

THE WHITE HOUSE

Feb 21

Kitty
Marcia HALE (16A)
ELIZ DRYE (DPC)

Nancy Kirschner has been
mtg w EPA & Educatn.
fairly consistently.

They told me THAT
DOT is slightly interested
in ADA; DOI on endangered
species; and maybe DOJ.

DOJ, EPA, & Educ are
the leaders.

KEL



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

To: Ann McGuire
Office of Cabinet Affairs

From: Jamienne Studley *JBS*
Deputy General Counsel for Regulations and Legislation

Subject: ED Comments on ACIR Report

Date: February 21, 1996

Attached, in response to Cabinet Affairs' request for agency comments on the ACIR draft report, are talking points developed by ED on the Individuals with Disabilities Education Act section and recommendations. We provided these to Marcia Hale's office last week.

Please let me or Frank Holleman know if you want additional information or comments on the rest of the report or on the strategy for ACIR activities.

cc: Frank Holleman
Judy Heumann
Jack Kristy
Suzanne Sheridan

TALKING POINTS: ACIR and IDEA

The Individuals with Disabilities Education Act (IDEA) was particularly unsuited for ACIR's review because (1) a much more thorough, comprehensive and careful review was done by the Administration in developing its reauthorization proposal, and (2) there is a very close relationship between the IDEA and civil rights laws and constitutional protections that establish the basic individual right to the educational services and procedural protections that the IDEA helps States and localities provide.

The Department of Education's reauthorization proposal: (1) drew upon a comprehensive review of current law and the oral and written comments of over 3,000 parents, educators, and administrators, representing the widest possible spectrum of views; (2) has among its basic objectives reducing administrative burden and paperwork for State and local school systems and promoting the resolution of disagreements between parents and schools through mediation rather than litigation; and, (3) is being used by both the House and the Senate as the basis for their respective legislative vehicles (expected to move through Congress in the Spring of 1996), thereby ensuring that a substantial portion--perhaps 70%--of the Administration's reform program is likely to be enacted.

With respect to the specifics of ACIR's draft recommendations:

(1) Increase Federal Funding to 40% Level. While in principle it would be desirable to increase the level of Federal funding, any dramatic increase--much less the five-fold increase called for by ACIR--is simply not realistic in light of current budget stringencies.

(2) Relieve States From Administrative Mandates. Many of the provisions of the Administration's proposal are designed to reduce burden and paperwork at the school, school district, and State level and re-direct those energies into improving educational outcomes for disabled children.

(3) Require Alternative Dispute Resolution Practices. The Administration's proposal would, for the first time, require States to offer impartial mediation to parents as a no-cost optional means of settling disputes between them and the school district regarding services provided to their disabled child. The Department considered, and rejected as impractical, requiring parents to avail themselves of mediation, based in part on the comments of State administrators with experience in the operation of mediation systems.

(4) Require Any Court Challenge Be Brought By State or Federal Agencies, Not Parents. The Administration is strongly opposed to ACIR's fourth recommendation, to require that any

court challenge based on IDEA be brought by State or Federal agencies, not parents.

-- Depriving parents and students of the ability to vindicate their rights under IDEA in court, if necessary, is fundamentally inconsistent with the intent of the law to create individual rights in those parents and students, and would call into question the nature of the "rights" created.

-- While one of the objectives of the Administration's proposal is to promote non-litigative means of settling disputes between parents and school systems, it cannot be said that the amount of litigation spawned by IDEA is disproportionate: IDEA serves each year approximately 5.4 million disabled children in approximately 14,000 school districts across the country; according to ACIR's study, there were 61 reported cases in the Federal Courts under IDEA in calendar year 1994--slightly more than one in each State.

-- Without correspondingly large increases in funding for Federal enforcement staff (e.g., investigators, resolution experts, and litigators)--an unlikely result in today's climate, and not called for by ACIR--IDEA enforcement would be substantially undermined. Even if additional Federal resources were available, it is hard to see how "Federalizing" the enforcement function, of necessity involving intrusive investigations and Federal versus State litigation, would promote intergovernmental harmony and cooperation.

-- As a practical matter, because the rights conferred on disabled students and their parents by IDEA are rooted in the non-discriminatory principles of other Federal laws (e.g., section 504 and the Equal Protection Clause), it is unlikely that such parents and students could be kept out of Federal Courts in any event.

-- There is no significant political support for divesting disabled students and their parents of their rights under IDEA to seek redress in the courts.

DRAFT**U.S. Department of Labor**Office of the Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

February 20, 1996

MEMORANDUM FOR KRIS BALDERSTON
SPECIAL ASSISTANT TO THE PRESIDENT *then for JH*
THRU: GERI D. PALAST ASSISTANT SECRETARY OF
CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS
FROM: NANCY KIRSHNER *NK*
DIRECTOR OF INTERGOVERNMENTAL AFFAIRS
SUBJECT: ACIR Report

The Unfunded Mandates Act instructed the ACIR to write a report on unfunded mandates and to include how mandates effect not only state and local government, but also how they effect working men and women.

The ACIR draft report released on January 24th attacks fundamental Administration policies related to worker protection, and ignores the Congressional instruction of considering the impacts on workers. In effect a major assault on Administration's policies concerning working men and women has been launched by a Commission which is portraying itself as representing the President (attached is the January 24th press release).

Among the roll backs recommended:

- State and local employees would lose their eligibility for benefits under the Family and Medical Leave---the first major legislative accomplishment of the Clinton Administration.
- FLSA coverage for state and local employees would be repealed. As a result state and local workers lose the protection of the minimum wage and 40 hour work week.
- ACIR lists OSHA as a mandate, although state participation is OSHA totally voluntary, and the report ignores the reinvention initiative. ACIR recommends that states not be required to regulate state and local government workplaces when they opt to administer the OSH Act within a state.
- Gutting of the Davis Bacon Act by limiting its coverage to projects which are funded at least 50 per cent from Federal funds and exceed \$1 million. The report does not acknowledge benefits of the program and barely mentioned the Administration's efforts to reform the Act.

Working for America's Workforce

In addition to the draft report, ACIR is planning a conference entitled, "Lightening the Load....." The 15,000 announcements which were mailed to state and local officials (copy attached) list the President as having been invited and Administrator Browner and Secretary Riley as speakers. The sessions are focused on the report with a very clear bias against the Administration's policies on worker protection.

The ACIR is advertising a registration fee of \$395, and they are soliciting agencies for financial support. According to EPA, Agriculture, the Corps of Engineers and Transportation have agreed to fund the conference. The registration fee of \$395 would appear to eliminate most members of the general public who may have some fundamental concerns related to the impact of the roll back of various working protection provide.

We are very concerned that if changes are not made, this report will be unfairly used as evidence by Congress of bi-partisan support for the repeal of some key laws that protect American workers. I think you are aware that our department has been talking with EPA and Education regularly regarding how to proceed in a coordinated fashion. Both EPA and Education share our concerns.

Attached is a draft of a statement of concerns which the Department has in relation to the ACIR recommendations. These points have been prepared for inclusion in a letter for Secretary Reich to send ACIR Chairman William Winter.

It is our sense that in order for this report to be more consistent with Administration's policy, it is necessary for the Administration to put forward a consistent and coordinated effort at the highest levels of the White House.

I look forward to talking with you as soon as possible regarding our next steps. Please do not hesitate to call me or Earl Gohl at (202) 219-6141.

Attachments

cc: Kitty Higgins

Fair Labor Standards Act (FLSA)

The ACIR report recommends repeal of FLSA's coverage of state and local government workers.

By guaranteeing maximum hours and a minimum wage, the FLSA establishes an employment floor below which all Americans should not have to work. There is no reason why public servants should lack these fundamental protections and thereby earn the status of second class citizens. In recent years, the provision of public services such as nursing care, transportation, sanitation, water and sewer service, has increasingly been done by both public and private entities, and in these instances, the FLSA simply ensures that every employee, regardless of his or her employer, is entitled to a minimum level of compensation and adequate time off.

The report notes that the Department of Labor has provided assistance to state and local governments with respect to their FLSA obligations, and acknowledges that DOL has worked with state and local governments to recognize the unique issues that arise in the enforcement context. We should strengthen this partnership, rather than dismantle it. While the report decries the rights of workers to seek judicial redress under the statute, rolling back those rights suggests far more than a restructuring of Federal/State relations.

In several instances, the report levels criticism against application of the FLSA to the public sector that has no foundation in fact. For example, there is no basis whatsoever for the suggestion made in the report that Federal agencies have manipulated FLSA regulations in order to meet budgetary restrictions, and there is certainly no basis for allowing the states to do so.

Family and Medical Leave Act (FMLA)

The report recommends repeal of FMLA's coverage of state and local government employees.

Like the FLSA, the FMLA provides a fundamental safeguard to American workers. The report provides no substantive justification for repealing that safeguard with respect to public workers.

In addition, the report not only overstates the perceived costs of compliance, but ignores the substantial benefits achieved by the FMLA, including improved worker productivity and morale, reduced employee turnover, and greater labor-management stability. In fact, available data show that the costs of hiring and training new employees far outstrip the costs of granting temporary leave for family or medical reasons. In addition, the bipartisan Commission on Leave created under the FMLA released two studies in October 1995. One study of employers in the private sector revealed that over an 18-month period, 90 % of participating firms reported little or no costs associated with implementation of the statute, and 85% reported no noticeable effect on employee turnover, absence or productivity. There is no evidence to suggest that the results are any different in the public sector.

Occupational Safety and Health Act (OSH Act)

The report recommends repeal of all state coverage.

As a preliminary matter, the Department cannot accept the Commission's assertion that a voluntary program institutes a mandate. In any event, we believe -- **and many states agree** [?] - that repeal of the OSH Act with respect to public workers endangers the lives and safety of thousands of workers who perform some of the nation's most dangerous jobs -- firefighting, hazardous waste cleanup, maintenance and sanitation work. Indeed, according to the American Federation of State, County and Municipal Employees, almost 200 of their members were killed on the job between 1983 and 1993. These workers deserve the same protections accorded America's private sector employees.

As with other DOL-related recommendations, the report fails to acknowledge the substantial benefits that accrue from the Act. These benefits not extend to the affected workers; public employers, who experience reduced worker compensation costs, higher employee productivity, and reduced liability and insurance costs; and otherwise be exposed to dangerous conditions in public buildings and other facilities.

Many of the report's criticisms rest on misperceptions. For example, the report notes that even in states that have not volunteered to participate in the Federal OSHA problem, there is often a belief that OSH Act requirements are nonetheless mandatory. It is difficult to imagine how this makes the case for repeal of the Act, rather than increased education. Similarly, the report charges that the credibility of safety and health programs under the Act is seriously compromised by the "perceived" rigidity, complexity and burdensomeness of the regulations, and a focus on punishment rather than compliance assistance. On the contrary, in recognition of the unique characteristics of public employers, OSHA has encouraged flexibility in State plans by 1) encouraging states to develop alternate standards that provide equivalent protection when circumstances differ from the private sector; 2) exempting States from a requirement to impose monetary penalties to compel compliance; 3) permitting agency self-inspection under certain conditions. In addition, OSHA provides a great deal of assistance to states that volunteer to participate. Punishment is not a focal point of enforcement, since OSHA has no jurisdiction over public workplaces. In fact, an atmosphere of cooperation pervades the Federal/State relationship under the OSH Act, as typified by a Memorandum of Understanding between OSHA and various state regulators to address areas of mutual interest.

Finally, the report assumes that by eliminating the state Plan requirement, states would have the same freedom from regulation as Federal agencies. Once again, this premise is incorrect. All Federal agencies must comply with OSHA standards, as the recent debate on extending OSH Act protections to Congressional employees recognized.

Davis-Bacon Related Acts (DBRA)

The report recommends an exemption for projects below one million dollars or for which the Federal grant or other assistance is less than 50 percent of total funding.

The report fails to provide any data for its assertions, which are often incorrect and misleading. It suggests that the DBRA automatically increase public construction costs because certain low-wage construction contractors may pay lower than prevailing wages. This flawed reasoning ignores any comparative differences in productivity from different wage levels and work experience, and that fact that the shoddy construction practices that often accompany substandard wages almost inevitably result in increased repair and maintenance costs.

The Department has accomplished significant regulatory reforms over the past decade to ensure that its wage determinations accurately reflect wages paid in the local community. When there is a lack of recent construction, then DOL looks to the surrounding area for wage data, but not to distant areas. Regulatory provisions also encourage apprenticeship and training of persons with limited experience by allowing for exceptions to the journey-level wage.

The Clinton Administration's Davis-Bacon reform bill last year would have raised the DBRA threshold to \$50,000 for alteration and repair projects, and \$100,000 for new construction projects, in addition to reducing administrative burdens and costs. DOL cannot, however, concur in the report's proposal to raise the threshold to \$1 million. This would simply eliminate prevailing wage protections for thousands of workers under the guise of reform.

Similarly, we have serious concerns with the report's recommendation to base coverage on the percentage of Federal finance provided to the construction project. DBRA coverage must be established before the competitive bidding process begins. ACIR's proposal would disrupt that process, and impose additional burdens on state and local contracting agencies to determine if DBRA applies.



ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

**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
Marvin 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**

Mayors

**Victor H. Ashe, Knoxville, TN
Robert M. Isaac, Colorado Springs, CO
Edward G. 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 Franks, Marion County, OR
Gloria Molina, 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
Suite 450 South Building
Washington, DC 20575
Telephone: (202) 653-5540
Fax: (202) 653-5429**

"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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###

Feeding 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 & liaison 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

Learn what's new. Impact future changes.

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

ACIR Conference Day One

7:30 am Registration

8:30 - 8:45 Welcome

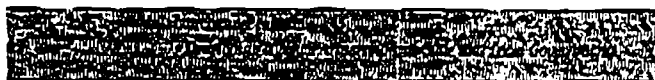


10:30 - 10:45 Break

10:45 - 12:15 p.m.

Concurrent Seminars

- Current Efforts to Reform Federal Regulatory Impact on State and Local Governments
- Measuring the Costs and Benefits of Mandates
- Reducing State Mandates on Local Governments



2:30 - 4:45

Concurrent Workshops

- Environmental Mandates
- Labor Mandates
- Mandates Affecting Individual Rights



ACIR Conference Day Two

7:00 am Registration

7:30 - 9:00

Breakfast Program

- What Will Happen to the Congress After ACIR Submits its Mandate Report



10:30 - 10:45

Break

10:45 - 12:15 p.m.

Concurrent Seminars

- Impact of Federal Court Mandates on State and Local Governments
- Mandate Relief for the Private Sector
- The Future Federal Role After Current Reforms are Implemented



2:30 - 4:45

Concurrent Workshops

- Health & Social Service Mandates; Transportation Mandates; Metric 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

*Invited

Put your position on the record at
The ACIR Conference On Federal Mandates.

Advisory Commission on
Intergovernmental Relations

800 K Street, NW
Washington, DC 20575

Lightening
The ACIR Conference
On Federal Mandates
The Road

March 6-7, 1996

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.
- ☒ Academic teaching faculty & public policy research staff.
- ☒ Staff and members of non-profit organizations.
- ☒ Private sector executives & liaison 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:

- ☒ 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.

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.

