required to comply with certain OSHA provisions.

Background

OSHA provisions are designed to reduce or eliminate work-related accidents, illnesses, and deaths. Reduction of work accidents, illness, and deaths will enhance the productivity of our nation's workers and will improve the nation's economy. According to DOL, OSHA's protective standards and enforcement program are largely responsible for the 57 percent decline in workplace fatalities over the last 25 years. Each day, however, DOL statistics indicate that more than 6,000 workers still lose time from their jobs as a result of a work related injury. Besides the personal and family tragedies, DOL estimates that job-related injuries cost the economy over \$100 million a year and occupational illnesses cost many times more than injuries.

Although most states operate occupational health and safety programs, state and local government employees are not covered by federal OSHA requirements unless their state government volunteers to administer the federal OSHA program in their state. At the current time, public sector employees in 23 states are covered by federal OSHA requirements because their state has assumed responsibility for operating the federal OSHA program and the employees in two additional states are covered by DOL approved OSHA plans for state and local government employees only. States usually do not choose to administer the federal OSHA program solely to gain coverage for their public sector employees. Rather, states choose to assume OSHA responsibilities because they see it as a way to continue using a state occupational safety and health staff established before the 1970 enactment of OSHA, they feel it will allow them to maintain closer relationships with businesses and workers in their state than would be possible with federal government administration of OSHA, or they sense that a state administered OSHA program has more ability than a federally administered program to deal with local conditions.

Intergovernmental Concerns

State and local government concerns with OSHA requirements included the lack of federal funds for compliance costs, the perception that the program is more focused on monitoring measures and the collection of fiscal sanctions than on compliance assistance, and the lack of credible information on the rationale for or the scientific basis of many OSHA standards and requirements. In addition, OSHA's credibility is compromised by the perceived or real complexity of the programs requirements especially for recordkeeping and reporting purposes. Intergovernmental tensions grow when such concerns are combined with the realization that state and local priorities cannot be met because state and local resources have been used to pay for

construction plans and specifications to the metric system. To accommodate difficulties experienced by state and local governments, DOT has a waiver process to provide exceptions to the metric requirements. Other federal agencies also have metric conversion policies, but, the DOT policies have been the subject of the most intergovernmental concerns.

A number of areas throughout the nation have already taken significant steps towards metric conversion. Further, ACIR received comment from several areas indicating that they intend to continue conversion efforts on a faster schedule than assumed by the recently extended October 2000 deadline. Such activities are encouraging and will add positive support to metric conversion efforts.

Intergovernmental Concerns

The *Unfunded Mandates Reform Act of 1995* required ACIR to include in its review of federal mandates concerns related to metric utilization requirements. The Commission, therefore, indicated a special interest in metric issues when it solicited comments on existing federal mandates. Responses on this issue came primarily from local governments who are required to use metric measurements in the design and construction of federally aided highway projects. Comments from state governments generally indicated support for metric conversion requirements or indicated an unawareness of the requirements.

The concerns cited by local governments included the inability to procure supplies in metric units at the local sites. Also, mentioned was the potential for mistakes in the bidding and construction process because of the unfamiliarity of local contractors and suppliers with metric measurements. In addition, concerns were raised that the use of the metric system could create problems for property owners seeking or providing right-of-way acquisitions, for surveyors, and for local deed registries.

Recommendation Rationale

ACIR commends the Congress and the President for enacting an extended deadline for metric conversion of plans and specifications. The extension acknowledges the value of converting to the metric system of measurement, while providing mandate relief to areas unable to meet the original deadline. DOT's approval of more than 2,200 waivers of metric requirements attests to the difficulties some areas are having with the conversion process. The recently enacted extended deadline retains the requirement for eventual conversion of plans and specifications to the metric system; but facilitates compliance on a more gradual basis in areas of the country that would have had difficulty meeting the 1996 deadline.

Medicaid: Boren Amendment

RECOMMENDATION: *Repeal the language of the Boren Amendment and insert language specifying that rate determinations are the sole responsibility of each participating state and that such rates must be established to assure that health and nursing home care is provided in conformity with applicable federal and state laws and regulations related to quality of care and safety standards.*

Description

The *Boren Amendment* requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons eligible for assistance through the Medicaid program. The law specifies that the reimbursement rates be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards"

Background

The intent of the *Boren Amendment* was to give states a means of controlling costs related to reimbursement claims from providers of Medicaid services. Instead of basing reimbursements on a cost-related payment requirement for hospitals and nursing home services, the amendment allows states to pay for services based on a predetermined reimbursement rate, giving states a basis for denying reimbursement for costs determined to be in excess of that necessary to provide "efficiently and economically" delivered services. The language of the law, however, left state rate determinations open to challenge on several grounds.

Intergovernmental Concerns

Intergovernmental concerns with the *Boren Amendment* stem, in part, from the fact that the law gives state governments and the federal government shared responsibility for determining the reimbursement rates. While the state is to determine rates in accordance with methods and standards developed by the State, the federal government is required to approve the rates so established. Federal government approval of a state's rate determination process or established rates, however, does not give a state immunity from litigation over the adequacy of their reimbursement rates or their methods for determining the reimbursement rates.

This lack of immunity, combined with the 1990 Supreme Court ruling in *Wilder v. Virginia Hospital Association*, (496 US 498), has created numerous intergovernmental tensions related to the Boren Amendment. In the *Wilder* case, the Supreme Court declared medical providers (instead of the individuals receiving health care) to be the intended beneficiaries of the *Boren Amendment*. This ruling allows medical facilities and nursing home to obtain judicial review of state reimbursement rates under Section 1983 of the *Civil Rights Act*. In other words, the Supreme Court ruling allows medical facilities and nursing homes to claim that a state is violating their civil rights by failing to pay a certain reimbursement rate.

While some state governments have not had problems related to the *Boren Amendment*, other states have been sued by medical providers or nursing homes in their state and have been found liable for significant sums of money to cover retroactive rate increases ordered by a court. In some cases, retroactive payments are not be eligible for cost-sharing from the federal government even though the federal government may have approved the rate process or the rates used. Retroactive payments must be determined within a certain time period to qualify for cost-sharing from the federal government.

Recommendation Rationale

ACIR recommends repeal of the *Boren Amendment* and adoption of statutory language making it clear that rate determinations are the sole responsibility of each participating state. To acknowledge the relationship between reimbursement rates and the quality care given to

The effectiveness of *Davis-Bacon Act* requirements is the subject of considerable debate with both positive and negative opinions being strongly held by various parties. For example, some parties claim repeal of the *Davis-Bacon Act* will save money while others argue that a repeal will make little or no difference in the cost of construction projects. Likewise, some parties claim that Davis-Bacon requirements are still appropriate to assist local economies while other parties allege that Davis-Bacon requirements hinder the growth of local economies by forcing state and local governments to divert resources from their construction priorities to cover the cost of projects subject to Davis-Bacon requirements.

Intergovernmental Concerns

As noted above, state and local governments are only subject to *Davis-Bacon Act* requirements if they receive federal financial assistance through a Davis-Bacon Related Act (i.e. a law that includes language making receipt of federal funds contingent upon compliance with *Davis-Bacon Act* requirements.) When Davis-Bacon requirements are made applicable to a federally-assisted state or local government construction project, the state and local government concerns include the same arguments noted above concerning the effectiveness of the law in federal construction projects. For example, some state and local governments claim that Davis-Bacon requirements increase the cost of projects by mandating wages higher than would otherwise be paid in the area of the construction projects. Also, concerns are expressed about the recordkeeping and reporting requirements related to documentation of *Davis-Bacon Act* compliance.

Intergovernmental issues are aggravated when Davis-Bacon Related Acts apply federal construction requirements with no special exceptions to recognize the nature of the state or local construction project or the percentage of federal funds compared to total project cost. Intergovernmental concerns are relieved in some Davis-Bacon Related Acts with language making the applicability of the requirements subject to certain conditions. For example, in the Housing and Community Development Act of 1974 for the Community Development Block Grant program, the Secretary of Housing and Urban Development (HUD) is authorized to waive *Davis-Bacon Act* provisions in connection with grants to Indian tribes.[Section 107(e)(2)]. In other laws within HUD's jurisdiction *Davis-Bacon Act* requirements do not apply to projects involving less than 8 housing units.

Also, Davis-Bacon Related Acts usually fail to acknowledge that many states have their own version of Davis-Bacon requirements which are applicable to construction projects funded with state money. In these situations, the application of the federal Davis-Bacon requirements may conflict with state requirements and create a situation inappropriately detrimental to intergovernmental comity while not necessarily benefiting working men and women any more than would be true under the state law.

Recommendation Rationale

ACIR recommends that the Davis-Bacon Related Acts be amended to exempt state and local projects with a cost below a higher dollar threshold than exists in most laws. Also, ACIR urges the Congress and the President to consider exempting state and local projects in which the federal funding share is a low percentage of total cost. These recommendations recognize the national interests, which led to making Davis-Bacon compliance a condition-of-aid in 60 plus federal laws, while also recognizing the concerns of local and state governments regarding

Davis-Bacon Related Act requirements. The goal of amendments to Davis-Bacon Related Acts should be to allow state and local governments greater flexibility in federally assisted construction projects to apply state laws concerning working men and women and to use total funding available for a project in a manner which best achieves the state and local governments priorities.

Required Use of Recycled Crumb Rubber (Repealed)

RECOMMENDATION: *Commend the Congress and the President for repealing this federal mandate.*

Description

Section 1038 of the *Intermodal Surface Transportation Efficiency Act of 1991* (ISTEA) (P.L. 102-240) required states to satisfy a minimum tonnage utilization requirement for asphalt pavement containing recycled rubber on federal-aid projects. The requirement was 5 percent for 1994, 10 percent for 1995, 15 percent for 1996, and 20 percent thereafter. The Secretary of Transportation (DOT) could waive the penalty for any three-year period on evidence of health, environment, and performance problems associated with asphalt pavements containing rubber. Individual state exceptions could also be made if there was an insufficient supply of scrap tires. Section 205(b) of the *National Highway System Designation Act of 1995* repealed this mandate.

Background

This provision was adopted to encourage states to build better, longer lasting roads and to reduce used tire stockpiles.

Although this mandate has been repealed, ACIR has retained a discussion of this mandate in this report on federal mandates because it presents an outstanding example of a mandate that should have been given greater consideration from an intergovernmental perspective prior to enactment.

Intergovernmental Concerns

State and local government concerns with the requirement for including recycled crumb rubber in asphalt pavement on federally aided highway projects varied according to conditions in individual states. In some cases, it was argued that the material was inappropriate for use in the state's roads because of weather and other conditions. In other cases, it was noted that there was no need to recycle crumb rubber in asphalt because other markets exist for the use of crumb rubber. In one instance, a state reported the needed to import old tires into the state just to meet the crumb in asphalt requirements.

Besides the general sense that the law inappropriately infringed on traditional state or local regulated activities, intergovernmental tensions were raised by the law's provision allowing the withholding of highway funds if a state failed to comply with the recycled crumb rubber requirements. The federal intrusion into this area of state operations, along with the withholding of grant money for non-compliance, demonstrate the breakdown intergovernmental comity surrounding this particular issue.

State and local government concerns were corroborated by construction industry concerns about both the integrity of the pavements and the life-cycle maintenance costs of crumb-rubber-mix

asphalt. Research had not completely shown any improved life of asphalt pavements using crumb rubber, while the costs doubled in many instances. According to the American Association of State Highway and Transportation Officials (AASHTO), costs vary regionally and from product to product but could result in 20-100 percent higher paving costs for construction of short life and poor quality roads. It was also contended that the law mandated an engineering approach that is still experimental and has unresolved environmental, health, and safety issues.

Recommendation Rationale

ACIR commends the Congress and the President for repealing the mandate requiring the use of recycled crumb rubber in asphalt. The repeal recognizes that most state and local governments and highway user interest groups do not believe there is sufficient benefit in using waste tire rubber in hot-mix asphalt to justify the costs or the need for a federal mandate to create a national policy on this issue.

FUTURE ACTIONS RELATED TO FEDERAL MANDATES AND THEIR IMPACT ON INTERGOVERNMENTAL RELATIONS

Enactment of the *Unfunded Mandates Reform Act of 1995* was the beginning, not the end, of a process to provide mandate relief for state and local governments. The legislative debate preceding enactment of the Act resulted in a compromise regarding prospective vs. retrospective applicability of the law. Under the compromise, Titles I and II of the statute established mechanisms to provide relief from future mandates—as exhibited in the January 1996 legislative debate on the telecommunications bill—but, they provided no relief from existing federal mandates. For existing federal mandates, Title III of the statute directed ACIR to review the impact of federal mandates on state and local governments and to submit a report to Congress and the President with recommendations. Essentially, the law postponed the discussion of existing mandates for one year.

During the course of the study, over 200 mandates—mandates being broadly defined under Title III of the Act—were identified to ACIR by state and local governments and other organizations (An inventory of these mandates can be found in ACIR's *Catalogue of Federal Mandates on State and Local Governments*). This report concentrates on 14 specific mandates of concern. Other mandates are also in need of thorough review. For example, requirements for identification, management, and disposal of solid and hazardous waste materials under the *Resource Conservation Recovery Act (RCRA)* and the Superfund program were cited by state and local governments as needing review. Also, components of Medicaid caseload eligibility regulations, job training services, and "Motor Voter" requirements are causing significant concerns for state and local governments. *A review of some of these additional mandates should be authorized as soon as possible.*

The review of existing mandates has already contributed positively to improvements in intergovernmental relations. Advocacy groups on all sides of various mandate issues have started to rethink their positions, to better articulate their concerns, and to discuss issues face-to-face with one another. In addition, several of ACIR's recommendations mirror similar proposals and

events unfolding in the executive, legislative, and judicial branches of the federal government. The Administration's Fiscal Year 1997 budget calls for repeal of the *Boren Amendment*. Amendments to the *Safe Drinking Water Act* have passed the Senate with bipartisan support and may be enacted during 1996. A recent Supreme Court decision in *Seminole Tribe of Florida vs. Florida* challenges the power of Congress to create a private right of action against a state if the state has violated a federal right flowing from a federal statute. Further study is needed to examine the issues raised by federal statutes authorizing private rights of action against state and local governments.

Further changes proposed by ACIR in national intergovernmental policy may be realized in the near future. For example, the Department of Interior publicly recognized the need for changes in the *Endangered Species Act* to give it more flexibility in working with state and local governments. The Department of Education is proposing to reduce record-keeping requirements in the *Individuals with Disabilities Education Act* to relieve some of the more onerous provisions of the Act not related to the education of a child with a disability. Numerous changes in the *Fair Labor Standards Act* are being proposed which will relieve mandate burdens on state and local governments. The need for change is evidenced by the actual and potential liabilities of state and local governments soaring into the millions of dollars as a result of lawsuits under the FLSA. It is up to the appropriate federal agencies and Congressional committees to evaluate and propose statutory language related to specific provisions in the various federal laws reviewed by ACIR.

For the *Unfunded Mandates Reform Act* to be truly successful, further study is required on the provisions of the Act that ACIR was not able to accomplish due to resource constraints. Efforts must be made to examine the measurement and definition issues involved in calculating the total costs and benefits to state, local, and tribal governments of compliance with federal laws. In addition, it is imperative to include a discussion of the role of state mandates imposed on local governments in any future discussion of mandate reform. Also, ACIR was not able to evaluate the application of mandates to the private sector or to consider the views of and the impact of these mandates on working men and women. The issues and options related to solutions for private sector mandate relief are significantly different from those related to solutions for public sector relief, and should be examined accordingly. Moreover, ACIR's court ruling report, which also was done in response to a directive of the Act, revealed that there were 3,500 judicial decisions in 1994 involving federal laws and state or local governments. The results of ACIR's studies provide a dramatic picture of the complex relationship between the federal government and state and local governments.

As is now the case with future mandates, the federal government should take a second look at existing federal mandates and the state and local government costs of implementing these mandates. In the future, the challenge facing the federal government will be to exercise its power to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own priorities. It is not too late to use this same power to correct some of the problems of the past.

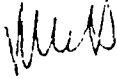
THE WHITE HOUSE
WASHINGTON

March 14, 1996

MEMORANDUM

TO: Kitty Higgins
Sally Katzen
Elizabeth Drye ✓
Jennifer O'Connor
Marilyn Yeager

CC: Harold Ickes

FROM: Marcia L. Hale 

SUBJECT: ACIR

Attached is a list of individuals that have asked to testify at the ACIR public hearing. Please call me when you have a moment to discuss the hearing.

Attachments

WATKINS LUDLAM & STENNIS
P.O. BOX 427
JACKSON, MISSISSIPPI 39205
601-949-4900

TELECOPIER TRANSMITTAL COVER SHEET

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ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS		
REQUESTS TO TESTIFY ON MARCH 26, 1996		
#	name	organization
1	DOUG BROWN	INT'L ASSOC. OF FIRE CHIEFS
2	HAROLD SCHAIBERGER	INT'L ASSOC. OF FIRE FIGHTERS
3	MANDY RODGERS	PARENT OF CHILD W/DISABILITIES FROM MS
4	SHEILA LACHS	CHILDREN & ADULTS WITH ADD
5	MIKE ROSENBERG	JOHNS HOPKINS UNIVERSITY
6	ROBERT BOHLMAN	NATIONAL ALLIANCE FOR MENTALLY ILL
7	ALISE SWARTZ	NATIONAL WILDLIFE FEDERATION
8	ROBERT HERMAN	PARALYZED VETERANS OF AMERICA
9	RICHARD TREANOR	LAWYER
10	BETTY LIVINGSTON	PARENTS EDUCATING PARENTS IN MS
11	BARRY WEINTRAUB	DISABILITY RIGHTS, INC.
12	MARCA BRISTO	NAT'L COUNCIL ON DISABILITY
13	JUDITH LICHTMAN OR DONNA LENHOFF	WOMEN'S LEGAL DEFENSE FUND
14	BARBARA LYMAN OR AMIE AMIOT	AMERICAN SPEECH, LANGUAGE, AND HEARING ASSOCIATION
15	LEE SAUNDERS	AFSCME
16	PAUL MARCHAND	THE ARC
17	JANIS HAGEY	NAT'L EDUCATION ASSOCIATION
18	MARK GLAIBER	NAT'L ASSOC OF FLEET ADMINISTRATORS
19	GARY BASS	OMB WATCH
20	KEVIN DWYER	NAT'L ASSOC OF SCHOOL PSYCHOLOGISTS
21	ELISE HOERATH	NAT'L WILDLIFE FEDERATION
22	JAYDEE R. HANSON OR DR. THOM WHITE WOLF FASSETT (METHODIST CHURCH)	GENERAL BOARD OF CHURCH & SOCIETY
23	SHARON BUCCINO	NATURAL RESOURCES DEFENSE COUNCIL
24	JUSTIN DART	JUSTICE FOR ALL
25	MARGARET J. DUNAWAY	PARENT OF CHILD W/DISABILITIES FROM MS
26	AL BILIK	AFL-CIO PUBLIC EMPLOYEE DEPT.

MAR-12-1996 11:40

202 653 5429

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 MAR 12 '96 12:36 FROM PCIR
 WATKINS LUDIAN
 TO WINTER
 PAGE. 004/005
 002

REQUESTS TO TESTIFY ON MARCH 26, 1996

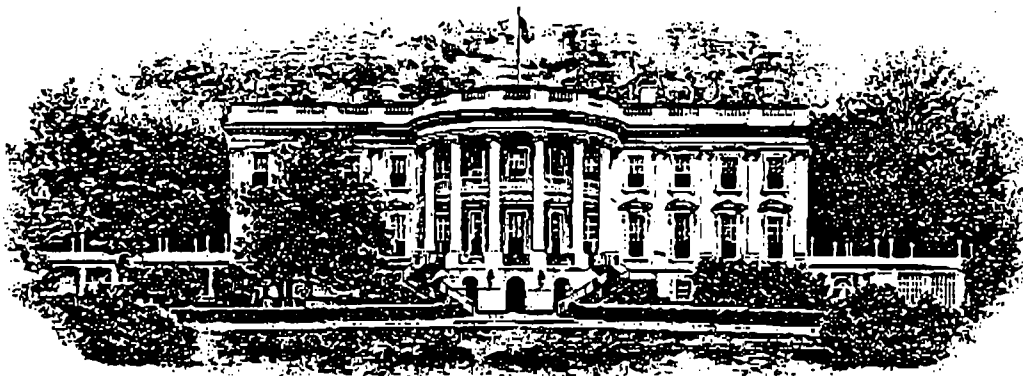
#	name	organization
27	KATHRYN L. MC MICHAEL	NATIONAL SCHOOL BOARDS ASSOCIATION
28	CHERIE TAKEMOTO	testify on IDEA & ADA
29	KATY BEN NEAS	CONSORTIUM FOR CITIZENS WITH DISABILITIES EDUCATION TASK FORCE
30	CHRISTINE WOODELL	MS COALITION OF PEOPLE W/DISABILITIES
31	CHAI FELDBLUM	GEORGETOWN FEDERAL LEGISLATION CLINIC
32	MOUREEN HOLLOWELL	NAT'L COUNCIL OF INDEPENDENT LIVING
33	DEBRA JOHNSON	IDAHO PARENTS UNLIMITED, INC.
34	TERRI DAWSON	PARENT INFORMATION CENTER (WY)
35	DIANA AUTIN	STATEWIDE PARENT ADVOCACY NETWORK
36	THERESA REBHORN	UNAFFILIATED
37	ROBERT A. GEORGINE	AFL-CIO, BUILDING & CONSTRUCTION TRADES
38	JOHN H. SULLIVAN	AMERICAN WATER WORKS ASSOCIATION
39	BILL SNAPE	DEFENDERS OF WILDLIFE
40	MARY WYKOFF	ACLU - WOMEN'S RIGHTS PROJECT

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** TOTAL PAGE.005 **

P.005



THE WHITE HOUSE
OFFICE OF CABINET AFFAIRS

Room 160 OEOB
Washington, D.C. 20500
Telephone: (202) 456-2572
Faxsimile: (202) 456-6704

FAX COVER SHEET

DATE:

March 7, 1996

TO:

Liz Doye

PHONE:

FAX:

2216

FROM:

Kirk Balderson

NO. OF PAGES:

6

(Including Cover Sheet)

PRIORITY:

Y N

MESSAGE:

Please see attached

ENVIRONMENTAL PROTECTION AGENCY
REGIONAL OPERATIONS/STATE/LOCAL RELATIONSDATE March 1-96

To:

NAME:

Kris Balderson

ORGANIZATION:

White House Cabinet Affairs

FAX NUMBER:

456 - ~~257~~ 6704

PHONE NUMBER:

FROM:

Anne RaymondSHELLEY METZENBAUM, ASSOCIATE ADMINISTRATOR
OFFICE OF REGIONAL OPERATIONS & STATE/LOCAL RELATIONS

PHONE: (202) 260-4719

FAX: (202) 260-2159

TIME: 11:30 AMTOTAL NUMBER OF PAGES: 2

SUBJECT:

ACIR - Letter Comments

MESSAGE:



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460

MARCH 1, 1996

OFFICE OF REGIONAL OPERATIONS
AND STATE/LOCAL RELATIONS

MEMORANDUM

SUBJECT: Comments on ACIR letter to Governor Winter from Marcia Hale

FROM: Anna Raymond for *Anna Raymond*
Shelley H. Metzenbaum

TO: Kris Balderson
White House Cabinet Affairs

We have only one suggestion to add to the letter. However, we are not wedded to this language, but feel it would be useful to put in some form of this statement:

Paragraph 1 - White House Letter to Governor Winter.

Suggested language to be added -- line #3 after *Mandates in Intergovernmental Relations*.

As you know, the President is deeply committed to building a strong and effective working partnership with state local and tribal governments. Furthermore, this administration has strongly supported the ACIR and is greatly appreciative of its past efforts to improve intergovernmental relationships. For that very reason, it is essential that the next draft of this report correct the serious problems in the Preliminary Staff Draft. --The draft report fails....

With regard to the substance of the letter, it is fine with us because of the balance with the other pertinent issues. If you make substantial changes to these issues we would like to see the letter again.

Thanks.