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 to Congressional Legislation
 Hon. Dirk Kempthorne^{**}, U.S. Senator
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 regulation, 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 panelists 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:
 Larry Malloran, Staff Director, U.S. House Subcommittee on Human Resources and Intergovernmental Relations

2. Measuring the Costs and Benefits of Mandates

The *Unfunded Mandates Reform Act of 1995* requires ACIR to study the techniques used to assess the costs, benefits, and feasibility of federal mandates. During this seminar, 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 costs and benefits of federal mandates.

Moderator:
 Dr. Mark Rosentraub, 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. Panelists 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 materials 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 Lashulka^{**},
 Mayor, City of Columbus, OH

2. Labor Mandates

Moderator:
 Hon. Randall Frank^{**},
 Commissioner, Marion County, OR

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 Commissioner

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

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 conducted an inventory of federal court decisions from 1994 that imposed standards 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.
- Debate ways to reduce the burden of federal court decisions on state and local governments.

Moderator: Dr. Robert Beaucus, George Washington Univ.

5. Mandate Relief for the Private Sector

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

- Debate the effects of state and local mandate relief efforts on the private sector.
- Examine how similar 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 change will be accelerated by current mandate and regulatory reforms, proposals to transfer federal programs to state and local governments, and the growth of block grants. Functions 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; Metric Mandates

Moderator:
 Hon. Art Hamilton**, 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 two issues that ACIR's preliminary Mandate Report identifies as 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, standardizing 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 Stroger, Jr.**, President,
 Cook County Commissioners, IL

* 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/acir>
- FedWorld/NTIS's home page:
<http://www.fedworld.gov> (\$12 per download)
- FedWorld/NTIS's bulletin board:
 703-487-4223
- For a print copy, fax your name and address to:
 202-653-5429 or call ACIR at 202-653-5540.

3 Easy Ways To Register:

Phone your registration
to 703-883-9363...

For our fastest service, call any time
between 9 a.m. - 5 p.m. EST

Or fax this form
to 703-883-9366...

Complete the form below and fax this entire
page back to ACTR c/o ENC Marketing (24 hours a day).

Or return this form
by U.S. Mail.

Tear off this form and mail it to:
ACTR Registration, c/o ENC Marketing
2010 Corporate Ridge, Suite 700, McLean, VA 22102

Your Conference Registration Includes...

- ☐ A copy of ACTR's preliminary Mandate Report.
- ☐ A conference workbook with session handouts.
- ☐ Admission to all plenary sessions, workshops and seminars.
- ☐ March 6 luncheon, afternoon reception and dinner.
- ☐ March 7 breakfast and luncheon.

Hotel Accommodations

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 \$114 (government). To obtain this special rate, please identify yourself as an attendee of the ACTR Federal Mandates Conference. Registrants should call the hotel directly at 202-797-5520 or the central reservations office at 1-800-445-8667.

The cutoff date for registrations at 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 two night's prepaid deposit for all reservations. Checks, money orders, or major credit cards can be used to establish prepayment. All credit cards used as first night's prepayment will be charged immediately. Reservations can be cancelled prior to 72 hours of arrival without penalty.

Special Accommodations

Please call 703-883-9363 with any special accommodations you may require in accordance with the Americans with Disabilities Act.

Payment Terms and Cancellation Policy

Pre-registration payments must be postmarked on or before February 28, 1996. On-site registrations will be accepted (please call 703-883-9363 to reserve a space). 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 audio cassettes of the conference sessions. Substitute registrants will be accepted from the same organization.

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

March 6-7, 1996

Washington Hilton,
Washington, D.C.

Please R.S.V.P. by February 28, 1996

Conference Pricing

	Pre-Registration Price (postmarked on/before Feb. 28, 1996)	Regular Registration Price (after Feb. 28, 1996 and on-site)
Government and Academic*	\$345.00	\$395.00
Other	\$445.00	\$495.00

*Federal, state, or local organizations representing government officials & executives or university academics only.

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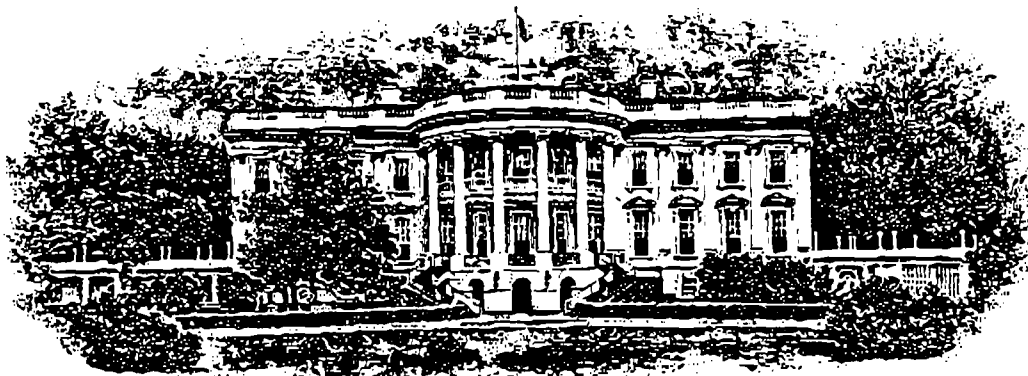
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Authorized Signature:

To register additional attendees, please include personal information for each on your organization's letterhead.

☐ I am also attending ☐ NACO and/or ☐ NLC ☐ I will only attend ACTR's conference.



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OFFICE OF CABINET AFFAIRS

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

FAX COVER SHEET

DATE:

4/29

TO:

Agency ACIR CONTACTS

PHONE:

FAX:

FROM:

Kizis Balderson

NO. OF PAGES:

(Including Cover Sheet)

5

PRIORITY:

(Y)

N

MESSAGE:

Material for the ACIR call at
4 pm today Code 4590

sent 4/23

THE WHITE HOUSE
WASHINGTON

April 23, 1996

MEMORANDUM

TO: Sally Katzen
Marilyn Yager
Kris Balderston
Jennifer O'Connor
Elizabeth Drye
Bill White

FROM: Marcia L. Hale *MLH*
SUBJECT: New ACIR Draft Report

Handwritten notes:
- A large curved line above the word "Veto".
- "Veto" with a star to its right.
- "interim storage" with a star to its left.

ACIR is looking for guidance before issuing their next draft report. Attached is a memo indicating some changes they are presently considering. My office is in the process of setting up a meeting for next week where we should discuss the ACIR proposal - please attend as I need to get back to them with some guidance.

Attachment

04/28/96 21:07 2024566220

PAGE.002

APR 22 '96 16:56 FROM ACIR

ELSA

Prelim. Rec'dation: Exempt state and local govt. employees from act.

Alternative Final Rec'dation: Recommend amendment of the Act to remove uncertainties relative to overtime provisions. (This would be a version of Option #4 contained in the Dec. 1 staff working paper.)

FMLA

Prelim. Rec'dation: Exempt state and local govt employees from Act.

Alternative Final Rec'dation: Recommend continued applicability of act to state and local govt. employees. (This would be the equivalent of adopting Option #1 contained in the Dec. 1 staff working paper.)

OSHA

Prelim. Rec'dation: Exempt state and local govt employees from Act..

Alternative Final Rec'dation: Recommend commitment of federal \$ for training and technical assistance to states and to help finance state and local implementation.

Drug and Alcohol Testing

Prelim. Rec'dation: Exempt all state and local govt. employees from Act.

Alternative Final Rec'dation: Amend law to permit alternative testing requirements for small and isolated local governments, or to permit program certification in lieu of existing federal requirements. (This would be a version of Option #3 contained in the Dec. 1 staff working paper.)

Metric Conversion

Prelim. Rec'dation: Exempt states and local govts. from requirement to convert to metric.

Alternative Final Rec'dation: Find that extension of original requirement to year 2000 gives adequate time to implement. (This would be a version of Option #1 contained in the Dec. 1 staff working paper.)

-2-

Medicaid: Boren Amendment

Prelim. Rec'dation: Repeal Boren Amendment and make states solely responsible for determining Medicaid reimbursement rates.

Final Rec'dation: SAME

Clean Water Act

Prelim. Rec'dation: Restore federal cost sharing or give states and local governments greater authority to adopt their own control methods and timetables for implementing federal clean water standards.

Alternative Final Rec'dation: Increase federal funding for states and local governments to support construction of municipal wastewater treatment facilities. Amend clean water act to give EPA more flexibility to extend deadlines for compliance. (This would disconnect additional federal funding from the relaxation of federal standards. Rather than giving individual states and local governments discretion to determine their own methods and timetables, it would give EPA additional authority to do so.)

Individuals With Disabilities Education Act

Prelim. Rec'dation: Increase federal funding to 40% authorized level or relieve states of responsibility to comply with administrative mandates. Require alternative dispute resolution practices. Prohibit individual suits against states or local governments.

Alternative Final Rec'dation: Increase federal funding to 40% authorized level. Relieve states and local governments from the requirements that are unrelated to the education of the child. Support increased use of mediation. (Eliminate any reference to individual suits.)

Americans With Disabilities Act

Prelim. Rec'dation: Increase federal funding to help states and local governments comply or modify requirements to meet state and local government technical and budget constraints. Designate a single federal ADA enforcement and assistance agency. Prohibit individual suits against states or local governments.

Alternative Final Rec'dation: Increase federal funding to help states and local governments comply. Support increased federal technical assistance and information to help states and local governments comply. Better coordinate federal enforcement and assistance. (Eliminate any reference to individual suits.)

-3-

The Safe Drinking Water Act

Prelim. Rec'dation: Enact amendments similar to those approved by Senate. Establish a goal of returning responsibility for standards to state governments.

Alternative Final Rec'dation: Enact amendments similar to those approved by Senate. Permit states increased flexibility for implementation of national standards.

Endangered Species Act

Prelim. Rec'dation: Give states and local governments a role in listing process. Apply exemptions more extensively.

Final Rec'dation: SAME

The Clean Air Act

Prelim. Rec'dation: Permit states to develop their own ways of meeting federal standards. Eliminate federal penalties where states are making "good faith" efforts.

Alternative Final Rec'dation: Make no change in existing federal standards. Increase federal aid and technical assistance to help states comply. (This would be a version of Option #1 in the Staff Working Paper.)

Davis-Bacon Related Acts

Prelim. Rec'dation: Amend Davis-Bacon related laws to exempt state and local construction projects below a larger dollar cost than now exists and below a certain federal percentage of cost sharing.

Alternative Final Rec'dation: Amend Davis-Bacon related laws to exempt state and local construction projects below a larger dollar cost than now exists and below a low federal percentage of cost sharing. (Eliminate the reference to the \$1M and 50% threshold in the text.)



**Office of Policy Development
United States Department of Justice**

10th Street and Constitution Avenue, NW
Washington, D.C. 20530

FAX COVER PAGE

May 2, 1996; 3:04 pm

TO: **Kris Balderston**
White House Cabinet Affairs

FAX: 456-6704
VOICE: 456-2572

FROM: **Kevin R. Jones** *KRJ*
Deputy Assistant Attorney General

VOICE: (202) 514-4604
FAX: (202) 514-9112

Room 4256, Main Justice

Total Pages (excluding this cover): 2

Additional Message:

RE: ACIR Report

Attached is a redraft of the Americans with Disabilities Act section of the ACIR report, prepared by the Civil Rights Division. This is the only section drafted by the Department in response to the direction given to agencies at the conference call on April 29. The Environment and Natural Resources Division coordinated separately with EPA and Interior regarding the revised sections drafted by them.

The Role of Federal Mandates in Intergovernmental Relations

The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA) (P.L. 101-336) requires State and local governments to ensure that qualified individuals with disabilities do not experience discrimination based on their disabilities in public employment or in public programs, activities, or services (including public transportation). The ADA provides important and necessary social benefits by enabling individuals with disabilities to participate in the mainstream of American life.

The ADA strikes a balance between the right of individuals with disabilities to participate in public activities and the legitimate financial and operational concerns of State and local governments. Rather than imposing rigid requirements, the ADA employs an inherently flexible approach using concepts developed and tested in the implementation of Section 504 of the Rehabilitation Act of 1973, which prohibits disability-based discrimination in federally-funded programs. The ADA extends this prohibition to state and local programs that do not receive Federal funds.

Rather than imposing rigid requirements, the ADA is oriented toward the achievement of accessibility goals established by each public entity through a process of self-evaluation that reviews each covered program and identifies the changes required to make the program accessible without fundamentally altering the program or incurring undue burdens. Rather than mandating expensive retrofitting, the ADA permits public entities to use alternatives other than site modifications to make their programs and activities accessible. Physical changes to existing facilities are only required when it is not possible to provide program accessibility in any other way and when the changes will not result in undue burdens.

Concern has been expressed about ADA implementation, particularly with respect to the uncertainty experienced by public officials because of the absence of a rigid standard of compliance. Public officials clearly need extensive technical assistance from the Federal government to enable them to determine how to comply with the ADA. The ADA recognizes this need by requiring the Federal agencies that are responsible for ADA implementation to publish technical assistance manuals and to develop and implement technical assistance plans. The Attorney General is responsible for coordinating the development of a government-wide technical assistance plan.

Because effective and consistent technical assistance is vital to the successful implementation of the ADA, the Department of Justice should assertively pursue the development and implementation of a government-wide program of technical

assistance to ensure that all significant compliance and implementation issues are fully addressed by the appropriate agencies.

Public entities also need increased support from Federal agencies to achieve greater accessibility in their programs. There are sources of Federal financial assistance now available to State and local governments that may be used to increase accessibility. One example is the Community Development Block Grant program. Federal agencies responsible for the administration of financial assistance programs should, to the extent permitted by law, actively encourage eligible State and local entities to apply for available funding and to use those funds to provide increased accessibility in State and local programs.

RECOMMENDATION: *Expand authority under Federal grant programs to use Federal funds to provide accessibility in state and local programs; increase Federal technical assistance and information to help states and local governments to comply; and improve coordination of Federal technical assistance and enforcement.*

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

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**

APR-23-1996 12:31

OROSLR STATE&LOCAL

202 260 2159 P.01/20



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

67024

TOO MUCH
BUT, BUT
JUST IMPROVING

OFFICE OF REGIONAL OPERATIONS
AND STATE/LOCAL RELATIONS

April 23, 1996

MEMORANDUM

SUBJECT: ACIR Report - Rewrite pages 1-6

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

TO: Interested Parties
Federal Agencies
(See distribution)

Attached is a draft rewrite of the first six pages of the ACIR Report. Please have the appropriate individuals within your agency review carefully **ASAP** and contact Anna Raymond (260-0421) of my office by Thursday, April 25th with your comments. Please pay especially close attention to the Common Issues section, because it includes recommendations. We have promised ACIR to have this to them by Friday, April 26th, since they have already started the rewrite of the report.