U.S. Department of
Transportation

Office of the Secretary
of Transportation

400 Seventh St. S.W.
Washington, D.C. 20590

TELECOPIER COVER SHEET

DATE: 3-1-96

THE FOLLOWING 3 PAGES (INCLUDING COVER SHEET) ARE FOR:

NAME:

Kris Balderson

ORGANIZATION:

PHONE:

FAX: 456 - 6704

THE FOLLOWING PAGES ARE FROM: BARBARA LEACH, DIRECTOR
OFFICE OF INTERGOVERNMENTAL AFFAIRS

PHONE: (202) 366-1524

FAX: (202) 366-7907

COMMENTS:

See attached for ACIR comments.

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL THE ABOVE
NUMBER PROMPTLY.

DOT COMMENTS ON 2/29/96 DRAFT LETTER TO ACIR

- On page 2, last paragraph, could also take credit for overall progress in regulatory reform made by the Administration as part of the National Performance Review (see proposed sentence penciled in on page 2)
- In the attachment, could include following section on **Drug & Alcohol Testing**

The preliminary staff draft recommends repeal of drug and alcohol testing for state and local government employees who operate commercial vehicles.

The Administration strongly disagrees with the draft report's recommendation. From a transportation safety perspective, it makes no difference who employs the person driving a commercial vehicle (which is defined as weighing over 13 tons or carry 16 or more people). Common sense tells us that a motorist is in just as much danger from an impaired state or local employee driving a large truck as from a private company's employee. And contrary to the draft report's analysis, drug and alcohol testing is not inconsistent with the treatment of law enforcement and emergency personnel. In many, if not all cases, local governments already apply their own drug and alcohol testing requirements to these personnel.

For example, the preliminary staff draft recommends that Congress repeal the Family and Medical Leave Act's (FMLA) applicability to state and local governments. I oppose this recommendation. The draft report asserts that the FMLA has "created unfunded costs related to extending medical insurance coverage to employees while on leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities..." The report cites no supporting evidence for this claim, however. Further, the report does not acknowledge the substantial benefits to employers, families, and individuals of implementing FMLA requirements.

The preliminary staff draft also recommends several generic modifications to federal laws without carefully considering the consequences of such changes. For example, the draft report proposes eliminating citizens' rights to sue state and local governments to enforce federal mandates. I strongly oppose this broad-sweeping change. Again, the recommendation is based on a consideration of costs but not of benefits. The draft report simply asserts that citizen suits create "budgetary uncertainties and substantial legal costs" for state and local governments. The draft report does not document or quantify these costs or discuss the constructive role citizen suits have played in strengthening enforcement of civil rights, environmental, and other federal statutes.

Another particular concern is the report's recommendations with respect to civil rights laws for people with disabilities -- specifically, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). Since the Unfunded Mandates Reform Act does not apply to civil rights statutes, it is inappropriate for ACIR to recommend changes to these laws. The draft report's recommendations to eliminate a private right of action and allow voluntary compliance under these statutes would set back our efforts to guarantee equal rights for citizens with disabilities. I oppose these recommendations. I would note that both of these laws allow federal agencies to emphasize education and voluntary compliance as much as possible, and that this Administration has taken a cooperative and flexible approach in implementing the ADA and IDEA.

I am also concerned about the process for seeking public comment on the staff draft. I urge you to ensure full public participation in the Commission's deliberations. I understand the ACIR is sponsoring a March 6-7 Conference on federal mandates and is charging a \$400-500 admission fee. Charging a fee in this context is inappropriate since it creates a barrier to full public participation. I strongly recommend you [instead?] host a free and accessible public meeting to seek comment on ACIR's activities.

As you know, the Clinton Administration has worked hard to strengthen the intergovernmental partnership and to address state and local government concerns about unfunded mandates. The President signed Executive Order 12875 during his first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, he signed the Unfunded Mandates Reform Act. In addition, the Administration has proposed or supported modifying a number of federal laws to ease the public sector's compliance burden. Further, in implementing federal laws, the Administration has sought to provide state and local governments with enhanced technical assistance and to help them take full advantage of the flexibility that already exists in many federal statutes.

He and the Vice President have taken tremendous strides in regulatory reform through the National Performance Review.

THE WHITE HOUSE
WASHINGTON

① Alice Rivlin
who in her place

② that level
(Ken A. for her?)

② OMB: Ken will attend

should they also
invite

- Litan
- DeSev
- Minn

per
Jeremy

THE WHITE HOUSE
WASHINGTON

February 27, 1996

MEMORANDUM TO FEDERAL WORKING GROUP ON COMPREHENSIVE SERVICES

FROM: Jeremy Ben-Ami
Gaynor McCowen

SUBJECT: Materials for March 4 Meeting

Thank you very much to all of you who have submitted materials since the last working group meeting. The schedule for the next two weeks is hectic:

Monday, March 4 -- 4:45 p.m.

Domestic Policy Council Meeting

Cabinet Secretaries will be meeting with Carol Rasco, Elaine Kamarck and Alice Rivlin to review the initial vision statement and action plan and to discuss the status of the Oregon and Connecticut efforts.

Wednesday, March 6 -- 3:00 p.m. - 5:00 p.m.

Federal Working Group Meeting

Room 450 -- OEOB

Federal Working Group will meet to review the direction given by the Cabinet members and to continue to work on the draft vision statement and action plan in advance of the Working Meeting the following week.

Tuesday and Wednesday March 12-13

White House Working Meeting on Comprehensive Strategies

Attached please find two documents:

- (1) Draft vision statement
- (2) List of attendees at March 12-13 White House Working Meeting on Comprehensive Services

Please review the vision statement and get any comments back to us by Thursday at noon. We apologize for the short review time but we intend to circulate it to the Secretaries by the end of the day on Thursday for the Monday meeting. In addition to the vision statement and the list of attendees, we will also give them an outline of the action plans submitted to us by each agency! Please note that the vision statement and the outline of the action plan are both working drafts and we will indicate that to the Cabinet Secretaries.

In preparation for the meeting next Wednesday, we will send you a copy of the outline as well as a more detailed version of the draft action plan. You should plan to come to the meeting prepared with any edits, additions or objections. Many thanks for your cooperation.

FEB 22 1996

ENVIRONMENTAL PROTECTION AGENCY
REGIONAL OPERATIONS/STATE/LOCAL RELATIONS

DATE: 2/22/96

To:

NAME: Kris Balderson; Marcia Hale, Katie McGinty, Kathryn Higgins;
Carol RascoORGANIZATION: White House

FAX NUMBER: _____

PHONE NUMBER: _____

FROM:

SHELLEY METZENBAUM, ASSOCIATE ADMINISTRATOR
OFFICE OF REGIONAL OPERATIONS & STATE/LOCAL RELATIONS

PHONE: (202) 260-4719

FAX: (202) 260-2159

TIME: 9:30AMTOTAL NUMBER OF PAGES: 3 plus coverSUBJECT: ACIR

MESSAGE: HERE IS A CLEAN COPY OF THE MEMO THAT WAS
FAXED LAST NIGHT TO KRIS BALDERSON. ANY QUESTIONS
PLEASE CALL ANNA RAYMOND.

February 16, 1996

MEMORANDUM FOR ELIZABETH DRYE

FROM: Debbie Fine

SUBJECT: Response from Advocacy Groups to the ACIR Draft Report

I have been in touch with the Women's Legal Defense Fund over the course of the last three weeks on this report. My sense from them and the disability community is that although this may not be a 'hot issue' across the United States at this point, there are certainly a number of supporters who:

- are aware of the draft report,
- are concerned about the recommendations,
- would like to know how these recommendations came from an advisory committee that includes members of the administration, and
- who would like to find a way to influence the outcome.

There is a coalition called Citizens for Sensible Safeguard -- headed up by AFSCME and OMB Watch -- that is tracking this issue carefully and strategizing around it. Their membership is pretty broad, with a stronger focus on unions, health and safety, and public interest groups. At this point the disability and labor movements seem the most informed and mobilized, but other communities are starting to become more involved; for example, the Women's Legal Defense Fund is sending out an alert to approximately 1500 people early next week. (Their list includes the Council of Presidents of Women's Organizations, the Family and Medical Leave Coalition, and other key women from around the country.)

Public Input: Groups seem confused and somewhat upset by the mechanisms developed for influencing this report and process. Although they can utilize the public comment period, the conference scheduled for March 6-7 does not provide a real forum for the public to express its views because: (1) it requires a \$400 admissions fee, which is problematic for many people and organizations; and (2) I am told that the schedule for the conference does not allow for much input. Citizens for Safeguard Protections feels that it is a 'rigged deal' -- set up to make the case for the proposed recommendations.

I was told tonight, however, that there is now a public hearing scheduled for March 8th for which a time and place has not been announced. This apparently was stated in a letter to a children's advocacy group in Mississippi in response to their concerns that there was no public hearing scheduled.

I think it is important to think about our role in both the conference and the public hearing. Furthermore, if we are at all affiliated with the 3/6-7 conference, I would suggest looking into changing the admissions charge.

Participation of Commission Members: Citizens for Sensible Safeguards has been making calls to the Commission members and has found that at least several have disavowed the draft report. For example: Donald Payne says he didn't vote and is not happy with the report, and Jim Moran said he voted against it and is preparing a statement in response.

Following are some specific questions I was asked that I said I would look into:

1. From polling the members of the ACIR, Citizens for Sensible Safeguards has learned that Riley and Browner voted 'no', but they haven't heard whether or not Marcia Hale voted.
2. There is talk that there are two vacancies on the Commission -- one House slot and one state legislator spot. I was told that the President is the one to appoint the state legislator spot, and was asked if he planned to.
3. I have also been asked:
 - Is there another scheduled meeting of the Commission?
 - Do we have guidance on other ways the public can influence this process?
 - How does the Administration plan to respond to/influence this process?

I think that it is important to have internal guidance on what to say about this report and the ACIR process to organizations and to the public so that we are consistent when discussing it.

Thanks. Please let me know if you have questions or need additional information.

cc: Carol Rasco
Jeremy Ben-Ami
Diana Fortuna

Feeling The Pressure of Federal Mandates?

Here's a question...What do the White House, members of Congress, state and local officials, government employees, the academic community, private companies, and millions of American citizens have in common?

The answer...Many, if not most, agree that while certain issues benefit from federal oversight, federal mandates aren't always the best way to achieve national goals.

Many would also argue that states, localities, and the private sector have been left out of the decision-making process. This conference will provide participants with the opportunity to debate the merits and problems of mandates and regulatory issues affecting those entities.

As part of the *Unfunded Mandates Reform Act of 1995*, Congress directed the Advisory Commission on Intergovernmental Relations (ACIR) to make recommendations on whether to modify, suspend, or terminate specific existing mandates. This conference will let participants evaluate and comment on ACIR's preliminary recommendations.

If you feel the impact of mandates, this conference is your opportunity to learn which issues ACIR has identified as the most important or most troublesome. It's also your opportunity to make your positions on these issues and ACIR's recommendations a part of the permanent public record.

Speakers and Moderators Include:

- President William J. Clinton*
- Sen. Robert Dole*
- Sen. Dirk Kempthorne
- Members of the U.S. Senate
- Members of the U.S. House of Representatives
- Members of the Cabinet
- Federal Department Administrators
- Governors
- State Legislators
- County Commissioners
- Mayors
- Academicians
- The Private Sector

Who Should Attend:

- Elected state and local government officials, state executive branch officials, state legislative staff, federal regulatory agency personnel, Congressional staff, local government agency officials, staff & members of non-profit organizations, private sector executives & financial staff, academic faculty & public policy researchers, and representatives of public-sector employee organizations

Ease the pressure and lighten the load.

Attend The ACIR Conference On Federal Mandates
March 6-7, 1996 • The Washington Hilton Hotel

cc Elizabeth D
Debbie F
Paul W
Jeremy B

From Diana F

ACIR Program
lists POTUS
invited

as speaker(?)!

Conference Day One:

Wednesday, March 6, 1996

7:30 a.m. Registration

8:30 - 8:45 Welcome
Hon. William F. Winter, ACIR Chairman

8:45 - 10:30 Plenary Session
A New Approach in Congressional Legislation
Hon. Dirk Kempthorne**, U.S. Senate
Intergovernmental Principles Emerging from ACIR's Mandate Studies
Hon. Bob Graham**, U.S. Senate
Hon. Richard Nathan**, Director, Rockefeller Institute of Government

10:30 - 10:45 Break

10:45 - 12:15 p.m. Concurrent Seminars

1. Current Efforts to Reform Federal Regulatory Impacts on State and Local Governments

Current regulatory reform bills would require federal agencies to assess the impacts of proposed regulations, involve state and local governments in regulatory development processes, and allow waivers of federal requirements hindering the integration of two or more federal programs under an approved flexibility plan. This seminar will feature expert panels from federal, state, and local governments who will:

- Debate regulatory reform bills under consideration by Congress.
- Evaluate recent efforts by federal agencies to improve their regulatory processes.

Moderator:
Barry Halloran, Staff Director, U.S. House Subcommittee on Human Resources and Intergovernmental Relations

2. Measuring the Costs and Benefits of Mandates

The *Delegated Mandates Reform Act of 1995* requires ACIR to study the techniques used to assess the costs, benefits, and feasibility of federal mandates. During this session, panels of federal, state, and local representatives will:

- Review the current methods used to assess regulation.
- Discuss the feasibility, approaches, and issues in measuring the time and benefits of federal mandates.

Moderator:
Dr. Mark Rosenbaum, School of Public and Environmental Affairs, Indiana University

3. Relieving State Mandates on Local Governments

Several states have taken statutory or executive action to relieve the burden of federal and state mandates on local governments. Panels from state and local levels of government will:

- Look at the current progress of state mandate relief efforts.
- Look at the influence mandates have on state regulatory processes.

Moderator: Hon. Bruce Todd*, Mayor, City of Austin, TX

12:30 - 2:15

Luncheon Program *Developing a New Partnership with State and Local Governments*

Hon. William J. Clinton*, President of the United States

Introduced by:
Hon. Richard Riley**, Secretary of Education

2:30 - 4:45

Concurrent Workshops

Workshops 1 through 6 will present the findings and recommendations of ACIR's preliminary report on the effects of existing federal mandates on state and local governments. Each workshop will include ACIR Commission members, providing attendees the opportunity to directly communicate their views. Panels will also include members of the public, private, and non-profit sectors who will:

- Offer comments on ACIR's preliminary findings and recommendations.
- Present mandates supporting their individual positions.
- Respond to the comments and questions of those who wish to participate in an open discussion.

1. Environmental Mandates

Moderator:
Hon. Gregory Lashinsky**, Mayor, City of Columbus, OH

2. Labor Mandates

Moderator:
Hon. Randall Brunk**, Governor, Maine County, ME

3. Mandates Affecting Individual Rights

Moderator:
Hon. Edward Rendell**, Mayor, City of Philadelphia, PA

5:00 - 6:00

Conference Networking Reception

Hosted by Members of the Advisory Commission on Intergovernmental Relations

6:00 - 8:00

Dinner Program *A Future Agenda for Rebalancing American Federalism*

Hon. Michael Leavitt**, Governor, Utah

* Invited
** ACIR Commissioners

Lightening the Road
The ACIR Conference on Federal Mandates

Conference Day Two:

Thursday, March 7, 1996

7:00 am	Registration
7:30 - 9:00	Breakfast Program What Will Happen in the Congress After ACIR Submits Its Mandate Report? Introduction: Hon. James Moran**, U.S. House of Representatives Speaker: Hon. Christopher Shays*, Chairman, U.S. House Subcommittee on Human Resources and Intergovernmental Relations
9:15 - 10:30	Plenary Session A Vision of American Federalism for the 21st Century Introduction: Hon. Craig Thomas**, U.S. Senate Speaker: Hon. Robert Dole*, Majority Leader, U.S. Senate

10:30 - 10:45 Break

10:45 - 12:15 p.m. Concurrent Seminars

4. Impact of Federal Court Mandates on State and Local Governments

ACIR completed an inventory of federal court decisions from 1994 that imposed mandates on state and local governments or prevented those governments from taking certain action. During this seminar, panelists representing differing legal and governmental interests will:

- Discuss the ACIR study findings and the problems of federal court decisions for state and local governments.
- Discuss ways to reduce the burden of federal court decisions on state and local governments.

Moderator: Dr. Robert Brundage, George Washington Univ.

5. Mandate Relief for the Private Sector

The *Unfunded Mandates Reform Act of 1995* requires that ACIR make efforts to reduce the burden on state and local governments that may impact the private sector. Public and private sector panelists will:

- Evaluate the effects of state and local mandate relief efforts on the private sector.
- Examine how statute relief may be extended to the private sector.

Moderator: Thomas Bradshaw, Smith-Barney

6. The Future Federal Role After Current Reforms Are Implemented

Once current reforms are implemented, the federal role will change dramatically. This session will be moderated by eminent mandate and regulatory reformers, proposals to transfer federal programs to state and local governments, and the growth of block grants. Panelists from federal, state, and local governments will:

- Discuss what the future federal role should be.
- Review the effects of federal agencies migrating from micromanagement-style regulation to regulation by performance goals and measures.

Moderator: Paul Posner, Director, Budget Issues, GAO

12:30 - 2:15

Luncheon Program

CBO's Approach to Its Responsibilities Under the Unfunded Mandates Reform Act of 1995

Hon. June E. O'Neill,
Director, Congressional Budget Office

EPA's Implementation of Title II of the Unfunded Mandates Reform Act of 1995: Regulatory Analysis & Reform

Hon. Carol Browner**, Administrator, U.S. EPA

2:30 - 4:45

Concurrent Workshops

4. Health and Social Service Mandates; Transportation Mandates; Medicare Mandates

Moderator:

Hon. Art Hansman**, Minority Leader,
Arizona House of Representatives

5. The Impact of Federal Mandates on Smaller Local Governments; Litigation Against State and Local Governments

During this workshop, a panel of federal, state and local government representatives will address how issues that ACIR's preliminary Mandate Report identifies are critical. A general session will follow where attendees can respond to this discussion.

Attendees' comments and recommendations may be included in the Commission's final report.

Moderator:

Hon. Victor Ashe*, Mayor, City of Knoxville, TN

6. Consolidating and Simplifying Federal Regulations for State and Local Governments

Part of ACIR's responsibilities under the *Unfunded Mandates Reform Act of 1995* is to provide recommendations for consolidating, streamlining and simplifying federal program regulations on state and local governments. This workshop will include a panel of federal, state and local governments to address these issues.

ACIR is also seeking information and recommendations that can be included in its final report on how federal regulatory requirements can better accommodate local governments.

Moderator:

Hon. John Stenger, Jr.**, President,
Clark County Commissioners, NV

* Invited

** ACIR Commissioner

Each attendee will receive his or her own copy of ACIR's Preliminary Report on Federal Mandates. Copies are also available in advance from:

- ACIR's home page: <http://www.access.gpo.gov/ncl>
- FedWorld/NTIS's home page:
<http://www.fedworld.gov> (\$12 per download)
- FedWorld/NTIS's bulletin board:
703-487-4228
- For a printed copy, fax your name and address to:
202-653-5529 or call ACIR at 202-653-5540.

Note: this conference program is current as of Jan. 11, 1996. Final programs subject to schedule availability.

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Conference Pricing

	Pre-Registration Price (premarked invoice, Feb. 28, 1996)	Regular Registration Price (after Feb. 28, 1996 and onward)
Government and Academic*	\$545.00	\$595.00
Other	\$445.00	\$495.00

*Includes conference materials, lunch, registration, and a copy of the preliminary mandate report.

Method of Payment

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- ☒ A conference workbook with session handouts.
- ☒ Admission to all plenary sessions, workshops and seminars.
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- ☒ March 7 breakfast and luncheon.

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Please make hotel reservations by February 12.

A limited number of rooms are available at the Washington Hilton at the discounted rate of \$150 (single), \$175 (double) and \$195 (government). To obtain this special rate, please identify yourself as an attendee of the ACIR Federal Mandates Conference. Registrants should call the hotel directly at 202-797-9823 or the central reservation office at 1-800-445-3807.

The cutoff date for registrations in this special rate is February 12. Because of the strong demand for this conference, we suggest that you make your reservations as soon as possible.

The Washington Hilton requires a first night pre-paid deposit on all reservations. Credit, money orders, or major credit cards can be used to establish payment. All reservations must be confirmed prior to 72 hours of arrival without penalty.

Special Accommodations

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Payment Terms and Cancellation Policy

Pre-registration payment terms for premarked invoice before February 28, 1996. (Phone registrations will be accepted (phone call 703-883-9363) to receive a quote). Cancellations received on or before February 28 will be accepted subject to a cancellation fee of \$95.00. Conference registration fees will not be refunded after February 28. Registrants cancelling after February 28 will receive a full refund of the conference fee. Refundable registrations will be accepted from the same organization.

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The ACIR Conference
on the 6th and 7th of March
The Road

March 6-7, 1996

Washington Hilton,
Washington, D.C.

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- ☒ State legislative staff.
- ☒ Federal regulatory agency personnel.
- ☒ Congressional staff members.
- ☒ Local government department & agency officials.
- ☒ Academic teaching faculty & public policy research staff.
- ☒ Staff and members of non profit organizations.
- ☒ Private sector executives & union staff.
- ☒ Public sector employee organization representatives.

Program Components:

- ☒ Featured speakers will address plenary sessions on the effects of mandate and federal reforms.
- ☒ Concurrent workshops will let participants impact ACIR's mandate findings and recommendations.
- ☒ Workshop participants will be encouraged to suggest additional mandate issues for ACIR's consideration.
- ☒ Concurrent seminars will include current and needed reforms, state mandate reform, federal court rulings, and the cost and benefits of mandates.
- ☒ Meals: attendance includes lunch on both days, dinner on March 6, and breakfast on March 7.

Topics Covered:

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- ☒ An assessment of the progress of implementation of the *Uniformed Mandates Reform Act of 1995*.
- ☒ Impact of mandates imposed by federal courts.
- ☒ Impact of mandate reforms on the future of intergovernmental relationships.
- ☒ Techniques for measuring the costs and benefits of mandates.
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Attending This Conference Will Benefit *You* By:

- ☒ Letting you speak directly with members of Congress, governors and state legislators, local government officials, academics, and private-sector executives who all have an interest in mandate reform.
- ☒ Providing a forum for debating and discussing a wide range of mandate and regulatory issues.
- ☒ Helping you gauge the impact of mandate reform on your constituents, jurisdiction, or organization.
- ☒ Debating which mandate issues are important or troublesome to state and local governments.
- ☒ Highlighting the changes ACIR has recommended for modifying specific existing mandates.
- ☒ Letting you evaluate and comment on ACIR's recommendations and findings.

And perhaps most importantly...

- ☒ Letting you voice your position for the permanent public record.
- ☒ Letting you help shape ACIR's final report and recommendations.

Comments from conference attendees will be included in ACIR's final report to Congress and the President.

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ACIR Conference Day One

7:30 am	Registration
8:30 - 8:45	Welcome
8:45 - 10:30	Plenary Session • A New Approach to Congressional Legislation • Intergovernmental Principles Emerging from ACIR's Mandate Studies
10:30 - 10:45	Break
10:45 - 12:15 p.m.	Concurrent Seminars • Current Efforts to Reform Federal Regulatory Impacts on State and Local Governments • Measuring the Costs and Benefits of Mandates • Reducing State Mandates on Local Governments
12:30 - 2:15	Luncheon Program • Developing a New Partnership with State and Local Governments
2:30 - 4:45	Concurrent Workshops • Environmental Mandates • Labor Mandates • Mandates Affecting Individual Rights
5:00 - 6:00	Conference Networking Reception
6:00 - 8:00	Dinner Program • A Future Agenda for Redefining American Federalism

ACIR Conference Day Two

7:30 am	Registration
7:40 - 9:00	Breakfast Program • What Will Happen in the Congress After ACIR Submits its Mandate Report
9:15 - 10:30	Plenary Session • A Vision of American Federalism for the 21st Century
10:30 - 10:45	Break
10:45 - 12:15 p.m.	Concurrent Seminars • Impact of Federal Grant Mandates on State and Local Governments • Mandate Relief for the Private Sector • The Future Federal Role After Growth Reforms are Implemented
12:30 - 2:15	Luncheon Program • CBO's Approach to its Responsibilities Under the Unfunded Mandates Reform Act of 1995 • EPA's Implementation of Title II of the Unfunded Mandates Reform Act of 1995: Regulatory Analysis & Reforms
2:30 - 4:45	Concurrent Workshops • Health & Social Service Mandates, Transportation Mandates, Motor Mandates • The Impact of Federal Mandates on Smaller Local Governments, Litigation Against State and Local Governments • Consolidating and Simplifying Federal Regulations for State and Local Governments

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March 6-7, 1996

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

03-Feb-1996 02:41pm

TO: Kathryn Higgins
TO: Marcia L. Hale

FROM: Carol H. Rasco
 Domestic Policy Council

SUBJECT: ACIR

I along with my staff am beginning to hear a lot about the recently finished report by ACIR. Are we as a White House or are the agencies going to do any type response, have a presentation on it or whatever? I think we need to be readying answers that are being commonly asked like on Family Leave and Medical Act, etc.