We have also included a copy of proposed changes to one of EPA's specific mandate reviews. It is our understanding from ACIR staff they do not plan a separate summary and staff report on each mandate, but, rather will combine them. Accordingly, we have drafted proposed alternative language for each of our mandates as one section, using the following outline:

- 1) Overview of existing statute
- 2) Reasons for mandate
- 3) Benefits and concern with mandate
- 4) Corrections made to address problem
- 5) Recommendation

Attachments (2)

Introduction

Safe Drinking Water Act

APR-23-1996 12:31

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202 260 2159 P.02/20

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APR-23-1996 12:32

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202 260 2159 P.03/20

INTRODUCTION

DRAFT

The Unfunded Mandates Reform Act of 1995 (P.L. 104-4) represents a bipartisan agreement to strengthen the partnership between the federal Government and state, local and tribal governments. (NB: This language comes from the introductory paragraph of Public Law 104-4). To this end, 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," balancing consideration of the impact of mandates on state, local, tribal and federal government objectives and responsibilities, the competitive balance between governments and the private sector and impacts on working men and women. The law also directs the ACIR to make recommendations to the President and the Congress as to appropriate relief from certain requirements of federal mandates for state, local and tribal governments aimed at facilitating their overall compliance with mandates while mitigating any resulting burdens on the private sector. Such relief includes flexibility in complying with rigid and complex federal mandates, reconciling inconsistent requirements, consolidating reporting requirements, establishing common terms of compliance, temporarily suspending certain non-critical mandates on fiscal grounds, and terminating mandates in cases of duplication, obsolescence or lack of utility.

Due to resource constraints, the ACIR was unable to complete the level of investigation envisioned by Section 302 of the law. In particular, the ACIR did not look at the competitive balance between governments and the private sector or impacts of mandates on working men and women.¹ Moreover, the detailed comparative analysis of mandates that would be necessary to make the kind of recommendations called for in the Unfunded Mandates Reform Act was beyond the resources of the ACIR. In this preliminary report, the ACIR instead proposes for public review and comment recommended changes in federal policies to improve intergovernmental relations while maintaining a commitment to national interests based largely on concerns raised by a relatively small number of state and local officials. The ACIR recognizes that these recommendations may therefore reflect a bias in favor of resource savings for state and local governments without giving full consideration to impacts on federal objectives and responsibilities, additional costs and burdens on the private sector or the affect on working men and women of implementing these recommendations. For this reason, these recommendations should serve the narrower purpose of identifying mandates of concern to state and local governments for more detailed investigation and follow-up recommendations as envisioned by the Unfunded Mandates Reform Act.

¹Due to resource constraints, ACIR was also unable to complete several reports required by other sections of the Unfunded Mandates Reform Act (UMRA). UMRA charges ACIR with completing four separate reports in fiscal year 1996. Financial constraints made it necessary for the ACIR to limit its attention to one report on the role of federal mandates. It was not possible to complete reports on 1995 court rulings, the effects of state mandates, or the feasibility of estimating baseline mandate costs and benefits as required by UMRA.

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APR-23-1996 12:33

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202 260 2159 P.04/20

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DETERMINING THE APPROPRIATE FEDERAL ROLE

The American experiment with federalism was unique at its inception. When the Constitutional Convention met in Philadelphia in 1787, models for strong central governments existed, as did examples of confederations, consortia of independent governments agreeing to act together without creation of a national government. Federalist governments, however, were unknown in practice until the U.S. Constitution set forth the plan for this new model of government.

From the beginning of U.S. 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. James Madison said during the drafting of the Constitution that it was "neither a national nor a federal constitution but a composition of both." [Check with Congressman Portman for citation.] A half century later, ambiguity remained. In the 1830's, de Tocqueville observed, "American government is no longer a federal government, but an incomplete national government". [Check with Congressman Portman for citation.] The United States has continued to define and refine how federalism can best work in a changing world. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Supreme Court recognized that clear lines defining the appropriate scope of federal activities could not be drawn. Instead, the Court decided that it is the function of the federal legislative process to balance debate among democratically elected representatives of the people to determine the precise scope of national authority over state and local governments. Indeed, it has never been possible to sort out the balance between the Constitutional partners in a rational way that would prevail under all or even most circumstances.

James Madison, in Federalist Paper No. 51, described the value of the ambiguity. It served as protection for the citizens of the United States against the potential dangers of a too-powerful government. 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.

Madison also explained how the federalist system works to protect minority rights:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens....

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APR-23-1996 12:33

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202 260 2159 P.05/20

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Today, the success of this intentional tension has led many nations to pattern their political system after the American federalist system.

Despite the difficulty of sorting out appropriate federal, state, and local roles in theory, in practice such deliberations are made on a daily basis. Historically, the American people have 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 1930's produced federal programs to alleviate national economic and social problems. In other instances, national policy is necessary because problems transcend state lines such as when dirty air or water from one state intrude on another state. As a result, some federal government mandates on state and local governments are recognized as an essential feature of the U.S. federal system.

Over time, a wide variety of circumstances have come to be recognized as justifying a national interest or federal action on an issue. These include:

- National defense and foreign affairs. The federal government is in a unique position to defend and represent the interests of the country as a whole.
- Civil rights. The Constitution and Bill of Rights guarantee to every U.S. citizen their civil rights. Federal laws and standards are passed as needed to implement those rights.
- Spillover effects crossing political jurisdictions. Actions taken in one state may result in costs and consequences in another. Federal and state laws are passed to prevent interjurisdictional spillover or to create a mechanism to compensate those who experience the consequences.
- Spillover effects from a business to the community. Federal laws are established to "internalize" costs that a single source generates but others, often the surrounding community, has to pay. Mandates on littering, wastewater, and airplane safety standards fall into this category. By establishing mandated standards or charges, the private generators of costs begin to absorb the costs they create. This creates market incentives that encourage development of innovative, lower cost approaches to deal with the costs as part of everyday investment and trading decisions. Standards can and are established at the federal, state, or local level. Federal standards are more appropriate in some cases depending on the nature and dispensation of the problem and of the industry.
- Preventing destructive interstate competition. State and local governments frequently compete with one another to attract business, tourism, and residents. Competition is and

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APR-23-1996 12:34

DROSLR STATE&LOCAL

202 260 2159 P.06/20

DRAFT

can be a healthy dynamic encouraging innovation, good management, and improved service delivery. It can also lead to destructive competition, with governments compelled to subsidize costs or cut services below levels that are in the best interest of the jurisdiction and its residents. Federal and state laws are adopted that establish a minimum set of standards below which states cannot compete.

- Minimum standards. Americans have been blessed with a standard of living higher than enjoyed in many parts of the world. Those who work, live, and travel in the United States assume and count on certain minimum standards associated with that standard of living. Federal laws have been adopted to ensure minimum work, living, and travel conditions throughout the United States.
- Protecting the interests of future generations. Some federal mandates are established to protect minimum standards for future generations of Americans. The American economy thrives in part because the "invisible hand" of competitive market forces let people and businesses trade to improve their own well-being. Future generations cannot trade on their own behalf, so federal and state laws are adopted to protect minimum standards for future generations.
- Risk-sharing and spreading. Some costly events, such as flooding, hazardous spills, and high unemployment, may occur at unexpected times in different parts of the country. Federal laws are adopted to establish national insurance arrangements to protect those experiencing unanticipated hardship, where private insurance arrangements have not been able to address the problem.
- Promoting commerce through private economies of scale. Variation in standards across states can create additional costs or uncertainties for private firms. Federal standards can reduce costs for private firms in many ways. Some federal standards have been established because they reduce the costs to business of complying with 50 or more state (and local) standards by establishing a single national standard. Some federal standards provide certainty that allow business and others to make long-term investments that would be too costly in an uncertain climate.
- Promoting commerce through improved information. Federal mandates, such as nutrition labeling requirements, SEC reports, and safety warnings, ensure that the general public, employees, and businesses have reliable information to make wise purchasing and investment choices. Because the industries operate on a national scale, national regulation is often a more efficient, common-sense approach for accomplishing the task.
- Serving a transient population. Some programs, such as social security, serve people over their lifetime regardless of where they live. Federal laws and standards make it possible to serve a transient population regardless of their residence.
- Global representation. Increasingly international markets may necessitate federal action, especially when and where other countries are directly engaged in commerce.
- Evaluation. Justice Louis Brandeis described the states as the "laboratories of democracy." Accurate analysis of the experiments taking place in the laboratories requires that data from these experiments be accurately and consistently reported. Federal laws are adopted to ensure reporting of consistent data across the country so that evaluation of different public policies is possible, helping states and localities make

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informed policy choices.

Federal laws are adopted for a wide variety of reasons, some of which are listed here, to serve the well-being of the people of the United States. How the laws are structured will vary. Some federal laws set standards or provides services or tax individuals or corporations directly; some laws are structured so states or occasionally local governments may opt whether or not to run a program and incorporate provisions of federal laws or let the federal government run the program in the state; some federal laws set standards that state and local governments as service providers, employers, or businesses must meet.

The challenge facing the federal government is to exercise its power and ability to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs. The challenge is to capture for American citizens the economic and social advantages possible from actions at a national level without impairing innovation, adaptation, citizen engagement, and the sense of accountability to the people that can be much more vibrant at the local level.

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, and if proper, if it is designed in the most appropriate manner. Nevertheless, analysis can help establish a clearer conceptual framework for thinking about the role of federal mandates. The ACIR has, through this report, attempted to contribute to that analysis by looking in depth at 14 federal mandates identified as being problematic by state and local governments.

THE ACIR REVIEW OF EXISTING MANDATES

As required under Title III, Section 302 of the *Unfunded Mandates Reform Act*, the ACIR initiated an investigation and review of the role of federal mandates in intergovernmental relations. The ACIR began its review process by drafting a number of criteria intended to assist the Commission in identifying mandates that are candidates for evaluation. The Commission's decision on which mandates to review were based on formulation of a set of criteria capable of meeting the following objectives:

- (1) providing a basis for identifying mandates of significant concern; and
- (2) providing a basis for formulating recommendations to retain, modify, suspend, or terminate specific mandates that are of concern.

The proposed draft criteria were published by the ACIR in the Federal Register in May 1995, so as to obtain public comment on their ability to fulfill these objectives. The ACIR met with or received correspondence from over 200 individuals or organizations, many from federal, state, local and tribal agencies and their constituency organizations. The criteria were modified in response to several received comments. For example, the criteria were revised to ensure that

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the analysis would look at the beneficial aspects of mandates and the reason for their adoption. Final criteria were published in the Federal Register (July 6, 1995). The full set of criteria can be found in Appendix B.

The ACIR next attempted to identify the universe of specific federal mandates to which the criteria could be applied. Information about mandates and their relation to the criteria were solicited from state, local and tribal governments, federal agencies, constituency organizations, and the public. To encourage receipt of broad and diverse points-of-view on the issue of federal mandates, the ACIR used several communication strategies, including reliance on several organizations other than the ACIR to solicit comments. These included:

- Publication of a Federal Register notice (citation), which elicited ____ comments, ____% of which were from individual state, local and tribal governments and their constituency organizations.
- A solicitation by the National Governors Association to each governor's office to list mandates of most concern in their state.
- A general appeal made in magazines and newsletters of national and state groups representing state and local governments (e.g., sample names of magazines).
- A survey of small rural governments conducted by the National Rural Development Partnership (from which ____ responses were received).
- Solicitation of state and local government officials attending national meetings (e.g., cite several conferences)
- An ACIR sponsored conference in March of 1996 in Washington, D.C., titled "Lightening the Load" (note: could cite registration and attendance figures and how many from "outside beltway")

Through these and other means, over the course of a (span of time from beginning of solicitation to end of comment period - 9 month period?), comments were received from over half the states, eight municipal leagues, four state associations of counties, national associations representing state and local governments and their officials, and from a variety of local government officials (note: recommend adding an appendix or table, cataloguing responses received, by type. If tabulated by sub-category, lists need not provide for mutually exclusive categories, as double entries might be appropriate and easier to report).

Although ACIR had hoped to prepare an information system to assist in the organization of comments, resources prohibited the systematic tracking and summary of the received comments.

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The # comments to the ACIR and other sources reviewed by Commission staff identified over 177 separate Acts of Congress with mandate provisions meeting one or more of the specified criteria (note: recommend adding appendix listing 100/200+ mandates). The nature of the concerns identified by the criteria served to illustrate the diverse, complex, and challenging aspects in sorting out the role of federal mandates in the intergovernmental system. Constrained by time and resources, the ACIR elected to narrow the focus of its task of developing recommendations to a smaller, more manageable number of the federal mandates for closer inspection. The selection of this smaller set of mandates by the ACIR was based on the following materials:

- (1) The preponderance of communications identifying the mandates as troubling to state and local governments. (Is this true?/Are we describing it right?/Can ACIR staff verify this?);
- (2) The significance and diversity of issues posed for intergovernmental relations; and
- (3) The criteria published by the Commission on July 6, 1995.

[Note: if we cannot document and describe methodology for narrowing then just say we narrowed to 14 to simplify analysis but not claim any special characteristics attributed to these 14.]

The *Unfunded Mandates Reform Act* also includes several other features deemed important by Congress in selecting mandates for review, and making recommendations. In Section 302(e), the Act requires that the ACIR give "highest priority" to federal mandates "that are the subject of judicial proceedings between the United States and a state, local or tribal government." This level of analysis was not possible. In addition, due to limited time and resources, the ACIR was forced to rely primarily on comments and the Commission staff to assist in identifying these mandates. To the extent comments on these type of mandates were not received, there could be several unintended omissions from the condensed list. Moreover, more thorough analysis was needed to verify and clarify some of the issues raised, especially since preliminary follow-up suggested so many of the problems cited arose from mis-understandings and misconceptions about what the laws and federal agencies actually required.

The ACIR staff focused on a selected set of Federal mandates to form the basis for recommendation to Congress and the President. Although substantial constraints on time and resources limited the number of mandates analyzed and the quality of the analysis possible even on the limited number, the Commission believes that all Federal mandates could benefit from the evaluation originally conceived by Congress that looks more fully at the role of federal mandates in intergovernmental relations and the specific questions set forth in Section 302(a)(3) of the *Unfunded Mandates Reform Act*.