Thanks.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

16-Feb-1996 08:44am

TO: Elizabeth E. Drye

FROM: Carol H. Rasco
 Domestic Policy Council

CC: Patsy Fleming

CC: Jeremy D. Benami

SUBJECT: RE: Request for memo from POTUS re. AIDS Conf. follow-up

Maybe a memo was too harsh but a letter as follow up to his call
for such action in his major speech is not unprecedented....can
Staff Secretary swallow that?

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Program components:

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- ☑ Meals: attendance includes lunch on both days, dinner on March 6, and breakfast on March 7.

Topics Covered:

- ☑ Impact of ACIR's preliminary report on the reform of existing mandates.
- ☑ An assessment of the progress of implementation of the *Unfunded Mandates Reform Act of 1995*.
- ☑ Impact of mandates imposed by federal courts.
- ☑ Impact of mandate reforms on the future of intergovernmental relationships.
- ☑ Techniques for measuring the costs and benefits of mandates.
- ☑ Successes and failures of relief measures.
- ☑ Current Congressional proposals.
- ☑ Federal regulatory changes after block grants and other reforms take effect.

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Feeling the burden of Federal Mandates?

March 1996 marks the first anniversary of the *Unfunded Mandates Reform Act of 1995*.

Will it lighten the burden existing mandates place on governments, regulatory bodies, or the private sector?

Yes, but relief from existing mandates requires additional legislative or executive action. Which issues should be addressed? Which should be modified or eliminated? How much real relief can states and localities expect? How will regulators be affected?

On March 6-7, 1996, the Advisory Commission on Intergovernmental Relations (ACIR) proudly presents a Conference on Federal Mandates. Mark your calendar and plan to join us at the

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We'll start by presenting preliminary findings and recommendations from our study on mandates. We'll invite your comments, which will be included in the final report.

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The Role of Federal Mandates in Intergovernmental Relations

**A Preliminary ACIR Report
For Public Review and Comment**

**released: January 24, 1996
public comment period to end: March 15, 1996**

**U.S. Advisory Commission on Intergovernmental Relations
800 K Street, NW, Suite 450 South Building
Washington, DC 20575**

**Phone: (202) 653-5540
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PRELIMINARY ACIR REPORT ON FEDERAL MANDATES

Approved for Public Review and Comment
by the U.S. Advisory Commission on Intergovernmental Relations
January 5, 1996

INTRODUCTION

The *Unfunded Mandates Reform Act of 1995* (P.L. 104-4) represents a bipartisan agreement that something is wrong with American federalism as it has evolved in recent years. The law directs the Advisory Commission on Intergovernmental Relations (ACIR) “to investigate and review the role of federal mandates in intergovernmental relations” and to make recommendations to the President and Congress as to how the federal government should relate to state, local, and tribal governments. In this preliminary report, ACIR proposes for public review and comment recommended changes in federal policies to improve intergovernmental relations while maintaining a commitment to national interests.

CHANGES IN THE FEDERAL SYSTEM

The mandate issues examined in this report arose because American federalism no longer has clearly defined responsibilities for federal, state, and local governments. One result of this lack of defined roles has been increased federal involvement in activities historically considered to be state and local affairs. Federal involvement usually began with financial aid to achieve national goals. In recent years, federal involvement has taken the form of direct orders to meet federal requirements, often with no federal financial assistance. The extensive and complex nature of this involvement is illustrated by the following examples:

- More than 200 separate mandates were identified to ACIR by state and local governments, involving about 170 federal laws reaching into every nook and cranny of state and local activities.
- The ACIR report *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994*, identified 3,500 decisions involving state and local governments, relating to more than 100 federal laws.
- State and local officials must comply with 33 federal laws to receive non-construction federal grants.

These numbers provide a dramatic picture of the cumulative effects of federal laws on state and local governments. They also confirm the need for better definition of the appropriate working relationships between the partners in the federal system. Relief from existing federal mandates will be especially important if state and local governments are to assume greater responsibilities from federal devolution.

DETERMINING THE APPROPRIATE FEDERAL ROLE

In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Supreme Court made it clear that constitutionally the Congress is responsible for determining the precise scope of national authority over state and local governments. The court recognized that clear lines defining the appropriate scope of federal activities could not be drawn and, instead, left it to the political process to determine appropriate governmental roles.

Historically, the political process has determined that some activities are so important to national interests that a federal role is generally accepted as necessary. Among the most obvious is legislation protecting civil rights granted by the Constitution. In an earlier period, the economic emergency of the 1930s produced federal programs to alleviate national economic and social problems. In other instances, national policy is necessary because the problems transcend state lines, such as when dirty air or dirty water from one state intrude on another state. As a result, some federal government mandates on state and local governments are an acceptable feature of the U.S. federal system.

In recent years, however, the Washington tendency has been to treat as a national issue any problem that is emotional, hot, and highly visible. Often, this has meant passing a federal law that imposes costs and requirements on state and local governments without their consent and without regard for their ability to comply. Such actions, even though they may have broad public support, are damaging to intergovernmental comity. The challenge facing the federal government is to exercise power to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own budget priorities.

The wide diversity of federal mandates makes it difficult to establish uniform ways to determine whether a mandate is proper or improper from an intergovernmental perspective. Nevertheless, ACIR has been charged with making determinations about existing mandates as they affect state and local governments. In reaching its conclusions, the Commission considered several key questions:

- Does the national purpose justify federal intrusion in state or local affairs?
- Are the costs of implementing the mandate appropriately shared among governments?
- Is maximum flexibility given to state and local governments in implementing the mandate?
- Are there changes that can be made in the mandate to relieve intergovernmental tensions while maintaining a commitment to national goals?

THE ACIR REVIEW OF EXISTING MANDATES

As required by the *Unfunded Mandates Reform Act*, ACIR started its review process by adopting criteria describing mandate issues of significant concern and the types of problems to be analyzed. These criteria were issued on July 6, 1995 (see Appendix B). Information about mandates meeting the criteria were solicited from state and local governments, federal agencies,

and the public. ACIR also relied on a variety of efforts by others to help in identifying mandates needing attention:

- The National Governors Association requested each governor's office to list the mandates of most concern in their states.
- A general appeal was made in the magazines and newsletters of national and state groups representing state and local governments.
- A survey of small rural governments was conducted by the National Rural Development Partnership.
- Officials attending national and state association meetings were asked to identify troubling mandates.

Information was received from over half the states, eight municipal leagues, four state associations of counties, the national associations representing state and local governments and their officials, and directly from a variety of local government officials.

ACIR selected 14 mandates for analysis. The 14 mandates selected constitute only a small portion of the over 200 identified, but they illustrate the diverse, complex, and troubling challenges that federal mandates pose for the intergovernmental system. *While only 14 mandates are reviewed in this report because of time and resource limitations, the Commission believes that many more of the over 200 mandates identified need to be evaluated. ACIR urges that a review of additional mandates be authorized as soon as possible.*

The selection of the 14 mandates was based on:

- (1) The preponderance of communications identifying the mandates as troubling to state and local governments;
- (2) The significance and diversity of issues posed for intergovernmental relations; and
- (3) The criteria published by the Commission on July 6, 1995.

BASIS OF RECOMMENDATIONS

In considering its recommendations on the intergovernmental role of federal mandates, the Commission was guided by the published criteria. The criteria defined mandates of significant concern as those that: (1) require state or local governments to expend substantial amounts of their own resources without regard for state and local priorities; (2) abridge historic powers of state and local governments without a clear showing of national need; (3) impose requirements that are difficult or impossible to implement; and (4) are the subject of widespread objections. The 14 mandates subjected to intensive review in this report meet one or more of these criteria.

The criteria also identified a number of specific conditions for which ACIR should make relief recommendations. The specific conditions were: requirements not needing national action or, if needing national action, not federally funded; unnecessarily rigid; unnecessarily complex or prescriptive; unclear goals or standards; contradictory or inconsistent provisions; duplicative

provisions; obsolete provisions; lacking in adequate scientific and economic basis; lacking in practical value; or would create undue financial difficulties for the governments.

ACIR recognizes that mandate issues are more than disagreements between political scientists about which government has the *right* to make a decision. Instead, mandate issues relate to the nuts and bolts of government operations that are necessary to provide effective protection and efficient services. This means evaluating how the mandate will affect not only costs but routine government operations as well.

In examining the individual mandates, the Commission considered the fundamental intergovernmental issues associated with the mandate, and did not evaluate the specific mandate requirements. We urge those reviewing these analyses and the accompanying recommendations to give similar attention to the roles of federal, state, and local governments as they relate to the mandate.

COMMON ISSUES

ACIR's review of existing mandates found a number of common issues that are troubling federal, state, and local government relations. These issues and ACIR's proposed recommendations to address them include:

1. Detailed procedural requirements. State and local governments are not given flexibility to meet national goals in ways that best fit their needs and resources. The imposition of exact standards or detailed requirements, in many instances, merely increases costs and delays achievement of the national goals. *The federal role in implementation should be to provide research and technical advice for those governments that request it, but, in general, state and local governments should be permitted to comply with a mandate in a manner that best suits their particular needs and conditions.*

2. Lack of federal concern about mandate costs. When the federal government imposes costs on another government without providing federal funds, the magnitude of costs is often not considered. If the federal government has no financial obligation, it has little incentive to weigh costs against benefits or to allow state and local governments to determine the least costly alternatives for reaching national goals. *The federal government should assume some share of mandate costs as an incentive to restrain the extent of the mandate and to aid in seeking the least costly alternatives.*

3. Federal failure to recognize state and local governments' public accountability. State governments often are treated as just another interest group, as private entities, or as administrative arms of the federal government, not as sovereign governments with powers derived from the U.S. Constitution. Local governments, despite the important role they play in delivering government services, have been given even less consideration. Non-governmental advocacy groups' views have sometimes been given more attention than those of state and local governments. *Federal laws should recognize that state and local governments are led by elected officials who must account to the voters for their actions, just as the President and Members of Congress.*

4. Lawsuits by individuals against state and local governments to enforce federal mandates. Many federal laws permit individuals or organizations to sue state and local governments over questions of compliance, even though a federal agency is responsible for enforcement. Federal laws, however, are often written in such broad terms, it is not clear what is required of federal, state, and local officials. In these circumstances, permitting litigation brought by individuals subjects state and local governments to budgetary uncertainties and substantial legal costs. Because the federal agency is not directly involved with the costs and problems of this litigation, it has little incentive to propose amendments that would clarify the law's requirements. *Only the federal agency responsible for enforcement of a law should be permitted to sue state and local governments.*

5. Inability of very small local governments to meet mandate standards and timetables. The requirements for many federal mandates are based on the assumption that all local governments have the financial, administrative, and technical resources that exist in large governments. Many very small local governments have only part-time staffs with little technical capability and very limited resource bases. Extending deadlines or modifying requirements for these small governments may have minimal adverse effects on the achievement of overall national goals but may make it possible for such governments eventually to comply. *Deadlines should be extended and requirements modified for very small local governments.*

6. Lack of coordinated federal policy with no federal agency empowered to make binding decisions about a mandate's requirements. There are mandates that involve several federal agencies. This has resulted in confusion about what the law requires and how state and local governments can know when they are in compliance. In addition to making state and local governments aware of mandate requirements, federal agencies should explain the reasons for the mandate and should assist in taking the actions necessary for implementation. *A single federal agency should be designated to coordinate each mandate's implementation and to make binding decisions about that mandate.*

SUMMARY OF RECOMMENDATIONS ON INDIVIDUAL MANDATES

ACIR's proposed recommendations for individual mandates can be summarized into three categories.

The Commission finds that the following mandates as they apply to state and local governments do *not* have a sufficient national interest to justify intruding on state and local government abilities to control their own affairs. While the Commission does not take issue with the goals of these mandates, it believes that achieving those goals can be left to elected state and local officials. **Thus, ACIR recommends repealing the provisions in these laws that extend coverage to state and local governments.**

Fair Labor Standards Act

Family and Medical Leave Act

Occupational Safety and Health Act

Drug and Alcohol Testing of Commercial Drivers

Metric Conversion for Plans and Specifications

Medicaid: Boren Amendment

Required Use of Recycled Crumb Rubber

The Commission finds that the following mandates are necessary because national policy goals justify their use. However, the federal share of the costs should be increased or the stringent requirements and deadlines imposed on state and local governments should be relaxed. These mandates impose substantial costs on state and local governments as a result of requirements that are unnecessarily burdensome. **Thus, ACIR recommends retaining these mandates with modifications to accommodate budgetary and administrative constraints on state and local governments.**

The Clean Water Act

Individuals with Disabilities Education Act

Americans with Disabilities Act

The Commission finds the following mandates are related to acceptable national policy goals, but they should be revised to provide greater flexibility in implementation procedures and more participation by state and local governments in development of mandate policies. **Thus, ACIR recommends revising these mandates to provide greater flexibility and increased consultation.**

The Safe Drinking Water Act

Endangered Species Act

The Clean Air Act

Davis-Bacon Related Acts

SUMMARY OF EACH MANDATE

Listed below are summaries of each mandate reviewed. For each individual mandate, *Appendix A* contains a full description of the requirements imposed, a discussion of its background and history, a listing of the concerns expressed by state and local governments, and recommendation options that were considered.

Fair Labor Standards Act

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) establishes minimum standards for wages, overtime compensation, equal pay, recordkeeping, and child labor for nearly every workplace in the United States. In 1974, amendments to the FLSA extended the applicability of the law to the public sector and treated state and local governments as if they were private entities. So, unlike the federal government, a state or local government cannot amend its personnel policies to accommodate situations unique to government employment or to reduce budgets.

Considerable contention has also arisen over the proper implementation of FLSA in the state and local public sector. The overtime pay provisions, in particular, have resulted in substantial litigation, with many state or local employees winning retroactive pay for work deemed by a court to qualify as overtime. The liability for many states and localities is in the millions of dollars and could go much higher. Moreover, even if a state or local government is successful in defending its employment policies as consistent with FLSA, there are often substantial litigation costs.

The employment policies of state and local governments should be set solely by the employment policies of those governments. The public accountability of elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers.

RECOMMENDATION: *Repeal provisions of FLSA covering state and local government employees.*

Family and Medical Leave Act

The *Family and Medical Leave Act of 1993* (FMLA) (29 U.S.C. 2601 et seq.) requires employers to provide employees up to 12 weeks of unpaid leave each year to care for a newborn, adopted, or foster child. Leave also must be granted for care of a seriously ill child, parent, or spouse. In addition, employees may use unpaid family and medical leave for personal illnesses. Medical insurance benefits must be continued during the leave and employees must be reinstated into the same or an equivalent position after leave.

The law forced state and local governments to revise long-standing personnel policies and created unfunded costs related to extending medical insurance coverage to employees on family and medical leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities. While the law contains special provisions for federal government employees, state and local governments are treated the same as private entities.

Leave policies of state or local governments should be determined solely by the employment policies of those governments. The public accountability of elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers.

RECOMMENDATION: *Repeal the provisions of FMLA that cover state and local government employees.*

Occupational Safety and Health Act

The *Occupational Safety and Health Act of 1970* (OSHA). (29 U.S.C. 651-678) establishes standards for safe, healthy, and productive work environments. State governments and their political subdivisions, as well as the United States government, are specifically *excluded* from the definition of "an employer" under the act. In the case of state governments and their political subdivisions, OSHA has no requirements unless a state volunteers to participate in the federal program. States that volunteer to administer the federal OSHA program within their jurisdiction are required to extend federal requirements to all public employees in the state.

Twenty-three states have assumed responsibility for operating the federal OSHA program. Two additional states have federally approved OSHA plans only for state and local government employees. Even in the remaining states, however, there may be an impact, or a perception of an impact, because some OSHA requirements are replicated in state laws or are perceived as mandatory even though they are not.

Numerous complaints expressed about OSHA policies in both participating and non-participating states attest to the widespread misunderstanding about the law's coverage and the substantial compliance costs. Making all states, not just the non-participating states, exempt from OSHA would allow all states to set their own health and safety standards, taking into consideration their priorities and budgetary constraints. Such a policy would give states flexibility similar to that given federal agencies.

RECOMMENDATION: *Repeal the provisions extending OSHA coverage to public employees in participating states.*

Drug and Alcohol Testing of Commercial Drivers

The *Omnibus Transportation Employee Testing Act of 1991* (P.L. 102-143, Title V) directs the Department of Transportation (DOT) to issue regulations establishing a program which "requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use . . . of alcohol or a controlled substance." The motor carrier requirements cover a substantial number of state and local government employees who have commercial drivers licenses, and require them to undergo random drug and alcohol testing by certain deadlines. The law is inconsistent in that it includes some employees, such as public works drivers, but excludes law enforcement and emergency workers from testing requirements.

Strict drug and alcohol testing requirements for small rural communities and transportation systems with few employees create situations where costs of compliance are disproportionately high relative to potential findings. State and local governments are concerned about drug and alcohol problems and will take their own measures to insure that their drivers are not a threat to public safety.

RECOMMENDATION: *Repeal provisions making some state and local employees subject to the federal drug and alcohol testing requirements for commercial drivers.*

Metric Conversion for Plans and Specifications

The *Omnibus Trade and Competitiveness Act of 1988* requires that each federal agency use the metric system of measurement in its procurement, grants, and other business-related activities, except to the extent that such use is impractical. The act permits the continued use of traditional weights and measures in non-business activities. Based on this law, the Department of Transportation (DOT) requires state and local governments to convert to metric for local construction plans and specifications by October 1, 1996.

The *Unfunded Mandates Reform Act of 1995* specifically requires ACIR to consider requirements that state, local, and tribal governments utilize metric systems of measurement. The principal concern, expressed primarily by local governments, is the requirement to use metric measurements in the design and construction of federally aided projects. While most local governments may be technically able to prepare plans and specifications in metric by the deadline, they cite several problems, including substantial costs. Another problem is that local contractors and suppliers are not used to working with metric measurements. As a result, the potential for mistakes in the bidding and construction process is significantly increased. In addition, metric will create problems for right-of-way acquisitions with property owners, surveyors, and local deed registries.

States have made considerable progress in the transition to metric, but more than 2,200 waivers have been necessary to relieve hardship situations. Despite the waivers, the deadline for conversions will create substantial problems for many local governments without corresponding benefits. Rather than require all states to implement metric requirements on the same timetable, a better approach is to encourage states that are well along on their conversions to continue assisting their local governments with the process. Successful implementation in these states will provide support for others to complete the conversions voluntarily.

RECOMMENDATION: *Repeal requirements that state and local governments convert to metric on a federal timetable as a condition of receiving federal aid.*

Medicaid: Boren Amendment

The Boren Amendment requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons eligible for assistance through the Medicaid program. The mandated federal criteria provide that the reimbursement rates must be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards"

The intent of the Boren Amendment was to give states a means of controlling costs related to reimbursement claims from providers of Medicaid services. Rather than basing reimbursements on a cost-related payment requirement for hospitals and nursing home services, the amendment allows states to pay for services based on a predetermined reimbursement rate, giving states a basis for denying reimbursement for costs determined to be in excess of that necessary to provide "efficiently and economically" delivered services.

Although flexibility was intended, the use of vague and undefined terms in the amendment created problems that were compounded by the federal government's decision not to issue regulations defining the vague terms. To add further confusion, the law, while requiring reimbursement rates to be "determined in accordance with methods and standards developed by the State," also requires the federal government to be satisfied with the state-determined rates. To implement this requirement, the federal government requires state processes for determining rates and the rates themselves to be a part of Medicaid State Plans, subject to approval by the Secretary of Health and Human Services.

The vagueness of the statutory language, combined with the lack of regulatory definitions, has resulted in substantial litigation, with some courts viewing the Boren Amendment as a cost based payment standard in which *all* cost incurred by the providers must be reimbursed. In these instances, states may be liable for significant sums to cover the retroactive rate increases ordered by the court for the group of providers involved in the suit even if their rate schedule was approved by the federal government. In some cases, the additional payments made as a result of a court-ordered retroactive rate increase are not eligible for cost-sharing from the federal government.

Because Medicaid is a state administered program and states are responsible for the quality and safety of medical services, states should be allowed to conduct reimbursement rate negotiations with Medicaid service providers without preconditions set by federal law. Litigation against states by medical service providers should be limited to matters related solely to the state's own laws and policies.

RECOMMENDATION: *Repeal the language of the Boren Amendment and insert language making states solely responsible for determining Medicaid reimbursement rates.*

The Clean Water Act

The *Clean Water Act* requires states to designate the uses of water, develop water quality criteria to protect those uses, monitor the condition of waters, and report on water quality every two years. States may administer a permit program for industrial and municipal pollution discharges and develop programs for the control of pollution from diffuse or nonpoint sources. Local governments are required, either directly by the federal government or indirectly through state implementation of federal laws, to treat sewage to national standards and to control discharges from combined sewers and stormwater drains.

In the *Water Pollution Control Act Amendments of 1972*, Congress provided for a comprehensive national program to protect water quality. Key provisions included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in permits as needed to meet state standards, and significant grant assistance to support construction of municipal sewage treatment facilities. In effect, states and local governments ceded control over water pollution controls to the federal government in return for substantial federal financial aid.

In 1987, the federal government changed the arrangement by a transition from direct grants to capitalization of state loan funds. Loan funds reduce interest costs for some projects, but they still require local governments to pay virtually the entire costs of future pollution control projects. In addition, the 1987 amendments required municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs. A national program originally supported and encouraged by state and local governments is no longer a balanced partnership to clean up the nation's waterways. Federal requirements, especially those dealing with stormwater drainage, have become increasingly stringent and expensive to implement. At the same time, the federal funding to aid in the cleanup has virtually disappeared.

Fully restoring the successful partnership requires either a return to substantial federal sharing in the costs of clean-up, or a relaxation of inflexible standards and deadlines on state and local

governments. If there is not a sufficient national priority to justify federal spending, then state and local governments should be able to use the least costly alternatives and to work within their fiscal constraints. State and local governments traditionally have been concerned about reducing pollution, and they should be given authority to work constructively with federal officials to design realistic programs that can be completed within technical and budgetary constraints.

RECOMMENDATION: *Either restore direct federal sharing of costs or give state and local governments greater authority to develop their own control methods and timetables for implementing federal standards for clean water.*

Individuals with Disabilities Education Act

The *Individuals with Disabilities Education Act (IDEA)* (P.L. 101-476) requires local school systems to provide a free appropriate education for children with disabilities. The law provides that federal aid to states for elementary and high school education will be available only after a state has a federally approved plan for educating children with disabilities. In addition, *IDEA* requires participating states to establish specific administrative procedures by which parents or legal guardians may challenge the identification, evaluation, or educational placement of the children. Requirements of the law are conditions of federal assistance or duties arising from participation in this voluntary federal program.

IDEA has provided millions of students with disabilities access to a free and appropriate education, but the law imposes significant costs and administrative burdens on state and local governments. Although the Act currently includes a provision authorizing the federal government to pay up to 40 percent of services to be provided under the law, only about 8 percent is currently appropriated. The law also limits the flexibility of states and local governments to combine *IDEA* funds with other funding streams to meet the unique needs of their children.

The resolution of disputes under the Act also has become overly litigious and has added to implementation costs. Currently, local agency decisions may be challenged in either state or federal court, and, in some cases, parents bringing actions on behalf of their children may be entitled to reimbursement for their costs, including attorney and court fees. ACIR's *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994* emphasizes the litigious nature of this law.