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COMMON ISSUES

ACIR's review of existing mandates found a number of common issues complicating intergovernmental relations. These issues and the ACIR's proposed recommendations to address them include:

- 1. Confusion and misinformation can create perceptions of rigidity that do not exist.**
The ACIR analysis revealed how frequently misunderstanding and misinformation about federal mandates create a perception of problems that do not exist. For example, while state participation in the federal Occupational Safety and Health Act is completely voluntary, some commentators erroneously believed it to be a federal mandate. *The federal government should have an easily identified state and local government ombudsman or network of ombudsman who can answer questions and clarify confusion about what federal laws require of states and localities. The federal government should make an effort to make the list of ombudsmen readily available to state and local governments throughout the country.*
- 2. Good communication is essential to good intergovernmental relations.** There are large gaps in information about the details of some federal laws and the assistance available to comply with it. Often, educational and technical resources exist in the federal government, state governments, non-profit service agencies and private for-profit legal and technical consultants to help local governments comply with federal laws, but the local governments are not aware of the availability of these resources. *When federal laws and standards are established, Congress should support both through authorization and appropriation the dissemination of information to state, local, and tribal governments about what the standards are and options for implementation.*
- 3. Frustration for local governments can be exacerbated by the difficulty of sorting out federal requirements and state requirements.** Some mandates identified as problematic by local governments were in fact state, not federal, mandates. Local governments noted that one problem they encounter in trying to deal with mandates is a lack of clarity in determining what is required by the federal government and what is required by the state government. This lack of clarity can be exacerbated by actual or apparent inconsistencies in what the two governments require. It can be further exacerbated if an individual state or federal official does not try to help the local official find an answer to the question or a resolution of the problem, but instead doesn't answer the question, refers it to the wrong office, or even tries to identify another government office as being the problem. *State governments should have an easily identified local government ombudsman or network of ombudsman who can answer questions and clarify confusion about what state laws require of localities. The state government should make an effort to make the list of ombudsmen readily available to local governments throughout the country. Both state and federal governments should make an effort to build strong links between the federal and state "local government ombudsmen." Also, federal and state government ombudsmen in each policy area should meet regularly with local governments in each state to develop clearer lines of communication.*

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- 4. Fear of retaliation can inhibit local government efforts to seek clarifying information from federal or state governments.** Some local governments expressed reluctance to contact federal or state regulatory agencies to seek clarification about compliance requirements, for fear that the call would identify them as being in non-compliance and lead to enforcement actions. Many federal and state agencies, including OSHA, EPA, and several state pollution prevention offices have programs and policies that allow local governments and small businesses to request assistance without fear of follow-up enforcement actions. *Federal and state regulatory agencies should develop policies that allow local governments to ask questions and seek and receive technical assistance without fear of "retaliation", so long as the local government is making a good faith effort to comply with the law.*
- 5. Inflexibility may be created by the way a law is implemented, rather than the way it is written.** Some of the problems identified to the ACIR may arise because of the way federal agencies or even individual officials choose to interpret the laws. *Federal agencies and officials should interpret laws in common sense ways, focusing on the result intended when the a federal mandate was established but allowing flexible methods for achieving those results.*
- 6. Conversely, too much flexibility may also create problems in program implementation.** Federal regulation and guidance that specify certain methods can reduce costs of compliance, especially for smaller communities, because they can save communities the cost of developing individual approaches for addressing their problems. Furthermore, differences in the implementation of federal mandates across the country can create inequities across communities and across companies operating in different jurisdictions. It may also make enforcement more difficult. *Wherever possible, mandates should be results oriented rather than process oriented. At the same time, federal and state agencies should consider "default recommendations" that allow communities the option of using a standardized approach and saving the costs of local design and adaptation.*
- 7. Detailed procedural requirements.** Detailed procedural requirements that do not permit flexibility in meeting national goals in ways best adapted to state and local needs and resources can be very frustrating. The imposition of exact standards or detailed requirements can result in unnecessary cost increases and delay achievement of national goals. *In general, state and local governments should be permitted flexibility in choosing the methods they adopt to comply with a mandate.*
- 8. Unnecessary paperwork.** Reporting local activities and results to a national data base can prove an invaluable resource helping federal, state, and local governments evaluate program effectiveness, compare policy alternatives, and identify problems of non-compliance. Where federal funds are involved, it can also ensure fiscal accountability to the taxpayer. It can, however, result in excessive paperwork demands on local governments. The Clinton Administration, in [], initiated a review of federal reporting requirements to identify and implement opportunities to reduce unnecessary reporting. *The federal government should continue its effort to work with state and local governments to review and streamline reporting*

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requirements.

9. Incentives to ensure attention to state and local government costs. Prior to passage of the Unfunded Mandates Reform Act, when the federal government established mandates that imposed costs on other governments without providing federal funds, the magnitude of the costs was not always considered. If the federal government has no financial obligation, it has little incentive to try to control costs on state and local governments as co-implementers of national standards. *The federal government should implement fully the Unfunded Mandates Reform Act and the requirements that costs borne by state, local, and tribal governments be given full consideration in the development of new laws and regulations.*

[Alternative language/closer to original ACLR staff recommendation: When state and local governments are co-implementers of national standards, the federal government should assume some share of mandate costs as an incentive to encourage federal attention to controlling costs in most cases. Exceptions to this would include cases where costs are created by those regulated locally, so that the need to create an incentive on those generating the costs dominate the value of a federal cost-control incentive, and cases where state or local government manage activities being affected by the standards, and federal subsidies will distort local incentives for improved management and innovation.]

10. Accountability of state and local elected officials undervalued by federal government processes. 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 that derive from the U.S. Constitution. Local governments, despite the important role they play in delivering government services, have been given even less consideration. Tribal governments, too, are often treated as another interest group when their interests are addressed at all, rather than as sovereign nations with whom the United States government has treaty and trust agreements. This problem was exacerbated by overly narrow interpretations of the Federal Advisory Committee Act recently corrected by the UMRA. *Federal policy debate and the resultant laws should recognize that state, local, and many tribal governments are often co-implementers of federal regulations who, in contrast to all other interest groups, are led by elected officials who must account to their voters for their actions just as must the President and Members of the Congress.*

12. Inability of very small governments to meet mandate standards and timetables. The requirements of 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 governments have only part-time staffs with little technical capability and very limited resource bases. Several federal agencies and federal laws incorporate provisions that allow extension of deadlines and modification of requirements for very small governments where minimal adverse effects on the achievement of national goals are expected. *Deadlines should be extended and requirements modified for very small local governments that cannot afford timely compliance with national standards. Where national standards that can affect the health or*

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safety of visitors to a community are not being met, visitors should be notified.

13. Models of flexibility worthy of further examination and replication. Federal, state, and local governments have been experimenting with many models for implementing national standards with increased flexibility. These warrant further examination for replication. *An intergovernmental effort should be undertaken to document, examine, and evaluate models that allow the citizens of the country to realize the value of national standards and flexible local implementation.*

14. Delays in compliance may drive costs of compliance up. State and local political processes can result in delays in addressing serious local problems and complying with reasonable national standards, ultimately leading to higher costs for citizens. Federal and state standards can serve as the needed external event that finally brings the relevant local parties to the table to negotiate the necessary action. *State and local governments should take advantage of the presence of federal (or state) standards for bringing critical players to the table in a timely manner to negotiate strategies for addressing local problems. The federal government should try to implement its laws in a manner that respects this dynamic relationship.*

Many of the recommendations suggested here for addressing the common issues are being carried out by some federal agencies, as well as state and local governments. As is apparent from the comments received by the ACIR in the preparation of the report, however, more widespread adoption of the suggestions made here is advised.

RECOMMENDATIONS ON INDIVIDUAL MANDATES

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DRAFT**Staff Report -- The Safe Drinking Water Act**

The Safe Drinking Water Act (SDWA) regulates drinking water for the roughly 58,000 community water systems (as well as providing lesser requirements for the additional 140,000 non-community water systems such as restaurants, campgrounds, churches, schools and factories) serving 25 or more persons on a regular basis. Approximately 37,000 of these systems serve less than 500 customers. The nearly 16,000 systems that are privately-owned range from trailer parks and homeowner associations, whose primary business is other than providing drinking water, to investor-owned water systems closely regulated by state utility commissions. 82 percent of systems in urban areas are publicly-owned.

SDWA was originally enacted in 1974 and amended in 1986. It directs the U.S. Environmental Protection Agency (EPA) to establish maximum levels for chemical, radiological and microbiological contaminants in public water systems, water testing and (for a few contaminants) specific treatment requirements, procedures for states to become primary implementation authorities for the Act and provides for enforcement and public notification. It sets a wide range of responsibilities for states and drinking water suppliers.

Why the Mandate was Adopted

Prior to 1974, states were responsible for ensuring drinking water safety, generally relying on voluntary standards set by the PHS. Congress adopted the SDWA in 1974 in response to a number of serious concerns that had been documented over the previous several years in studies of the U.S. Public Health Service (PHS).

A key PHS study cited in the congressional Committee reports found that only 10-15% of water systems conducted adequate testing for basic microbiological safety; that one-third of systems that tested found contamination exceeding the PHS limits; and that 56% of systems had physical deficiencies that could seriously affect safety. Small systems' lack of economies of scale was repeatedly noted as a major source of water safety vulnerability. An earlier PHS had noted that many of its drinking water standards were based on insufficient data, did not cover many known contaminants, and that new contaminants -- particularly organic chemicals with potentially carcinogenic effects -- were occurring in drinking water and could require regulation.

Thus, Congress decided in passing SDWA in 1974 that the lack of national requirements meant that the status quo was entirely inadequate to assure safe drinking water to the American people. Unsafe drinking water endangers both the residents of a local community and state and interstate travelers and interstate commerce, and is at odds with the American people's fair

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mandatory duty simply, on a regular basis, to examine the health effects and occurrence of a minimum number of contaminants, decide whether or not those contaminants warrant regulation based on that scientific examination, and regulate only those that do.

In addition, the current law's focus on affordable and available treatment technologies in setting standards does not allow flexibility to ensure that potentially-costly future regulations are also "worth it" in the degree of risk reduction they provide. A recent Congressional Budget Office (CBO) report found that costs per cancer case avoided for different contaminants currently regulated, averaged for all water systems, varied between \$0.5 million to \$4.3 billion. These are typically not treatment costs actually incurred, meaning "the high cost per cancer case avoided [is] ... the result of the extremely small number of cases avoided." Thus, the CBO also reported, "available data do not indicate that [SDWA] has imposed high costs on most households[,] ... [the] Act currently places a small fiscal burden on most municipalities," and 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."

However, the possible high cost of future regulations does suggest the potential value of having flexibility to examine and consider benefits and costs in selecting contaminants to regulate and in setting standards. EPA regulation and implementation requirements should focus efforts on the highest priority threats to public health, and encourage more cost-effective measures to gain the greatest risk reduction for drinking water dollars invested. Where the current law is too rigid to allow such important flexibilities, state and local officials believe it should be amended to provide for them.

A third area of concern has been the lack of federal financial assistance for compliance given the cost burden imposed by SDWA mandates, particularly for small systems. While over \$16 billion in grants and loans have been provided for rural water supply infrastructure through the Department of Agriculture, SDWA contains no authority for financial assistance to systems to aid with these compliance costs.

Innovations to Reduce the Mandate Burden: Progress to Date

In addition to the issues described above, some have raised other areas of concern for which appropriate, consensus remedies have already been identified in the congressional discussions over SDWA reauthorization, or in the EPA Safe Drinking Water program Redirection initiative. This initiative was undertaken beginning in October 1994 to explore ways in which the authority of the existing SDWA could allow the EPA to set more risk-based, cost-effective, flexible priorities for the drinking water

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expectation that tap water anywhere in America should be safe to drink. Thus, there is an enduring national interest in ensuring safe drinking water.

Benefits of and Concerns About the Mandate

In contrast with the record of limited compliance with the 21 voluntary PHS standards that led Congress to pass SDWA in 1974, today about 70 percent of systems comply fully with generally more protective standards for over 80 contaminants. Full implementation of surface water filtration requirements will prevent an estimated 83,000 cases of illness annually; of lead abatement requirements, will protect an estimated 600,000 children from unsafe levels of lead in their blood. Additional safeguards now under development are needed to prevent harm from contaminants such as cryptosporidium, the microbe that caused an estimated 400,000 cases of illness and 100 deaths in Milwaukee in 1993.

In 1986, Congress amended SDWA to identify 83 specific contaminants (61 not previously regulated) for which EPA was to set standards, and required that 25 additional contaminants be regulated every three years. And, it mandated EPA regulations governing filtration for surface water supplies and disinfection for all systems (both surface and ground water).

State and local concerns over the Safe Drinking Water Act focus on three principal issues. First, SDWA does not effectively address the high per capita costs sometimes faced by small systems because of their limitations in achieving economies of scale. While SDWA properly looks to the capability of the larger systems, which serve 80% of more of the American people on public water supplies, in defining what level of protection is affordable nationally, it lacks adequate implementation flexibility for small systems. In some instances, tests that have nominal costs per customer for large systems are extremely costly per customer for small systems. While variances and exemptions are permitted under some circumstances, the procedures and requirements to obtain them may be unworkable. It is also important to establish a more coherent and effective means to identify and target technical assistance to those small systems most in need of assistance to comply.

A second area of concern is standard-setting: how contaminants are selected for regulation, and how they are regulated once selected. Current law requires EPA to select and regulate 25 new contaminants every 3 years, regardless of whether or not so many contaminants actually present a health risk that warrants regulating, and regardless of whether scientific data or EPA resources clearly support all such regulations. Instead of the current law's mandatory duty to regulate, EPA should have a

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MCLs as Performance Standards: For example, one concern voiced is to revise SDWA so that compliance with maximum contaminant levels is based on performance not process. In fact, this is already the case. Systems whose finished water (that is, water within their distribution lines) violates an MCL need simply use whatever technology or other means their state will accept to bring their finished water quality into compliance with the MCL (the standard). Neither SDWA nor EPA's regulations require a system to use any specified technology to meet a MCL.

There have been two problems with MCL compliance in practice. One is that, for some contaminants, there is no technology or other means that many smaller water systems can afford that will treat their water to comply with the MCL. This problem is well-known, well understood, and appropriately addressed by providing new affordability variances, as in all three SDWA bills passed by either House of Congress to date.

The second problem is much less known. EPA must (under SDWA) set the MCL by reference to affordable, available technology that comes as close as feasible to the level at which there is "no adverse health effect." While the MCL that results is a numerical performance standard, many states have been unwilling to allow systems to use a different (or packaged rather than custom-engineered) technology than the technology that is the reference point for the MCL. This does not arise from a lack of state flexibility in implementing the law but results from an understandable state reluctance to approve technologies that may lack an extensive track record guaranteeing that systems using them would come into compliance with the MCL. The remedy is the provision in all relevant SDWA bills requiring EPA to list a range of technologies enabling states to presume that a system's use of such technologies will allow it to meet the MCL.

The Good Science Basis for Surface Water Filtration: Some of the more emphatic concerns voiced about SDWA relate to the Surface Water Treatment Rule (SWTR), which requires filtration for all surface waters whose sources are not clean and demonstrably free of the indirect indicators of microbial contamination, and of conditions that would tend to produce such contamination. The concerns are that the costs of filtration in such cases may be substantial and risks may seem relatively low because there may not always be direct evidence of specific existing and measurable contamination. While these concerns may seem troubling, the SWTR is based in sound science and well-established knowledge and practice in public health and sanitary engineering.

The SDWA allows EPA to prescribe a mandatory treatment technique, such as filtration, rather than a performance standard MCL, where it would be "technically or economically infeasible to measure the level of a contaminant." This is the case with microbial contaminants (such as giardia or cryptosporidium), which can be

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dangerous in any concentration and which (unlike most chemical or radiological contaminants) do not tend to dilute relatively evenly in surface water supplies. A system might sample uneconomically large quantities of water, find no waterborne diseases, and still not be able scientifically to be confident that diseases which would pose a serious threat to public health were not present. Thus, because of the nature and unpredictable occurrence of microbial contamination, the fact that samples may be free of direct contamination does not mean, scientifically, that the water is reasonably safe from that contamination where other, related conditions that show safety are not also present.

This is a widely accepted policy in the states and the drinking water and public health professions. Thirty states required filtration for all surface water systems even before the SWTR was promulgated. The American Water Works Association, the water industry's professional organization, has had a policy for three decades that water systems should filter all surface water supplies, without any exception -- even when source waters are well protected. The states and EPA have granted such exceptions to over 140 systems nationally. The late Abel Wolman, a pioneering sanitary engineer and for over six decades the dean of American water supply professionals, long urged surface water systems to use multiple barriers, in which they both protected source waters and filtered. Thus, EPA's allowance of filtration avoidance for source water protection is more lenient than the widely held view among sanitary engineers.