RECOMMENDATION: *Either increase federal funding to the 40 percent authorized level or relieve states from prescriptive and costly administrative mandates. Alternative dispute resolution practices should be required, and any court challenge based on the federal law should be brought by state or federal agencies, not by individuals.*

Americans with Disabilities Act

The *Americans with Disabilities Act of 1990 (ADA)* (P.L. 101-336) prohibits discrimination against individuals with disabilities in employment, public services, and public accommodations.

Any state or local government policies found to be inconsistent with ADA provisions are to be modified as soon as feasible. Each government program is to be examined for physical barriers to access and for remedial measures that need to be taken.

ADA provides important and necessary social benefits, but it is creating problems for state and local governments because of expensive retrofitting and service delivery requirements, confusing and ambiguous statutory language, and insufficient technical assistance provided by the federal government. Further, virtually no federal funding has been appropriated to cover most state and local compliance costs. With tight budgets and limited time to correct structural obstacles to improve public accommodation, it has been difficult for many governments to implement the extensive changes required. Structural changes to existing buildings to meet "program accessibility" requirements were to be made by January 26, 1995, a deadline not met by many state and local governments.

Also, the use of the terms "reasonable accommodation," "undue hardship," "readily achievable," and countless other broad expressions in the law has subjected state and local governments to numerous lawsuits over legal interpretations of ADA. The penalties for noncompliance are severe, and legal costs can be substantial.

Federal enforcement of ADA is uncoordinated, with eight federal departments having some enforcement power. The prime responsibility for processing complaints under ADA are the Justice Department and the Equal Employment Opportunity Commission. The Federal Communications Commission manages telecommunications issues. The National Council on Disability is an independent federal agency that identifies emerging issues and recommends disability policy to the President and Congress. The Architectural and Transportation Barriers Compliance Board provides some educational and technical assistance regarding accessibility.

RECOMMENDATION: *Either provide increased federal funding to state and local governments to assist in compliance, including funding for paratransit, or modify some deadlines and requirements to let state and local governments meet ADA goals in a manner that recognizes state and local technical and budget constraints without abridging the national commitment to the rights of individuals with disabilities. In addition, a single federal ADA enforcement and assistance agency should be designated to coordinate enforcement and technical assistance and legal action against state and local governments should be limited to actions brought by the federal government.*

The Safe Drinking Water Act

The *Safe Drinking Water Act* (SDWA) regulates drinking water standards for the 58,530 waterworks serving 25 or more persons on a regular basis. It establishes maximum levels for contaminants known to occur in public water systems, establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and establishes public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.

The safety of drinking water is a public health issue. Prior to 1974, states had responsibility for the safety of drinking water, but they generally relied on standards set by the Public Health Service. Since drinking water endangers not only the residents of a local community and state but also those traveling interstate, the regulation of drinking water may be justified as a national concern. It should be recognized, however, that other vital public health concerns, such as restaurant inspections, are the responsibility of state and local governments.

State and local concerns over the *Safe Drinking Water Act* hinge on what constitutes safe drinking water and how to achieve it in the most cost-effective way. These governments do not object to assuming the costs of providing safe drinking water, but some do object to incurring costs that in their opinion do not improve water quality. The existing law overreached in the standards and compliance requirements it imposed on local water systems.

Amendments recently approved by the Senate will repeal some of the most onerous provisions, including mandatory additional tests for contaminants, tests for contaminants not a threat in local areas, and eased provisions for treatment of surface water supplies. The Senate amendment also authorizes funding for state capitalization loan funds to reduce interest costs of compliance. The amendments, however, do not alter intergovernmental relationships in the SWDA.

RECOMMENDATION: *Enact amendments similar to those approved by the Senate and establish a long-term goal of returning to the states full responsibility for safe drinking water standards.*

Endangered Species Act

The *Endangered Species Act of 1973 (ESA)* (P.L. 97-304) requires every federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed threatened and endangered species or the destruction or adverse modification of critical habitat. Under the law, state, local and tribal governments may not obtain a federal permit, license, or grant if the project does not comply with federal standards for protecting endangered species. There is an exemption process allowing consideration of economic factors, but these provisions are rarely utilized.

State and local governments feel they have an inadequate share of decision-making authority in the management and planning decisions affecting the listing of threatened and endangered species. The listing process is rigid and limits state and local flexibility to apply the Act's provisions in their jurisdictions to meet local conditions. There is concern that valuable economic development activities within their boundaries, both public and private, are being impaired by strict federal regulation.

State, local and tribal governments should be full partners with the federal government in the preservation of threatened and endangered species. These governments should be granted shared authority for species protection, as well as flexibility to implement conservation plans for specific species within their boundaries. Broader participation by state, local, and tribal governments will improve the data collection process and allow biological science, economic constraints, and available management resources to be taken into account on a regional basis.

RECOMMENDATION: *Give state and local governments an official role in the management and planning decisions affecting the listing process beyond the traditional consultation and full notice and comment requirements currently in effect. In addition, exemptions to ESA should be applied more extensively to minimize social and economic impact on state, local, and tribal governments of recovery planning and listing procedures.*

The Clean Air Act

The *Clean Air Act of 1977* (P.L. 95-95) requires states to submit for federal approval a plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The federal government will prepare a plan for any state that fails to comply. The act spells out how to measure different types of pollution, the standards that must be met for each type of pollution, the specific compliance measures that may be taken, and the deadlines for those actions. Some federal financial assistance for planning and implementation is authorized in the law, but each state must provide assurances that "the State or general purpose local governments will have adequate personnel, funding, and authority under state and, as appropriate, local law to carry out such implementation plan."

The initial demand for federal help in controlling air pollution came from cities that were unable to act effectively on an individual basis. Because the federal government recognized the need to act on regional bases, and in recognition of the federal system as viewed at that time, the states were encouraged by the federal government to assume responsibility for controlling air pollution and were given federal grants to assist in implementing such controls. By 1970, only 21 states had submitted implementation plans, and the federal government decided it was necessary to set standards (including vehicle emissions) and to enforce state implementation.

In 1990, amendments to the law targeted smaller pollution sources, including facilities owned by local governments. Governments in areas with moderate carbon monoxide pollution were required to adopt vehicle inspection and maintenance programs and to use cleaner oxygenated fuels. Areas with moderate ozone pollution were required to set up similar programs and to require use of gasoline-pump devices to capture vapors. Failure to implement these programs can result in the loss of federal highway funds.

As the requirements have become increasingly detailed and specific, states have become implementers of federal laws with less and less discretion over how to implement them and with less federal financial assistance for their administration. As a result, the requirements often do not reflect conditions and citizens' preferences in the state.

RECOMMENDATION: *Permit states to develop their own ways of meeting federal air quality standards, and eliminate financial aid penalties if states are making good faith efforts to comply.*

Davis-Bacon Related Acts

The *Davis-Bacon Act* (40 U.S.C. 276a-7) only applies to federal government contracts over \$2,000 for construction, alteration, and/or repair work. The law requires such contracts to specify the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. The minimum wages must be based on the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on similar contracts in the city, town, village, or other civil subdivision of the state in which the work is to be performed.

About 60 other federal laws make compliance with Davis-Bacon provisions a condition-of-aid for grants to state and local governments (e.g., construction programs related to low-income housing, highways, and waste water treatment facilities). Some of the Davis-Bacon related laws contain special exceptions concerning the way in which a grantee must comply with Davis-Bacon requirements, but most of them apply the law without modification. Compliance with the provisions is generally required even if the dollar amount of the federal grant is a minimal share of the total project costs.

State, local, and tribal governments should be able to manage their construction project costs without Davis-Bacon pre-conditions when the major share of the project is being funded by the state or local government. Besides potentially increasing costs, Davis-Bacon requirements impose extensive reporting and recordkeeping that may be especially burdensome for small projects, and may make it difficult for small local businesses to compete.

To protect the national interests, which led to the inclusion of Davis-Bacon compliance requirements in about 60 federal laws, while recognizing state and local concerns, each related act should be amended to limit application of Davis-Bacon provisions to state and local construction projects over a certain dollar level and to projects where federal funding exceeds more than half of the total project costs. For example, a related act could be amended to apply Davis-Bacon provisions only in projects with a total dollar cost in excess of \$1 million and in which the federal grant funding for the project exceeded 50% of total project costs.

RECOMMENDATION: *Amend Davis-Bacon related laws to exempt projects below a larger dollar cost than now prevails and below a certain federal percentage of cost sharing from compliance with Davis-Bacon provisions in state and local construction projects.*

Required Use of Recycled Crumb Rubber (Repealed)

The requirement for including a percentage of waste-tire (crumb rubber) in asphalt pavement on federally aided highway projects was intrusive and infringed on traditional state-regulated activities. If states did not comply with the percentages, they were penalized by the withholding of an equivalent percentage of highway funds. The federal intrusion into this area of state operations, along with the withholding of grant money for non-compliance, demonstrate the intergovernmental breakdown surrounding this particular issue.

In addition, the construction industry had concerns about both the integrity of the pavements and the life-cycle maintenance costs of crumb-rubber-mix asphalt. Research has not shown any

improved life of asphalt pavements using rubber, while the costs double. This provision mandated a particular engineering approach that is still experimental and has unresolved environmental, health, and safety issues. In a few states, highway projects have failed due to crumb rubber use. In general, most state and local governments and highway user interest groups do not believe there is sufficient benefit in using waste tire rubber in hot-mix asphalt to justify the cost.

RECOMMENDATION: *The Commission commends the Congress and President for repealing this unwarranted federal mandate.*

Mark your calendar for
The ACIR Conference
on Federal Mandates:

March 6-7, 1996
Washington Hilton

Who should attend:

- ☑ Elected state and local government officials.
- ☑ State executive branch officials.
- ☑ State legislative staff.
- ☑ Federal regulatory agency personnel.
- ☑ Congressional staff members.
- ☑ Local government department & agency officials.
- ☑ University & college teaching faculty.
- ☑ Staff of non-profit organizations.
- ☑ University & college public policy research staff.
- ☑ Private-sector executives & liaison staff.

Program components:

- ☑ Featured speakers will address plenary sessions on the effects of mandate and federal reforms.
- ☑ Concurrent workshops will let participants impact ACIR's mandate findings and recommendations.
- ☑ Workshop participants will be encouraged to suggest additional mandate issues for ACIR's consideration.
- ☑ Concurrent seminars will include current and needed reforms, state mandate reform, federal court rulings, and the cost and benefits of mandates.
- ☑ Meals: attendance includes lunch on both days, dinner on March 6, and breakfast on March 7.

Topics Covered:

- ☑ Impact of ACIR's preliminary report on the reform of existing mandates.
- ☑ An assessment of the progress of implementation of the *Unfunded Mandates Reform Act of 1995*.
- ☑ Impact of mandates imposed by federal courts.
- ☑ Impact of mandate reforms on the future of intergovernmental relationships.
- ☑ Techniques for measuring the costs and benefits of mandates.
- ☑ Successes and failures of relief measures.
- ☑ Current Congressional proposals.
- ☑ Federal regulatory changes after block grants and other reforms take effect.

**Lightening
The Load**
The ACIR Conference
on Federal Mandates

For more information,
call 703-883-9363

Feeling the burden of Federal Mandates?

March 1996 marks the first anniversary of the *Unfunded Mandates Reform Act of 1995*.

Will it lighten the burden existing mandates place on governments, regulatory bodies, or the private sector?

Yes, but relief from existing mandates requires additional legislative or executive action. Which issues should be addressed? Which should be modified or eliminated? How much real relief can states and localities expect? How will regulators be affected?

On March 6-7, 1996, the Advisory Commission on Intergovernmental Relations (ACIR) proudly presents a Conference on Federal Mandates. Mark your calendar and plan to join us at the

Washington Hilton as we roll up our sleeves and tackle these and many other tough questions.

We'll start by presenting preliminary findings and recommendations from our study on mandates. We'll invite your comments, which will be included in the final report.

We'll also survey the current state of mandate reform and brief you on recent relief measures, Congressional proposals, key issues that will shape the course of future debate, and on the real effects of change on states, municipalities, and federal agencies.

If federal mandates impact you or your constituents, don't miss this opportunity to listen, learn, and be heard.