Nonetheless, some small water systems that lack economies of scale may well have difficulty affording filtration of surface water supplies. (It should be noted, however, that some of the claims of high filtration costs often inappropriately include high and unrelated costs of replacing worn out supply infrastructure.) Because surface water filtration is such a basic, essential health protection measure, EPA has advocated, and all three SDWA bills that passed the House or Senate have included, authorization of a State Revolving Loan Fund to help underwrite the cost of filtration, and provisions to authorize less costly, package filtration plants for small systems that states will accept in all cases, without custom engineering.

The challenge to which these measures respond is to find creative ways to afford the necessary level of protection consistent with the SWTR, not to provide less protection in this vital area. Indeed, protection of drinking water against microbial contamination is the most basic public health provision a water system can give its customers.

Water System Monitoring Requirements: While concerns have also been voiced that systems are forced unproductively to spend money on testing, which costs "do not improve water quality," this is true only in a literal sense. Tests of water quality do not literally "improve water quality" but simply tell what that quality is. But if systems do not adequately test the quality of

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their water, on what scientific basis can customers, state regulators, or the systems themselves be sufficiently confident that that water quality is safe? The burgeoning sales of bottled water, which a 1993 survey for the American Water Works Association identified as being about half motivated by concerns for drinking water safety, make complacency about consumer confidence and testing mistaken. Clearly, the appropriate issue for discussion in response to concerns about testing costs is, what constitutes "adequate" testing?

EPA has added testing waiver programs that states can adopt and which can cut testing costs by more than two-thirds. These waivers are given in situations where an anthropogenic (man-made) contaminant was never used in an area, or where hydrogeologic data shows that a system's water source is not vulnerable to contamination. Nearly all states have EPA-approved programs in place, and EPA has frequently given expedited, interim approval to allow many of these states to give systems waivers prior to full approval, specifically to address the cost concern.

However, EPA has recently recognized that even these waiver programs have their limitations. They are more resource-intensive to start than some states can afford without more federal aid, and gradual state implementation has not enabled all eligible systems to get the benefits of such waivers. Thus, as a part of its drinking water program redirection initiative, EPA has been framing and considering alternatives to reduce testing requirements for chemical contaminants (the source of greatest small system cost) to focus on those systems at risk of contamination, and on sampling to be done at the time of the water system's maximum vulnerability.

This approach can be flexible, cost-effective, responsible public health policy if tests are timed and located by good information to be properly indicative. Good information and good science are the foundation of responsible public policy.

Recommendations

Amendments recently approved by the Senate will revise some of the more inflexible provisions in current law, providing for important relief for small systems, risk-based priorities and cost-benefit flexibility in standard-setting, and more implementation authority for states, while retaining SDWA's priority on protecting public health. The Senate amendments also authorize funding for capitalization of state loan funds to reduce costs of compliance and to boost the capability of state drinking water programs, and allow some additional loan subsidies for hardship communities. The amendments thus address the leading concerns voiced by most state and local governments while retaining a baseline of federal standards that meet the justified

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METRIC CONVERSION

In 1988, Congress passed the Omnibus Trade and Competitiveness Act. Section 5164 of this Act amended the 1975 Metric Conversion Act to require that each agency of the Federal government implement the metric system of measurement in its procurement, grants, and other business related activities. It is this Congressional action that all Federal agencies, including FHWA, are implementing. In 1991, President Bush expressed his support for conversion to metric by signing Executive Order #12770 directing all Federal agencies to implement the metric system of measurement.

Since the approval of FHWA's Metric Conversion Plan in 1991, the FHWA has been working closely with AASHTO and the State DOTs to coordinate an orderly transition to the metric system. The 1991 Plan was a stepped process including a series of intermediate target dates with a final target date of September 30, 1996, after which all plans (PS&E's) authorized for construction had to be in metric units only. There was no requirement in the 1991 FHWA Metric Conversion Plan to change the legends on highway signs to metric units.

In 1995 the President signed the National Highway System Designation Act of 1995. This law postpones the FHWA's September 30, 1996 requirement to September 30, 2000. Project related metric conversion activities by a state are optional until September 30, 2000. Also, based on the NHS Act, the FHWA will not require metric legends on highway signs. This is a state prerogative. The Act does not restrict the use of Federal-aid funds for the installation of metric legends on highway signs if a state so desires. However, the 1996 DOT Appropriations Act prohibits the use of Federal funds for this purpose, but only during FY 1996.

Recommendation Leave the law as it is, and rely on federal waivers to ease problems of individual governments.

The overall goal of the AIR is to "lighten the burden" on states and local governments by repealing certain Federal mandates. The ACIR should seriously consider the American Association of State Highway and Transportation Officials' (AASHTO) remark "the time to stop conversion was in 1990 not in 1996..." Repealing the requirement that "states and local governments convert to metric on a Federal timetable as a condition of receiving Federal aid," will simply create a monumental hardship to most states as they will be taking the heat for conversion and experiencing unreasonable expenditure of time, effort, and money to convert back to the English system of measurement.

A national survey recently conducted by AASHTO indicated that the vast majority of state DOTs (42 states) have opted to retain September 30, 1996 as their target date for full conversion, another 5 states are talking about 1997 as their target date. Only 4 states have indicated their intention to begin converting to metric by September 30, 2000.

Although project related metric conversion activities by a state are optional until September 30, 2000, most states (over 80%) have indicated that they will continue to use September 30, 1996 as their target date for conversion. Many of these states have completed the conversion of their standard specifications, plans, manuals, and computer programs. These states have also been designing new projects in metric units for several years. States that have constructed metric projects have reported no problems during design and construction and have indicated that bids received have been comparable with bids in similar projects in English units.

DRUG AND ALCOHOL TESTING OF COMMERCIAL DRIVERS

The Omnibus Transportation Employee Testing Act of 1991 (P.L. 102-143, Title V; 49 U.S.C. §31306) mandates Department of Transportation regulations requiring drug and alcohol testing for operators of commercial vehicles. The Act requires use of testing procedures and laboratories meeting stringent Department of Health and Human Services standards and provides for confidentiality of employee information. The program's premise is that it is essential for transportation safety that individuals who perform safety-sensitive functions, such as driving large trucks and buses, are deterred from misusing drugs or alcohol. This rationale applies to all safety-sensitive transportation employees, regardless of what type of organization (e.g., private company, state or local government) employs them.

The DOT program includes significant protections regarding the accuracy and fairness of the program and the confidentiality of test results. The flexibility DOT has built into the regulations (e.g., the encouragement of the use of consortiums to operate testing programs for small employers), plus the operation of the free market for testing services (e.g., a highly competitive market for laboratory and collection services) have served to mitigate the cost impact of the program.

RECOMMENDATION: The Department should continue to refine the program and seek opportunities for additional flexibility and cost reduction, consistent with its statutory safety rationale.

REQUIRED USE OF RECYCLED CRUMB RUBBER (REPEALED)

The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (P.L. 102-240, Section 1038) required states to reduce used tire stockpiles by using tires' recycled rubber in asphalt pavement. All asphalt paving on state roads was required to contain recycled tire rubber, with the percentage requirement increasing to 20% in FY 1996.

As the Preliminary Draft report indicates, the crumb rubber legislative requirement already has been eliminated by the National Highway System Designation Act of 1995, Section 205(b). The Department of Transportation (DOT) reports that several recycled materials have been used, or have potential for use, in highway construction; however, each material should be evaluated on its own merits, through research, engineering assessments and cost evaluations.

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



U.S. Department of
Transportation

Office of the Secretary
of Transportation

File
ACIR

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

TELECOPIER COVER SHEET

DATE: 5-3-96

THE FOLLOWING 11 PAGES (INCLUDING COVER SHEET) ARE FOR:

NAME: Kris Baldwin

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: I faxed this last night and
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IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL THE ABOVE
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REQUIRED USE OF RECYCLED CRUMB RUBBER (Repealed)

Statutory Authority: Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (P.L. 102-240, Section 1038).

Repealed with the Passage of the NHS Designation Act of 1995. Section 205(b)

DRUG AND ALCOHOL TESTING OF COMMERCIAL DRIVERS

Statutory Authority: Omnibus Transportation Employee Testing Act of 1991 (P.L. 102-143, Title V; 49 U.S.C. §31306)

Summary of the Statutory Requirement: The Act requires the Department of Transportation to prescribe regulations requiring pre-employment, random, post-accident, and reasonable suspicion drug and alcohol testing for operators of commercial vehicles. The Act includes a specific mandate for use of testing procedures and laboratories consistent with requirements of the Department of Health and Human Services and provides for confidentiality of employee information.

Reason for Adoption of the Statute: It is essential for transportation safety that individuals who perform safety-sensitive functions, such as driving large trucks and buses, do not misuse drugs or alcohol. Alcohol and drug-related accidents are a serious transportation safety concern. Consequently, a program that deters the misuse of drugs and alcohol by safety-sensitive transportation employees by subjecting the employees to testing is needed to make transportation as safe as possible for the public. Obviously, this rationale applies to all safety-sensitive transportation employees, regardless of what type of organization (e.g., private company, state or local government) employs them. Congress was well aware of this rationale when it passed the Act, particularly in view of two multiple loss-of-life transportation accidents related to substance abuse in the years preceding its passage (one of which was caused by an intoxicated local agency employee), and intentionally applied testing requirements to all safety-sensitive employees, including those employed by state and local governments.

Benefits and Concerns: The primary benefit of the requirement is deterrence of alcohol and drug misuse by safety-sensitive transportation workers. While deterrence is difficult to quantify, industries in which there is data over a period of years have experienced declines in violation rates to low levels. Another benefit is the detection of a significant number of employees who have misused drugs or alcohol. These employees are prevented from performing safety sensitive functions until and unless they complete a specified return-to-duty process, including treatment for substance problems when needed.

The primary concern that employees have expressed about the program is that there need to be effective protections regarding the accuracy and fairness of the program and the confidentiality of test results. A variety of provisions in the statute and regulations meet this concern (e.g., requirements for the use of accurate testing methodology, Federally-certified laboratories, and evidential-quality procedures). The primary concern that employers have expressed is that the program can be costly. The flexibility the Department has built into the regulations (e.g., the encouragement of the use of consortiums to operate testing programs for small employers), plus the operation of the free market for testing

services (e.g., a highly competitive market for laboratory and collection services) have served to mitigate the cost impact of the program.

Progress to Date: The program had a phase-in period to permit employers to implement requirements in an orderly way (10.5 months for large employers, with an additional year for small employers). As of January 1, 1996, all covered employers in the U.S. were required to be implementing the program. Larger Canadian and Mexican motor carriers will join the program on July 1, 1996. The Department has provided extensive guidance and assistance to employers and testing service companies.

Innovations to Date: The Department has taken a number of steps to add flexibility to the program and reduce its cost. The Department has approved cheaper, non-evidential alcohol testing devices for alcohol screening tests. The Department has incorporated a random rate adjustment mechanism into its rules. This mechanism permits lowering of the random testing rate for an industry which has a very low violation rate. Under these provisions, the railroad and aviation industries' drug random testing rates have been reduced from 50 percent to 25 percent. The Department is currently engaged in a "reinvention" rewrite of its testing procedures rule, and is inviting the public's suggestions for clarifying and simplifying procedural requirements.

Recommendations: The DOT drug and alcohol testing program is an important transportation safety initiative. The Omnibus Transportation Employee Testing Act of 1991 and the Department's regulations successfully balance the safety need for deterring alcohol and drug misuse by safety-sensitive transportation employees and the need for an accurate, fair, confidential system that protects the interests of employees. The program properly applies to all employers of safety-sensitive transportation workers. The Department should continue to refine the program and seek opportunities for additional flexibility and cost reduction, consistent with its statutory safety rationale.

BRIEFING

ISSUE: The U.S. Advisory Commission on Intergovernmental Relations (ACIR) recommends repealing the requirement of metric conversion for plans and specifications by any State or local government as a condition for receiving Federal aid.

1. Overview of the statute

In 1988, Congress passed the Omnibus Trade and Competitiveness Act. Section 5164 of this Act amended the 1975 Metric Conversion Act to require that each agency of the Federal government implement the metric system of measurement in its procurement, grants, and other business related activities. It is this Congressional action that all Federal agencies, including FHWA, are implementing. In 1991, President Bush expressed his support for conversion to metric by signing Executive Order #12770 directing all Federal agencies to implement the metric system of measurement.

Since the approval of FHWA's Metric Conversion Plan in 1991, the FHWA has been working closely with AASHTO and the State DOTs to coordinate an orderly transition to the metric system. The FHWA's Plan is a stepped process including a series of intermediate target dates with a final target date of September 30, 1996, after which all plans (PS&E's) authorized for construction must be in metric units only. There is no requirement in the FHWA Metric Conversion Plan to change the legends on highway signs to metric units.

In 1995 the President signed the National Highway System Designation Act of 1995. This law postpones the FHWA's September 30, 1996 requirement to September 30, 2000. Project related metric conversion activities by a State are optional until September 30, 2000.

Also, based on the NHS Act, the FHWA will not require metric legends on highway signs. This is a State prerogative. The Act does not restrict the use of Federal-aid funds for the installation of metric legends on highway signs if a State so desires. However, the 1996 DOT Appropriations Act

prohibits the use of Federal funds for this purpose; but only during FY 1996.

2. Why the Statute was adopted originally (legislative intent, problems intended to be solved by the statute)

The intent of Congress, when passing the Omnibus Trade and Competitive Act of 1988, was to encourage the U.S. industry to convert to the metric system. In this sense, the buying power of a converted Federal Government would help the U.S. industry at home and, hopefully, this would trigger the beginning of a process that would lead the rest of the Nation to convert.

The 1988 legislation permits only two exceptions to metric conversion. These are:

1. When use of the metric system is determined to be impractical, or
2. When use is likely to cause significant inefficiencies or loss of markets to U.S. firms.

FHWA conducted an extensive public comment and the rulemaking process for our metric conversion plan and we attended many coordination meetings with the other Federal agencies. As a result of this extensive process, FHWA made the decision not to request an exception to the metric conversion requirement noted above.

3. Benefits and Concerns

The benefits of a conversion to metric units of measurements in the highway industry would include the following:

- 1) Simplicity - The strongest reason in favor of conversion is the simplicity of use of a decimal based system. The experience of every country that has

⑦

converted has been that the metric system was easier to use and less prone to error than the inch-pound system currently being used in the US.

- 2) Global competition - The metric system is the world's measurement system and a conversion by the US would make American goods more competitive in the global market place.
- 3) Increased Efficiency - Greater efficiency and competitiveness are available through the metric system. Upon acceptance, design costs and construction efficiencies should be evident.
- 4) Opportunity to Consolidate - The conversion process will provide industry with an opportunity to consolidate and redesign, perhaps through a smaller product line that is more responsive to demand.
- 5) Private Sector Conversion Underway - Many US businesses have already converted to become competitive in the international marketplace. Many American design and construction firms are already using metric units for their foreign contracts.

The concerns regarding metrification involve the resistance to change and the costs for conversion.

4. Progress to Date

Mr. Dean Testa, Chairman, American Association of State Highway and Transportation Officials (AASHTO) Metrification Task Force conducted a national survey to see the States' reaction to the metrification delay provision in the National Highway System Designation Act of 1995. After obtaining some clarification on the survey, it was concluded that, overall:

- 42 States (82%) have decided to stick to the September 30, 1996 deadline;
- 5 States (10%) will extend their implementation date one year (1997); and
- 4 States (8%) will be revising their metric conversion schedule to meet the September 30, 2000 deadline (ND, SD, AK, RI).

5. Innovations to Date

The primary innovation to date in this program has been FHWA's general acceptance of state and industry preferences for soft conversion (direct) rather than hard conversion (new rounded standards). This has allowed the conversion program to proceed in an orderly manner.

6. Recommendations

See the following:

TALKING POINTS:

- X The recommendation on page 5 in the ACIR's preliminary report, "repealing the provisions in these laws (among these is metric conversion for plans and specifications) that extend coverage to state and local governments" is based on the assumption that the metric mandate does not have sufficient national interest to justify intrusion on states or local governments. Although we do not "export" highways, it seems that our \$20 billion @ year program is of national interest - this is for highways alone. The total Federal construction program is much more than that.
- X The recommendation on page 9 in the ACIR's preliminary report, "repeal requirements that state and local governments convert to metric on a Federal timetable as a condition of receiving Federal aid" is based on several statements or assumptions made by the ACIR which are incorrect, misleading or without support.
 - First, as noted above, the DOT deadline of October 1, 1996 has been extended to October 1, 2000 by the

National Highway System Designation Act of 1995.

- "Substantial costs" is cited among one of the main reasons for the ACIR's recommendation. True, conversion costs are real, but minimal efforts are expected by local highway agencies since the State DOTs have done most of the work, i.e., local agencies will not have to "re-invent the wheel." Many locals use State specifications and these specifications are already in metric. Presently, we do not know of any local agency having made a comprehensive estimate of conversion costs, so, the statement "substantial costs" is really unfounded. Experience by other countries and several U.S. corporations indicate that initial costs were much less than originally anticipated.
- Another reason for the ACIR's recommendation is "Potential for mistakes in the bidding and construction process." Based on the survey we conducted in mid-1995 (copy attached), State experiences with actual design and construction of metric projects indicate that there have been no problems with design and construction activities, and that bids received were about equal or less when compared with similar projects in English units.
- Another reason stated was the "Problems for right-of-way acquisitions with property owners:" We have explained to Mr. Dearborn that we allow the use of dual units in our right-of-way program to avoid problems with property owners, title insurers, local recorders, etc. Apparently, Mr. Dearborn has chosen to ignore our previous comments.
- The report also states that "More than 2,200 waivers have been necessary to relieve hardship situations:" This statement confirms our suspicion that Mr. Dearborn's request for comments is a mere formality and that his opinion on the metric issue is not going to change. He obviously has turned around the statement we made in our October 23, 1995 letter to him (see attachment).

- Mr. Dearborn has concluded that requiring the same timetable for all states is not a good idea. This is contrary to our policy and goal of implementing an orderly transition to the metric system. Without national policy and guidance, neighboring states will implement metric conversion haphazardly creating confusion among contractors and consultants also doing business in bordering states.
- The quotations stated above were based on statements sent to Mr. Dearborn by individuals working for several States and local highway agencies. Their input is contrary to the official position of the States they represent (see attached FHWA letter to Mr. Dearborn dated October 23, 1995).
- X The FHWA recommends that only Option #1 on page A-14 in the ACIR's preliminary report be adopted: "Leave the law as it is, and rely on Federal waivers to ease the problems of individual governments."
- X The overall goal of the ACIR is to "lighten the burden" on States and local governments by repealing certain Federal mandates. The ACIR should seriously consider AASHTO's remark "the time to stop conversion was in 1990 not in 1996..." Repealing the requirement that "states and local governments convert to metric on a Federal timetable as a condition of receiving Federal aid," will simply create a monumental hardship to most states as they will be taking the heat for conversion and experiencing unreasonable expenditure of time, effort, and money to convert back to the English system of measurement.
- X A national survey recently conducted by AASHTO (copy attached) indicated that the vast majority of State DOTs (42 States) have opted to retain September 30, 1996 as their target date for full conversion, another 5 States are talking about 1997 as their target date. Only 4 States have indicated their intention to begin converting to metric by September 30, 2000.
- X Attached is a draft letter by the National Institute of



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission
on Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to convey serious concerns that the preliminary ACIR report reflects clear misunderstandings about the Endangered Species Act (ESA) and fails to acknowledge substantial reforms put forward by the Clinton Administration in making the law work more flexibly for States, local government and private landowners.

Fundamentally, we question the characterization of the ESA as an unfunded mandate. The ESA mandates only that each Federal agency ensure that its Federal actions are not likely to jeopardize the continued existence of threatened or endangered species. The ESA's only other regulatory provision prohibits anyone from killing or injuring individual threatened or endangered animals without authorization. Neither of these provisions constitute unfunded mandates.

The ACIR preliminary report summary recommends that "exemptions to the ESA should be applied more extensively," among other suggestions. Regrettably, more extensive use of the ESA's exemption process necessarily means that more endangered wildlife will become extinct. More extensive use of the ESA's exemption process is not necessary to balance conservation and economic concerns. In fact, the record to date shows from 1987-1995, only 0.3% of development projects were stopped as a result of the ESA consultation process, so it is fair to conclude that economic development objectives have almost always been met within the context of the ESA.

Perhaps more disturbing, the report fails to acknowledge unprecedented reforms advanced by the Administration to minimize economic consequences and increase flexibility of the ESA. Our efforts include regional conservation solutions such as the Pacific Northwest Forest Plan, the California Bay-Delta Accord, regional conservation planning in southern California, southern Utah and throughout the Southeast -- all developed in close cooperation with State and local governments. Across the country, more than 200 Habitat Conservation Plans

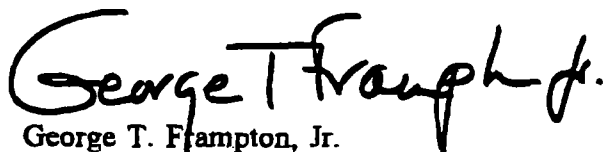
(HCPs) are under development with private landowners as a means of balancing conservation and development objectives. We have established "safe harbor" agreements that provide incentives to sustain wildlife habitat and provide regulatory certainty for private landowners. We have also built partnerships with States in endangered species candidate conservation and recovery programs, implemented uniform "peer review" procedures to ensure that every listing and recovery program is reviewed by independent scientific experts, and developed regulatory relief for small landowners.

There are a number of recommendations included in the ACIR report that reflect reforms we have already put in place. The ACIR report, for example, calls for additional funding and the Administration has consistently provided additional outlays in our budget proposals for State recovery and habitat conservation efforts including more than \$18 million for State habitat acquisition efforts in FY1996, which was eliminated by Congress.

Finally, there are several mischaracterizations of the regulatory provisions of the ESA within the ACIR report that include inaccurate representation of Section 9 prohibitions on "taking" of species. "Critical habitat" is also mischaracterized here as an automatic mandate rather than a standard in conservation of threatened or endangered species that may require special management considerations or protection by Federal agencies. Federal agencies do not have authority to target state parks for protection and recovery efforts. The only obligations that these non-Federal entities have under the ESA are those that every person and entity in this country has to not kill or injure individual threatened or endangered animal without proper authorization. They may, and sometimes do, voluntarily participate in Federal conservation objectives where the objective is to avoid regulation on private landowners.

In conclusion, we have demonstrated an unparalleled record in making the ESA work more flexibly for States, local government, and private landowners. We are interested in creating partnerships with ACIR to advance these efforts, however, it is important that we move forward with a common understanding of the ESA as well as with common objectives.

Sincerely,



George T. Frampton, Jr.
Assistant Secretary for
Fish and Wildlife and Parks

THE WHITE HOUSE
WASHINGTON

Facsimile from Diane Ikemiyashiro
Office of Presidential Letters and Messages

Voice: (202) 456-5519 FAX: (202) 456-5426

Number of Pages (including cover):

(7)

Date: 5.13.96

Time: 2:15 pm

To:

Elizabeth Dyer rm. 222

Voice:

FAX:

6.7028

☒ Incoming letter(s) from:

Judith Lichtenman + Donna Cahoff

re:

FMLA/ ACIR

☐ for your review

☒ per my e-mail or voice-mail message to you

☐ per your request

Additional comments:

- Homer's legal defense fund



WOMEN'S LEGAL DEFENSE FUND

#162605

April 16, 1996

The Honorable William Jefferson Clinton
The White House
Washington, D.C.

Dear President Clinton:

We write to thank you for your Administration's opposition to the preliminary recommendation that Congress repeal the Family and Medical Leave Act (FMLA) for state and local employees of the Advisory Commission on Intergovernmental Relations (ACIR). The ACIR's call for partial repeal of the FMLA is part of a larger plan to eviscerate federal standards that provide critical workplace and health safeguards for millions of Americans. Its Preliminary Report also advocates complete exemption of state and local governments from, among other laws, the Fair Labor Standards and Occupational Safety and Health Acts, and drastic cut-backs on the protections of the Americans with Disabilities and Individuals with Disabilities Education Acts.

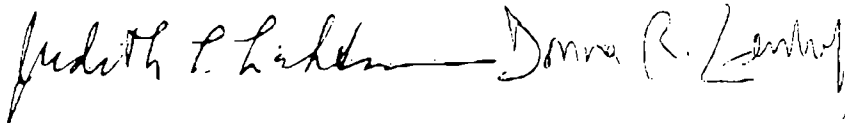
The landmark FMLA -- the first law of your Administration -- has made a tremendous difference in the lives of millions of American families, providing them with crucial economic security in these times when job loss can lead to severe economic consequences for families. According to the Family Leave Commission's new research, each year, at least one to three million American employees take specific advantage of the FMLA -- and state and local government employees are no exception.

The ACIR preliminary report claims that there is no compelling "national interest" justifying the FMLA's application to state and local governments. But the ACIR is wrong. The FMLA does serve such a compelling national purpose -- the purpose of ensuring that families can be together in times of critical need without risking their livelihoods. Indeed, the ACIR gives no facts or figures to support its concerns about the FMLA. Nor could it -- new scientifically valid research on the impact of the FMLA shows that it has had virtually no negative effect on employers, while helping employees tremendously. We reviewed this research, as well as the ACIR's claims about the FMLA, in the comments we submitted -- on behalf of the Women's Legal Defense Fund and 70 other organizations -- opposing the ACIR's recommendation; a copy of those comments is enclosed.

As you know, the Women's Legal Defense Fund, leading a broad coalition of representatives of women, children, parents, seniors, disabled children and their parents, health professionals, unions, religious and community leaders, and others, fought long and hard to ensure that the FMLA's protections for family employment security extend to as many Americans as possible. Had it not been for your signature, this minimal security for America's hard-pressed working families would never have become law; as you know, George Bush vetoed it twice.

Today we salute you again for your leadership on this critical issue to America's hard-working families. As the ACIR continues to develop its final recommendations, which are due to Congress soon, the continued strong opposition of your representatives on the ACIR will help ensure that the FMLA, one of the most vital policy successes of the Clinton Administration, will not be undermined. There is no justification for giving any government employees fewer family and medical leave protections than those enjoyed by employees of the private sector and of Congress.

Thank you again for your support.



Judith L. Lichtman
President

Donna R. Lenhoff
General Counsel and Director, Work and
Family Programs

Enclosure

cc: The Honorable Richard Riley
The Honorable Carol Browner
The Honorable Marcia Hale
The Honorable Robert Reich
The Honorable Edward Kennedy
The Honorable Christopher Dodd
The Honorable Bob Graham
The Honorable William Clay
The Honorable Pat Williams
The Honorable Jim Moran
The Honorable Donald Payne
The Honorable Patricia Schroeder

April 22, 1996

The Honorable John M. Novinson
Northbrook Village Manager
1225 Cedar Lane
Northbrook, Illinois 60062

Dear Mr. Novinson:

Thank you for your letter about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report.

Like you, the Administration has concerns about the report. Attached is a letter I sent to the ACIR stating the Administration's position.

Please contact my office if I may be of assistance.

Sincerely,

Marcia L. Hale
Assistant to the President and
Director of Intergovernmental Affairs

Attachment

DI
Here's the
info on the
ACIR report
Tracy

THE WHITE HOUSE

WASHINGTON

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. As a member of the Commission, I oppose many of the specific recommendations in the report, and would like to work with you ~~and other members of ACIR to develop a more balanced report of the Commission's work.~~

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) "review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;" (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of Federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents cursory and often misleading analyses of 14 Federal health, safety, environmental,

worker protection, and civil rights laws. These analyses fail to consider the views of or effects on working men and women as directed by Congress.

For example, the preliminary staff draft recommends that Congress repeal the Family and Medical Leave Act's (FMLA) applicability to state and local governments. The Clinton Administration opposes 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. In addition, the Administration strongly opposes the recommendations that would weaken other labor protections including proposed changes to OSHA, the Fair Labor Standards Act and Davis-Bacon-related acts.

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. The Administration strongly opposes 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.

The draft report's proposed changes to specific environmental laws are similarly disconcerting. The preliminary staff draft recommends -- again without adequate justification -- substantially weakening Federal environmental statutes. For example, the draft report recommends eliminating financial aid penalties for states that fail to meet Federal air quality standards where such states are making a good faith efforts to comply. The Administration opposes this proposal. As the draft report itself notes, most states did not adequately control air pollution until strong Federal standards and enforcement mechanisms were put in place. Now that sanctions are mandatory, states, with a few exceptions, are meeting compliance deadlines, although sanctions have almost never been applied.

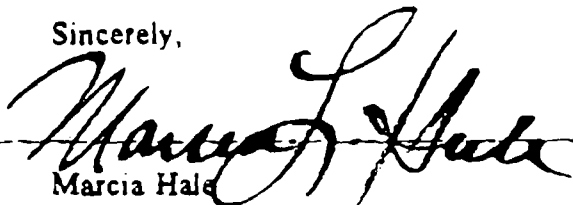
Another particular concern is the report's recommendations with respect to civil rights laws for people with disabilities -- specifically, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). The Administration opposes the draft report's recommendations with respect to these laws. 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 to reduce state and local governments' compliance obligations under these statutes would set back our efforts to guarantee equal rights for citizens with disabilities. 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 an admission fee. In my opinion, charging a fee in this context is inappropriate since it creates a barrier to full public participation. I strongly endorse an 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.

I have additional serious concerns about many of the draft report's recommendations not mentioned in this letter. Attached are comments prepared by Federal agencies and departments on the draft report. Federal agencies will also be forwarding comments to you and the Commission directly. I urge you to give their comments full consideration as the Commission redrafts the report.

Sincerely,



Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:

N T
N T

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
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

20-May-1996 01:12pm

TO: Daniel J. Chenok
TO: Michael A. Fitzpatrick
TO: Elizabeth E. Drye
TO: Kris Balderston
TO: Marilyn Yager

FROM: William White
Office of Public Liaison

SUBJECT: ACIR Meeting 2:00 PM Today in Rm 476

May 20, 1996

MEMORANDUM TO MARCIA HALE

FROM: BILL WHITE
OFFICE OF PUBLIC LIAISON

SUBJECT: ACIR MEETING WITH THE CITIZENS FOR SENSIBLE SAFEGUARDS

DATE/TIME: Monday, May 20, 1996
2:00 to 3:00 PM

LOCATION: OEOB #476

PURPOSE: To provide an opportunity for groups to review and
comment on the new alternative draft
recommendations from ACIR .