Lighten the load

Attend The ACIR Conference on Federal Mandates

**STATEMENT BY GOVERNOR WILLIAM F. WINTER
CHAIR, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS
JANUARY 24, 1996**

Welcome Members of Congress, the Administration, Mayors, members of the Commission and members of the press. And thanks to the U.S. Conference of Mayors for providing this forum for us this morning.

"No taxation without representation," was the rallying cry of the Revolutionary War. Today, states and local governments can empathize with those patriots of old. Because today, well-intentioned federal laws direct them to do all manner of things, often in impossibly short amounts of time, often without the appropriation of necessary funds. And states and local governments don't get a vote on these federal mandates.

There must be a better way. And there is. This Commission has come to understand that the way to achieve our most important national goals, like making drinking water safe, making the workplace healthy, and protecting Americans with disabilities from unfair treatment, is to include states and local governments in decision making.

The *Unfunded Mandates Reform Act of 1995* directed ACIR to investigate and review federal mandates and make recommendations to the President and Congress. Today we are taking the first step of this many-step process. ACIR is releasing a preliminary report — "The Role of Federal Mandates In Intergovernmental Relations." It examines the 14 cited as most troublesome of over 200 mandates called to our attention by states and local governments as unfair.

These recommendations touch on some of the most important and most hotly contested laws in our nation. But, I want to stress that we are dealing only with those aspects of these laws that affect compliance by state and local governments.

Other members of our distinguished panel here today will go into specifics on several recommendations. And we will take questions after the presentations. But to broadly summarize our report, of the 14 mandates, seven should be retained and seven should be repealed. Provisions should be repealed which extend coverage to state and local governments under seven mandates. These are: the Fair Labor Standards Act, the Family and Medical Leave Act, the Occupational Safety and Health Act, Drug and Alcohol Testing of Commercial Drivers, Metric Conversion for Plans and Specifications, the Boren Amendment to Medicaid, and Required Use of Recycled Crumb Rubber.

Three mandates should be retained with modifications: the Clean Water Act, Individuals with Disabilities Education Act, and Americans With Disabilities Act. Four mandates should be revised for greater flexibility and increased consultations: the

ACIR



ADVISORY COMMISSION
ON INTERGOVERNMENTAL RELATIONS

800 K St. NW. Suite 450 S.

FOR RELEASE:
9:30 AM, WEDNESDAY, JANUARY 24

Contact: Kathy Curtis
(202) 653-5540

PRESS RELEASE

**PANEL APPOINTED BY CLINTON AND CONGRESS
CALLS FOR REPEAL, RELAXATION OF MANDATES
ON STATE AND LOCAL GOVERNMENTS**

Chairman

William F. Winter, Jackson, MS

Private Citizens

Peter Lucas, Boston, MA
Richard P. Nathan, Albany, NY

Members of the U.S. Senate

Byron L. Dorgan, North Dakota
Bob Graham, Florida
Dirk Kempthorne, Idaho

*Members of the U.S. House
of Representatives*

James P. Moran, Virginia
Donald M. Payne, New Jersey

*Officers of the Executive Branch
U.S. Government*

Carol M. Browner, Administrator,
Environmental Protection Agency
Marcia L. Hale, Assistant to the President,
Director of Intergovernmental Affairs
Richard W. Riley, Secretary of Education

Governors

Arne H. Carlson, Minnesota
Howard Dean, Vermont
Michael O. Leavitt, Utah
Robert J. Miller, Nevada

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Victor H. Ashe, Knoxville, TN
Robert M. Isaac, Colorado Springs, CO
Edward C. Rendell, Philadelphia, PA
Bruce Todd, Austin, TX

Members of State Legislatures

Paul Bud Burke, President, Kansas Senate
Art Hamilton, Minority Leader, Arizona
House of Representatives
Samuel B. Nunez, Jr., President, Louisiana
Senate

Elected County Officials

Randall Franke, Marion County, OK
Glenn Molins, Los Angeles County
Board of Supervisors, CA
John H. Stroger, Jr., Cook County
Commission, IL

Executive Director

William E. Davis III

800 K Street, NW
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"The way to achieve our most important national goals, like making drinking water safe, making the workplace healthy, and protecting Americans with disabilities from unfair treatment, is to include states and local governments in decision making. They've been pushed around far too long and now they need to be given relief," according to former Mississippi Governor William F. Winter, Chair of the U.S. Advisory Commission on Intergovernmental Relations (ACIR).

In Washington today, ACIR released its preliminary report, "The Role of Federal Mandates in Intergovernmental Relations." The 26-member Commission includes six Members of Congress appointed by House and Senate leadership; four governors, three state legislators, four mayors, and three county officials appointed by President Clinton from nominations by national associations of state and local governments; three private citizens and three federal executive branch representatives appointed by the President.

"From more than 200 mandates called to our attention by states and local governments as unfair, this first report makes recommendations on the 14 cited as most troublesome. Seven should be retained and seven should be repealed," Governor Winter said. "That doesn't mean the other 186 are okay. We need to take a hard look at all these mandates. It's a big job, but a very necessary one."

- more -

ACIR's proposed recommendations on the 14 mandates on state and local governments fall into three categories: (1) those that don't have a sufficient national interest to justify intruding on state and local government abilities to control their own affairs; (2) those that are necessary because national policy goals justify their use (however, federal share of costs should be increased or requirements and deadlines should be relaxed); (3) those that are related to acceptable national policy goals, but should be revised to provide greater implementation flexibility and more state and local government participation in setting mandate policies.

The report calls for repealing provisions extending coverage to state and local governments in seven mandates: the Fair Labor Standards Act, the Family and Medical Leave Act, the Occupational Safety and Health Act, Drug and Alcohol Testing of Commercial Drivers, Metric Conversion for Plans and Specifications, the Boren Amendment to Medicaid, and Required Use of Recycled Crumb Rubber.

The report calls for retaining three mandates with modifications: the Clean Water Act, Individuals with Disabilities Education Act, and Americans With Disabilities Act. It calls for revising four mandates for greater flexibility and increased consultations: the Safe Drinking Water Act, Endangered Species Act, Clean Air Act and Davis-Bacon Related Acts.

The Commission is calling for public comment and review. "These are critical issues not only for state and local governments, but for the people who work for them and all Americans. We need to hear from concerned citizens and organizations," Governor Winter said. Comments will be taken through March 15, 1996. After the comment period, the Commission will make final recommendations to the President and the Congress.

The Commission is sponsoring "Lightening the Load," a national conference March 6-7 in Washington D.C. to bring local and state officials together with federal agency officials, congressional staff, and non-profit organization representatives to debate report recommendations.

COPIES OF THE REPORT ARE AVAILABLE FROM ACIR, 800 K STREET NW, SUITE 450, WASHINGTON DC 20575, (202) 653-5540. FOR CONFERENCE REGISTRATION INFORMATION, CALL (703) 883-9363.

- more -

One example of the Commission's recommendations would affect state compliance under the Occupational Safety and Health Act. ACIR recommends that states that volunteer to operate the federal OSHA program should no longer be subjected to different federal requirements than states that do not volunteer to operate OSHA. This change would affect the 23 states with approved plans to operate the federal OSHA program: Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and Wyoming as well as Puerto Rico and the Virgin Islands.

"In recent years," the report concludes, federal laws have been passed that impose "costs and requirements on state and local governments without their consent and without regard for their ability to comply. The challenge facing the federal government is to exercise power to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own budget priorities."

Today's press conference was held in conjunction with the U.S. Conference of Mayors Winter Meeting. In addition to Governor Winter, speakers included Representatives Gary A. Condit (D-CA), Thomas M. Davis (R-VA), James P. Moran (D-VA), Donald M. Payne (D-NJ), and Rob Portman (R-OH); Marcia Hale, Assistant to the President and Director of Intergovernmental Affairs; Mayors Victor H. Ashe (Knoxville), Edward G. Rendell (Philadelphia), and Bruce Todd (Austin).

ACIR is a permanent, independent, bipartisan intergovernmental agency established by federal law in 1959 to strengthen the American federal system and improve the ability of federal, state, and local governments to work together cooperatively, efficiently, and effectively. ACIR was directed by the *Unfunded Mandates Reform Act of 1995* to investigate and review federal mandates and make recommendations to the President and Congress.

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4:00

- Marcia Hale's office

- AIR Report

Kitty Higgins

Sally Katzen

Marcia

EXECUTIVE OFFICE OF THE PRESIDENT

03-Feb-1996 01:43pm

TO: Carol H. Rasco
FROM: Deborah L. Fine
Domestic Policy Council

SUBJECT: RE: fmla

That would be great. I do want to let you know what I found out, because I think we should be probably be involved.

I'm not sure if you've seen it or not, but the recommendation on FMLA was just one of many other issues that were addressed in the draft report (the ADA, enviro legislation, IDEA, others). Based on a conversation I had with someone from Labor last night, it sounds to me like there may be an inter-agency response coordinated, but nothing has happened on it yet. The person I spoke to said that Tom Glynn was going to talk to Kitty Higgins about it. You might want to ask Kitty or Marcia, who is actually on the advisory committee, about it.

I know that several constituencies are concerned and poised for action on this -- although I have not heard anything about the women's community. Most vocal has been the disability community -- and I actually learned about the report from them. Also -- the enviros, and unions.

Please let me know when you would like to discuss it, and if in the meantime you would like me to ask Steve Silverman, someone or Intergovernmental, or anyone else about it.

Thanks. Hope you're having a good weekend. Debbie.

COMMUNITY

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REVIEW

◆ February 1996

Panel seeks reform of mandates

□ Commission recommends repealing or modifying 14 federal programs - including ADA and IDEA- to ease burden on states

THE WASHINGTON TIMES - "The way to achieve our most important national goals, like making drinking water safe, making the workplace healthy and protecting Americans with disabilities from unfair treatment, is to include states and local governments in decision making," said former Mississippi Gov. William F. Winter, chairman of the 26-member Advisory Commission on Intergovernmental Relations.

In its report the Commission says "In recent years...the Washington tendency has been to treat as a national issue any problem that is emotional, hot and highly visible. Often, this has meant passing a federal law that imposes costs and requirements on state and local governments without their consent and without regard for their ability to comply."

In March, President Clinton signed the Unfunded Mandates Reform Act of 1995, requiring Congress to fund mandates it imposes on local governments.

However, the law applies only to future mandates and leaves in place provisions in many measures that mayors and governors have complained are bleeding their budgets.

The Unfunded Mandates Reform Act directed the Advisory Commission to review existing mandates for possible streamlining or elimination. The Commission reviewed 14 of the "most

troublesome" mandates of the more than 200 identified by states and local governments.

The Commission's final report to Congress and the president is expected this spring.

Rep. Thomas Davis, III, Virginia Republican, a former Fairfax County supervisor who co-sponsored the mandates-reform bill, said the federal government is adept at taking noble goals and forcing them on financially strapped local governments.

For example, he said the Occoquan water treatment plant used to give tours to show off its facilities. When the Americans with Disabilities Act was passed, it required that barriers be eliminated throughout the plant.

"Then the law of unintended consequences kicks in," he said, noting that, because the changes would have cost about \$1 million, public tours were canceled.

Philadelphia Mayor Edward G. Rendell, a Commission member, also used the ADA to illustrate the dilemma facing cities.

Philadelphia is using about a quarter of its street-repair budget to pay for ADA-required modifications, such as the estimated 320,000 curb-cuts to enable people in wheelchairs to cross streets.

"The ADA is a mess," Mr. Rendell said. "It's a great act, with great goals, but it's a mess."

"If it's the sense of Congress and the president that they want absolutely immediate compliance within two years, then pay for it," he said.

DATATIMES

"Burdensome Mandates"

The Advisory Commission on Intergovernmental Relations recommends repealing or modifying 14 federal mandates that burden state and local governments. Final recommendations will be submitted to Congress and the president in March.

REPEAL:

- Fair Labor Standards Act
- Family and Medical Leave Act
- Occupational Safety and Health Act
- Drug and alcohol testing
- Metric conversion
- The Boren Amendment on Medicaid payments
- Use of recycled waste tires in asphalt paving

MODIFY:

- Clean Water Act
- Individuals with Disabilities Education Act
- Americans with Disabilities Act
- Endangered Species Act
- Safe Drinking Water Act
- Clean Air Act
- Davis-Bacon Act, which sets minimum wages to be paid on federal contracts