FORMAT:

Welcome and Introduction	Marcia Hale
ACIR Overview	Sally Katzen
Group Comments	Gary Bass
Closing Remarks	Marcia Hale

BACKGROUND:

Citizens for Sensible Safeguards (CSS) is a coalition of 150 national organizations that oppose the attack on federal regulatory protections. CSS, chaired by Gary Bass of OMB Watch, have been working aggressively to oppose the ACIR recommendations and coordinated the appearances of 50 witness at the ACIR hearing in February.

CSS greatly appreciated your March 1st letter to Governor Winter, and want the Administration to pursue a hard line toward the recommendations. They have been frustrated by the lack of information forthcoming from ACIR and are interested in coordinating their position and strategy.

We are having this meeting because the Administration is in the process of responding to the new alternative recommendations from ACIR, and as we begin to develop our response to the ACIR, we want to offer the groups an opportunity to download their major concerns with the report.

KEY POINTS

- o Thank you for your support. You are important.
- o Glad to have this meeting today on the DRAFT recommendations from ACIR.
- o ACIR timetable - Mid-June.
- o While we are in the process of responding to these recommendations, we need to hear of your major concerns with the report.
- o I have invited representatives from the Departments of Labor, Education, Transportation, and the EPA, who have involved in developing the Administration's response to ACIR.
- o (Sally - Overview of recommendations)
- o Let us open the meeting up for discussion by turning to Gary Bass from OMB Watch.

PARTICIPANTS

Gary Bass	OMB Watch
Ed Jayne	AFSCME
Joel Packer	NEA
Donna Lenhoff	Women's Legal Defense Fund (WLDF)
Doug Forand	ARC
Eddie Hailes	NAACP
Richard Womack	Leadership Conference on Civil Rights (LCCR)
Jay Power	AFL-CIO
Nick Stengel	OMB Watch
Judy Waxman	Families USA
Greg Wetstone	National Resource Defense Council (NRDC)

ADMINISTRATION PARTICIPANTS

Sally Katzen	OMB
Elizabeth Drye	DPC
Kris Balderston	Cabinet Affairs
Marilyn Yager	Public Liaison
Bill White	Public Liaison
Barbara Leach	Transportation

Jamieanne Studley
Henry Smith
Shelly Metzenbaum
Earl Gohl Labor

Education
Education
EPA

Marcia —
— Report by mid-June —



Office of the Attorney General
Washington, D. C. 20530

February 8, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission
on Intergovernmental Relations
800 K Street, N.W.
Suite 450, South Building
Washington, D.C. 20575

Dear Governor Winter:

I am writing to respond to the recommendations with respect to the Americans with Disabilities Act of 1990 (ADA) that were recently published for public comment by the U.S. Advisory Commission on Intergovernmental Relations (ACIR). These recommendations are apparently based on the significant misperception that the ADA imposes expensive requirements on state and local governments under inflexible deadlines.

The ACIR preliminary report was issued pursuant to title III of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48, which requires ACIR to conduct a study on the effect of Federal mandates on state and local governments, and to report to the President and to the Congress. However, the Unfunded Mandates Act expressly provides that "the Act shall not apply to any Federal regulation that establishes or enforces any statutory rights that prohibit discrimination on the basis of . . . disability." Despite this statutory restriction, the ACIR report recommends significant changes in the ADA and its implementing regulations as they apply to state and local governments.

The ACIR commendably recognizes the ADA's vital role in meeting this nation's obligation to ensure that citizens with disabilities are not excluded from the mainstream of American life. However, ACIR's preliminary report recommends significant changes in ADA implementation. I am concerned that these recommendations, if implemented, would seriously undermine the nation's effort to meet its obligations to people with disabilities.

Unfortunately, as noted, the ACIR report relies on the significant misperception that the ADA imposes expensive requirements on state and local governments under inflexible deadlines. In fact, the ADA is both flexible and reasonable. The statute was carefully crafted to protect the right of people with disabilities to participate in community activities while, at the same time, avoiding the imposition of undue burdens on

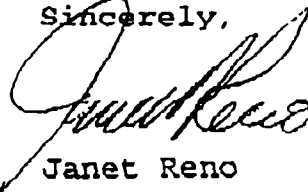
The Honorable William F. Winter
Page 2

public entities. Following precedent developed under section 504 of the Rehabilitation Act of 1973 (section 504) which prohibits discrimination on the basis of disability by recipients of Federal funds, the ADA generally permits state and local governments to exercise substantial discretion in determining how to make their programs accessible. In addition, cost is appropriately considered in determining what the ADA requires and whether compliance deadlines apply.

One example of the inherent flexibility in the ADA is the implementation of the requirement for the installation of curb ramps. The ADA requires public entities to install curb ramps to provide access to existing sidewalks if it is necessary to provide program access and if it can be accomplished without incurring undue financial and administrative burdens. This requirement is not new; it has applied to public entities subject to section 504 since 1977. In 1991 the Department of Justice's ADA regulation extended this requirement to public entities not subject to section 504. The regulation established January 1995 as the compliance deadline for the installation of required curb ramps, but provided that if necessary modifications could not be achieved without incurring undue financial burdens, those modifications would not be required to be completed within this time period. Since that time, in response to concerns expressed by members of Congress and others, the Department has proposed further extensions of time for compliance. The proposed extension of the compliance deadlines for the installation of curb ramps demonstrates that the ADA, in its present form, is being implemented in a way that permits state and local governments to consider local economic realities in making ADA determinations.

The Administration shares the ACIR's commitment to achieving effective implementation of the law without imposing excessive costs on state and local taxpayers. We believe, however, that the specific recommendations ACIR has made with respect to the ADA will not be effective in ensuring that the rights of people with disabilities are protected. To assist you in refining the ACIR recommendations, the Administration will provide more detailed comments on the ACIR report during the public comment period. I look forward to working with you in the future on this important issue.

Sincerely,



Janet Reno

THE WHITE HOUSE
WASHINGTON

February 29, 1996

MEMORANDUM TO: Marcia Hale
Kitty Higgins
Sally Katzen
Marilyn Yager
Jennifer O'Connor

FROM: Elizabeth Drye

SUBJECT: Draft letter from Marcia Hale to Gov. Winter Re. ACIR Report

Attached is a draft letter for your review. As we discussed, it characterizes the report as a draft staff product, argues that the report does not adequately reflect the Congressional charge to ACIR, argues that the report's recommendations are biased and not well justified, highlights examples of objectionable recommendations, and states Marcia's opposition to several specific issues. The letter also refers to an attachment outlining additional concerns.

I'm still working on the attachment, but am forwarding the work in progress. We had discussed my preparing a 4-5 page piece addressing each specific objectionable finding. I may need additional help with that task. I just received Agency comments on the following issues: the Endangered Species Act and the drug and alcohol testing of commercial drivers. We have no comments on the following: metric conversion for plans and specifications; Medicaid/Boren Amendment; and recycled crumb rubber.

I'm wary of portraying the attachment as a comprehensive statement on the Administration's concerns with the report -- if you want to pursue that strategy, we will need to allow time for a very thorough review of anything I and others put together. Instead, the Attachment could simply highlight particularly problematic issues.

Let me know how you would like to proceed. I'm at 6-5573.

DRAFT
2/29

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR's Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. I oppose many of the specific recommendations in the report, and would like to work with you and other members of ACIR to develop a more balanced report of the Commission's work.

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) review the role of Federal mandates in intergovernmental relations and their impact on State, local, and tribal governments, considering private sector effects; (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents a cursory and often biased analysis of 14 federal health, safety, environmental, worker protection, and civil rights laws.

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.

As discussed in more detail in the attachment to this letter, I oppose numerous other policy conclusions reached in the draft report. I look forward to working with you to improve the draft.

Sincerely,

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachment

cc: ????

The Occupational Safety and Health Act (OSHA)

The preliminary staff draft recommends repeal of provisions extending OSHA coverage to employees in participating states.

I [the Administration] oppose this recommendation. The draft report lists OSHA as a mandate, although state participation in OSHA is totally voluntary. Further, it recommends changes to OSHA based explicitly on perceptions about OSHA rather than facts. For example, the report notes that even in states that have not volunteered to participate in the Federal OSHA program, there is often a belief that OSHA requirements are nonetheless mandatory. That misperception argues for increased education about the Act's requirements, not repeal of those requirements.

Similarly, the report asserts that the Act's implementation is compromised by the Act's perceived rigidity, complexity, and burdens, and that efforts to enforce the act appear to focus on punishment rather than compliance assistance. To the contrary, OSHA provides states with extensive flexibility, and this Administration has worked with states to build flexibility into state plans. Further, the Department of Labor has emphasized cooperation, rather than punishment, in its enforcement policies.

Finally, the report fails to discuss the consequences of repealing OSHA coverage for state workers in states implementing the Act. We believe that repeal of OSHA with respect to these workers would endanger the health of thousands of workers who perform some of the nation's most dangerous jobs, including firefighting, hazardous waste cleanup, maintenance and sanitation work. According to the American Federation of State, County and Municipal Employees, almost 200 of their members were killed on the job between 1983 and 1993. These workers deserve the same protections accorded to America's private sector employees.

Americans with Disabilities Act (ADA):

The preliminary staff draft report recommends: increasing federal funding or modifying some deadlines and requirements for state and local governments, creating a single federal ADA enforcement and assistance agency, and limiting the private right to sue states and localities in federal courts.

I [the Administration] strongly oppose the draft report's recommendations with respect to the ADA. The draft proposals would seriously undermine the nation's effort to meet its obligations to people with disabilities. Making compliance standards voluntary for states and local governments eviscerates the civil rights components of the ADA.

ACID erroneously reports that the ADA imposes expensive requirements on state and local governments under inflexible deadlines. In fact, the ADA is flexible and reasonable; was crafted to avoid the imposition of undue burdens on public entities; permits state and local governments to exercise substantial discretion in determining how to make their programs accessible; and allows cost to be considered in determining what the ADA requires and whether

deadlines apply. Federal agencies are already implementing the ADA in a flexible manner, as the ACID recommends. DOJ postponed deadlines for municipalities to install curb cuts in response to concerns expressed by members of Congress and others.

Individuals with Disabilities Education Act (IDEA):

The preliminary staff draft recommends, among other things: increasing federal funding to 40% or relieving states from administrative mandates; requiring alternative dispute resolution practices; and denying parents the right to bring court challenges.

I [the Administration] oppose the draft report's recommendations with respect to this statute. The draft report essentially recommends that states not be required to comply with IDEA, jeopardizing the civil rights of students with disabilities. The draft's alternative proposal to increase Federal funding to 40% of special education costs is simply not realistic in light of current budget constraints.

The Administration's proposal to reauthorize IDEA would reduce paperwork, re-direct those energies into improving educational outcomes for disabled children, and encourage non-litigative means of settling disputes between parents and school systems, but it affirms the rights of these children and their families.

The ACID draft proposes prohibiting parents of children with disabilities from filing suit based on IDEA, and instead allowing only state or Federal agencies to bring such suits. Depriving parents and students of the ability to vindicate their rights under IDEA in court, if necessary, is fundamentally inconsistent with the intent of the law to create individual rights in those parents and students, and would call into question the nature of the "rights" created. Furthermore, the amount of litigation spawned by IDEA is not disproportionate: there were 61 reported IDEA cases in the Federal courts in 1994 -- slightly more than one per state. IDEA serves 5.4 million disabled children in 14,000 school districts.

As a practical matter, because the rights conferred on disabled students and their parents by IDEA are rooted in the non-discriminatory principles of other Federal laws (e.g., section 504 and the Equal Protection Clause), it is unlikely that such parents and students could be kept out of Federal courts in any event.

[TO BE REVISED / COMPLETED]

The Clean Water Act

The preliminary staff draft recommends either restoring federal sharing of costs or giving state and local governments greater authority to develop their own control methods and timetables for implementing federal standards for clean water.

I [the Administration] disagrees with the report's characterization of the current cost-

sharing arrangements [specifics?]. The federal government is currently providing assistance to state in ensuring water quality. A greatly enhanced federal contribution is not appropriate. Cost sharing arrangements must also create an appropriate incentive structure. Those polluting the water should fund its cleanup. The proposed change would undermine the current cleanup and pollution prevention incentives. Also, [the Administration] does not support any weakening of timetables or federal standards.

The Clean Air Act

The preliminary staff draft recommends permitting states to set their own ways of meeting air quality standards, and eliminating financial penalties where states make good faith efforts to comply.

I [the Administration] strongly oppose this provision

- EPA opposes removing financial penalties under CAA, noting that although sanctions are rarely applied, they've been effective in moving states to comply;

The Safe Drinking Water Act

- EPA supports the Senate SDWA bill but strongly opposes goal of handing total program to states.

Davis-Bacon Related Acts

To be added.

Marci's
Comment 5
3/1 PM

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR's Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. As a member of the Commission, I oppose many of the specific recommendations in the report, and would like to work with you and other members of ACIR to develop a more balanced report of the Commission's work.

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) "review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;" (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of Federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents cursory and often misleading analyses of 14 Federal health, safety, environmental, ✓

worker protection, and civil rights laws. These analyses fail to consider the views of or effects on working men and women as directed by Congress.

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.

The draft report's proposed changes to specific environmental laws are similarly disconcerting. The preliminary staff draft recommends -- again without adequate justification -- substantially weakening Federal environmental statutes. For example, the draft report recommends eliminating financial aid penalties for states that fail to meet Federal air quality standards where such states are making a good faith efforts to comply. I oppose this proposal. As the draft report itself notes, most states did not adequately control air pollution until strong Federal standards and enforcement mechanisms were put in place. Now that sanctions are mandatory, states, with a few exceptions, are meeting compliance deadlines, although sanctions have almost never been applied.

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). I oppose the draft report's recommendations with respect to these laws. 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 to reduce state and local governments' compliance obligations under these statutes would set back our efforts to guarantee equal rights for citizens with disabilities. 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

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I have additional profound concerns about many of the draft report's recommendations not mentioned in this letter. Attached are comments prepared by Federal agencies and departments on the draft report. Federal agencies will also be forwarding comments to you and the Commission directly. I urge you to give their comments full consideration as the Commission redrafts the report.

Sincerely,

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

OFFICE OF INTERGOVERNMENTAL AFFAIRS

TRANSMISSION NOTICE

THIS MESSAGE WAS ELECTRICALLY TRANSMITTED ON 2/29/96NUMBER OF PAGES (INCLUDING THIS PAGE): 2TO: CHRIS BANDARSON

AGENCY: _____

FAX NO.: _____ PHONE NO.: _____

FROM: JAY LEECH

MESSAGE:

CHRIS -

This is a quick analysis of the issues raised
in the draft report.

J3.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

February 29, 1996

NOTES FOR CABINET AFFIARS

FR: JAY ZIEGLER, DOI

RE: ACIR January 1996 Draft Report

The ACIR policy recommendations fail to address a number of administrative reforms implemented by the Clinton Administration to make the Endangered Species Act (ESA) more user-friendly for States, tribes and private landowners.

With regard to the ACIR recommendations, the Administration has provided a course to administratively address such issues as Federal ESA funding, expanding consultation with States, tribal governments, local governments and private interests and sought to minimize the consequences of conservation actions for private landowners. In short, we have demonstrated that there is substantial ability to engage stakeholders under the current law which had not been previously utilized.

Consistent with the recommendations of the Western Governors Association, there must be national standards for the conservation of endangered species while providing a larger role for States and other stakeholders in ESA listing and conservation actions. While most States have independent conservation programs for endangered species, the ESA recognizes that conservation of wildlife and plants is a national concern.

While we would generally agree with the measures identified in the ACIR report, the report fails to acknowledge substantial initiatives under the Administration's implementation of the Act to increase funding, increase stakeholder consultation, and work directly with States and local government to improve the balance in conservation and regional involvement.

Finally, in some areas, the ACIR Report would suggest inferentially that there be some interplay of cost-benefit analysis and conservation of endangered species. Such "optional conservation" endeavors clearly raises the likelihood of wide-scale extinction of endangered species and the habitat they depend on.

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

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worker protection, and civil rights laws. These analyses fail to consider the views of or effects on working men and women as directed by Congress.

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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.

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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). I oppose the draft report's recommendations with respect to these laws. 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 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.

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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.

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I have additional profound concerns about many of the draft report's recommendations not mentioned in this letter. Attached are comments prepared by Federal agencies and departments on the report. They will also be forwarding comments to you directly. I fully embrace their comments, and urge you to give them full consideration as the Commission redrafts the report.

Sincerely,

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:

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

01-Mar-1996 08:05am

TO: (See Below)

FROM: Marilyn Yager
 Office of Public Liaison

SUBJECT: RE: ACIR letter

I would prefer to send the attachment, but if not, then we need to add the stronger language on the ADA and IDEA section, specifically stating that we "oppose the draft report recommendations with respect to these laws." I need to be able to show a clear and strong denial that any of the report comments would be acceptable.

Distribution:

TO: Elizabeth E. Drye

CC: Marcia L. Hale
CC: Kathryn Higgins
CC: Sally Katzen
CC: Jennifer M. O'Connor
CC: Daniel J. Chenok
CC: Kris Balderston
CC: Diana M. Fortuna
CC: Deborah L. Fine

01 MAR 1996

To: Kris Balderston
From: Nancy Kirshner *NK*
Re: White House Letter to Governor Winter

After a quick review of the draft Winter letter, we believe there are two issues which you should be aware of and we hope you will include in the final letter and attachments.

First, the Unfunded Mandates Act instructed ACIR (Section 302(A) to consider the impact of the mandates on "working men and women." This was a fairly critical issue in the negotiation of the bill, and ACIR did not consider the issue in the report. From DOL's point of view this is a major omission on their part and we want to continually reiterate that fact.

The second issue is that we assume the attachment will include all of the department's issues including Federal Labor Standards, Davis Bacon, as OSHA and Family and Medical Leave, which are already written. If they are not all included then it implies that the Administration has given on some fundamental positions.

Please advise.

~~To: Elizabeth Dwyer~~
To Elizabeth Dwyer

From: Kris Balderston

Dan Cheate

DRAFT
2/29

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR's Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. I oppose many of the specific recommendations in the report, and would like to work with you and other members of ACIR to develop a more balanced report of the Commission's work.

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) review the role of Federal mandates in intergovernmental relations and their impact on State, local, and tribal governments, considering private sector effects; (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents a cursory and often ~~biased~~ ^{misleading} analysis of 14 federal health, safety, environmental, worker protection, and civil rights laws.

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 \$700-500 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. Dan says yes

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.

THE WHITE HOUSE

WASHINGTON

February 16, 1996

MEMORANDUM TO MARCIA HALE

FROM: Elizabeth Drye, Chief of Staff, DPC

SUBJECT: Comments on ACIR Report

Attached are background materials for your discussion with Gov. Winter regarding the draft ACIR report. We've outlined substantive concerns and provided talking points with respect to ACIR's recommendations regarding the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). We're still reviewing other parts of the report.

In addition, Debbie Fine in our office has been contacted by outside groups regarding the preliminary report. She has summarized their comments, concerns, and questions in a brief memo to me (attached).

Given the Administration's substantive concerns with the draft report, the level of outside interest, and the attention the March 6-7 conference will draw to the issue, we would like to work with you and others to develop a clear and timely response to ACIR's recommendations.

Attachments

cc: Sally Katzen
Kitty Higgins
Carol Rasco

TALKING POINTS: ACIR RECOMMENDATIONS AND THE ADA

- o If implemented, ACIR's recommendations would seriously undermine the nation's effort to meet its obligations to people with disabilities.
- o The ACIR report erroneously assumes that the ADA imposes expensive requirements on state and local governments under inflexible deadlines. In fact, the ADA is both flexible and reasonable; was crafted to avoid the imposition of undue burdens on public entities; permits state and local governments to exercise substantial discretion in determining how to make their programs accessible; and allows cost to be considered in determining what the ADA requires and whether deadlines apply.
- o The Department of Justice is already implementing the ADA in a flexible manner, as the ACIR recommends. DOJ has agreed to postpone deadlines for municipalities to install curb cuts in response to concerns expressed by members of Congress and others.
- o Making compliance standards voluntary for states and local governments eviscerates the civil rights components of the ADA, and has drawn fierce opposition from disability advocates. They may boycott the ACIR's public hearing on this report.
- o ACIR chose to study the ADA and the IDEA as Federal mandates even though the Unfunded Mandates Act does not apply to statutes that enforce the civil rights of people with disabilities.

TALKING POINTS: ACIR RECOMMENDATIONS AND IDEA

The Individuals with Disabilities Education Act (IDEA) is closely related to civil rights laws and constitutional protections that establish the basic individual right to the educational services and procedural protections that the IDEA helps states and localities provide.

The Administration has proposed to reduce paperwork for state and local school systems, and to promote the use of mediation rather than litigation to resolve disagreements between parents and schools. The House and Senate are using the Administration's proposal as the basis for their respective legislative vehicles (expected to move through Congress in the Spring of 1996).

With respect to the specifics of ACIR's draft recommendations:

(1) Increase Federal Funding to 40% of Special Education Costs (now at 7%): While in principle it would be desirable to increase Federal funding, any dramatic increase -- much less the five-fold increase called for by ACIR -- is simply not realistic in light of current budget constraints.

(2) Require Any Court Challenge Based on IDEA Be Brought By State or Federal Agencies, Not Parents. We have very serious concerns about this recommendation, and it is clearly contrary to Administration policy.

-- Depriving parents and students of the ability to vindicate their rights under IDEA in court, if necessary, is fundamentally inconsistent with the intent of the law to create individual rights in those parents and students, and would call into question the nature of the "rights" created.

-- While the Administration encourages non-litigative means of settling disputes between parents and school systems, the amount of litigation spawned by IDEA is not disproportionate: IDEA serves each year 5.4 million disabled children in 14,000 school districts across the country; according to ACIR, there were 61 reported cases in the Federal Courts under IDEA in calendar year 1994 -- slightly more than one per state.

-- Without correspondingly large increases in funding for Federal enforcement staff, the civil rights of children with disabilities could not be adequately enforced under ACIR's proposal. Even if additional Federal resources were available, it is hard to see how "Federalizing" the enforcement function, with intrusive investigations and Federal versus state litigation, would promote intergovernmental harmony and cooperation.

-- As a practical matter, because the rights conferred on disabled students and their parents by IDEA are rooted in the non-discriminatory principles of other Federal laws (e.g.,

section 504 and the Equal Protection Clause), it is unlikely that such parents and students could be kept out of Federal Courts in any event.

(3) Relieve States From Administrative Mandates. The Administration proposes to reduce paperwork related to special education and re-direct those energies into improving educational outcomes for disabled children. However, the Administration proposes to do so without jeopardizing the civil rights of students with disabilities.

(4) Require Alternative Dispute Resolution Practices. The Administration does not advocate requiring parents to use mediation to settle disputes between them and the school district about services for their disabled child, but has proposed that states offer mediation to parents as an optional means of settling disputes.

The disability community, especially families with children with disabilities, is very strongly opposed to these recommendations.

The Family and Medical Leave Act (FMLA):

The FMLA requires employers to grant eligible employees up to 12 weeks of unpaid leave, while maintaining medical health coverage, in order to take care of a sick child, spouse or parent; to address the birth or adoption of a child; or because of one's own serious health condition.

ACIR recommends that FMLA provisions that cover state and local employees be repealed on the grounds that:

1. 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..."
2. It further objects to the special provisions made for Federal governments, while none are made for state and local governments.

SUGGESTED RESPONSE:

- We agree with the report's acknowledgement of the importance of the "public accountability of elected officials and the collective bargaining powers of employee unions" as a source of protection for workers, but we also believe that the federal government has an important role to play in determining certain guarantees and rights for workers. The FMLA provides a fundamental safeguard for American workers.
- The FMLA, the first bill that President Clinton signed into law, is at the foundation of this Administration's commitment to family, and to balancing work and family.
- The ACIR draft report claims that this legislation creates burdensome costs for state and local governments without citing any supporting evidence. They provide no substantive justification for repealing provisions impacting public sector workers.
- The report further fails to acknowledge the many ways that FMLA actually often saves costs for employers, improves the workplace, and has helped thousands of working American families. Benefits range from reducing employee turnover, to improving worker productivity and morale, to greater labor-management stability.
- A study of private-sector employers commissioned by the bi-partisan Commission on Leave found that 86.5% of employers covered by FMLA report knowledge of FMLA, and about 90% of these firms report no costs or small costs associated with administration, hiring and training, and continuation of benefits under the FMLA. Further, at least 85% of establishments covered by FMLA report "no noticeable effect: on employee turnover, absences and productivity. There is no evidence to suggest that these findings would differ in the public sector.

- The Department of Labor has tried to work with all state and local governments to facilitate compliance of the law. Examples of these efforts include: (1) for those states where employers have collective bargaining agreements, they have granted extensions of the date of compliance to enable collective bargaining; and (2) they have distributed information to educate employers about their compliance obligations.
- In addition, the FMLA is flexible as applied to small employers: it exempts all employers with 50 employees or less. Furthermore, in order for an employee to qualify, there must be more than 50 employees within a 75 mile area. This applies to many local governments.
- The Federal government does have a special provision that the state and local governments lack -- which is an exemption from being sued. This distinction is one we ought to consider, however, repealing the Act for the public sector is not the answer. And furthermore, the Federal government has more generous policies than are required by the FMLA.

The Fair Labor Standards Act (FLSA):

FLSA guarantees maximum hours and a minimum wage, and requires compliance with child labor and record keeping provisions. All Americans depend on these standards.

The ACIR report recommends repeal of FLSA's coverage of state and local government workers on the grounds that:

1. Contention over proper implementation of FLSA in the public sector has resulted in substantial litigation, which has cost millions for states and localities.
2. A state or local government, unlike the Federal government, "cannot amend its personnel policies to accommodate situations unique to government employment or to reduce budgets."
3. "Employment policies of state and local governments should be set solely by the employment policies of those governments."

SUGGESTED RESPONSE:

- There is no reason why public sector employees should not have the same protections and standards as private sector workers -- particularly a minimum level of compensation and adequate time off.
- Absent these Federal standards, many employees would likely be left without protections from such oppressive working conditions as being required to work excessively long hours without overtime pay. This is in part evidenced by litigation at the state level that has resulted in retroactive pay for workers.
- The report suggests that confusion about the law's requirements has led to misapplication at the local level, which in turn has cost states and localities millions in litigation and retroactive pay. It is wrong to say that these governments should be relieved of their statutory obligations because they fail to meet them.
- As the report recognizes, the Department of Labor has provided assistance to state and local governments with respect to their FLSA obligations and has worked with state and local governments to recognize the unique issues that arise in the enforcement context. This partnership provides a foundation that ought to be strengthened rather than dismantled.
- Further, there is no foundation for the criticism against application of the FLSA to the public sector -- such as suggesting that Federal agencies have manipulated FLSA regulations in order to meet budgetary restrictions. Executive Branch agencies cannot ignore the law to reduce personnel costs; they must observe the law as enacted by the Legislative Branch.

- While more can be done to ensure consistent application of FLSA's requirements and to take into account significant changes in the workplace, these concerns are certainly insufficient grounds for denying state and local employees the essential protections of the Fair Labor Standards Act.
- The minimum wage in particular is a priority for this Administration as evidenced by the President's commitment to raising the minimum wage, about which he has spoken in numerous speeches, including the past two States of the Union.

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

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S.1

Unfunded Mandates Reform Act of 1995 (Enrolled Bill (Sent to President))

SEC. 301. BASELINE STUDY OF COSTS AND BENEFITS.

(a) IN GENERAL- No later than 18 months after the date of enactment of this **Act** , the Advisory Commission on Intergovernmental Relations (hereafter in this title referred to as the 'Advisory Commission'), in consultation with the Director, shall complete a study 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 law.

(b) CONSIDERATIONS- The study required by this section shall consider--

- (1) the feasibility of measuring indirect costs and benefits as well as direct costs and benefits of the Federal, State, local, and tribal relationship; and
- (2) how to measure both the direct and indirect benefits of Federal financial assistance and tax benefits to State, local, and tribal governments.

SEC. 302. REPORT ON FEDERAL MANDATES BY ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS.

(a) IN GENERAL- The Advisory Commission on Intergovernmental Relations shall in accordance with this section--

- (1) investigate and review the role of Federal **mandates** in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;
- (2) investigate and review the role of **unfunded State mandates** imposed on local governments;
- (3) make recommendations to the President and the Congress regarding--
 - (A) allowing flexibility for State, local, and tribal governments in complying with specific Federal **mandates** for which terms of compliance are unnecessarily rigid or

complex;

(B) reconciling any 2 or more Federal **mandates** which impose contradictory or inconsistent requirements;

(C) terminating Federal **mandates** which are duplicative, obsolete, or lacking in practical utility;

(D) suspending, on a temporary basis, Federal **mandates** which are not vital to public health and safety and which compound the fiscal difficulties of State, local, and tribal governments, including recommendations for triggering such suspension;

(E) consolidating or simplifying Federal **mandates** , or the planning or reporting requirements of such **mandates** , in order to reduce duplication and facilitate compliance by State, local, and tribal governments with those **mandates** ;

(F) establishing common Federal definitions or standards to be used by State, local, and tribal governments in complying with Federal **mandates** that use different definitions or standards for the same terms or principles; and

(G)(i) the mitigation of negative impacts on the private sector that may result from relieving State, local, and tribal governments from Federal **mandates** (if and to the extent that such negative impacts exist on the private sector); and

(ii) the feasibility of applying relief from Federal **mandates** in the same manner and to the same extent to private sector entities as such relief is applied to State, local, and tribal governments; and

(4) identify and consider in each recommendation made under paragraph (3), to the extent practicable--

(A) the specific Federal **mandates** to which the recommendation applies, including requirements of the departments, agencies, and other entities of the Federal Government that State, local, and tribal governments utilize metric systems of measurement; and

(B) any negative impact on the private sector that may result from implementation of the recommendation.

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