WHY ACIR REPORT DOES NOT MEET THE FEDERAL CHARGE

- Title III of the Act instructs ACIR to issue a final report on Federal mandates by March 22. It is not likely that this date will be met, given the March 15 closing of the comment period for the preliminary report.

- Congress asked 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**:

     -- providing flexibility,
     -- reconciling inconsistent mandates,
     -- terminating duplicative or obsolete mandates,
     -- temporarily suspending mandates not related to health and safety,
     -- simplifying mandate reporting requirements,
     -- establishing common Federal definitions,
     -- mitigating negative private sector impacts that result from intergovernmental mandate relief, and
     -- providing similar relief to the private sector.

  4) for each recommendation in 3, **identify specific mandates to be relieved**.

- **ACIR's draft report falls far short of the bill's ambitious charge.** There is little discussion the role of mandates, no attempt to place the individual mandates analyzed into a general framework, and no mention of the impact of State mandates on locals.

- The report contains a procedural discussion of how they did their work; a general section on common themes; and anecdotal analysis and recommendation of policy regarding 14 mandates that were chosen because they were most commonly cited by States/locals, consistent with ACIR's previously released review criteria, and presumably diverse in subject matter (although 12 of the 14 affect labor, the environment, or persons with disabilities).

- ACIR mentions but does not highlight that resources were limited, and only uses this to explain why they examined only 14 mandates; **with more money, they recommend examining more mandates, not answering the congressional charge**.

- ACIR also drafted for limited public comment a longer listing of roughly 200 mandates that has many inaccuracies.

- **Tribal governments are missing from the report.**

- **ACIR identifies 6 "common themes", which are primarily common sense and do not address many of the questions posed by the legislation**:

  1) Avoid detailed procedural requirements.
  2) The Federal Government should share costs as an incentive to restrain the mandate.
  3) Recognize that other governments are led by elected officials who are accountable.
  4) Ban litigation by individuals against States/localities that implement Federal laws (this would limit an individual's right to bring civil actions).
  5) Extend deadlines for very small governments.
  6) Designate a lead Federal agency for any mandate.

- Congress also instructed ACIR to conduct a baseline study to examine measurement and definitional issues involved in calculating total costs and benefits. This study was to consider the feasibility of measuring indirect as well as direct effects, including the benefits of Federal aid and tax benefits. **ACIR chose not to issue this study** due to resource limitations, although it would have provided important contextual analysis -- and could have been more useful than the catalogue of mandates issued by ACIR.

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

16-Feb-1996 01:01pm

TO: Elizabeth E. Drye

FROM: Paul J. Weinstein, Jr
Domestic Policy Council

CC: Sally Katzen
CC: Daniel J. Chenok

SUBJECT: Mandates

I think it is important that we emphasize all the things we've done on mandates since the President took office. The point to make is that the Unfunded Mandate Reform Act only took effect last month, and a report that suggests additional actions is innapropriate because we don't know what the impact of the new law will be.

In addition, it is about time that the governors and Mayors started giving the President some real credit on this issue. He was way out in front of Congress on this issue, as exampled by his EO 12875.

These include:

Executive Order 12875 -- "Enhancing the Intergovernmental Partnership" which prevents the issuing of any new, non-statutory unfunded regulations except in cases where the agency submits to OMB, prior to promulgation, a justification supporting the need for the regualtion and includes a description of the extent of the agnecy's prior consultations with state, local, and tribal governments. The EO also sets a deadline of 120 days for the approval or notification of wiavers requests. State and local governments praised the signing of this EO, which the President issued on October 26, 1993.

Unfunded Mandate Reform Act -- On March 22, 1995, the President signed legislation restricting Congress from passing on new mandates to state and local government witouth paying for them. This law honored the President's long-term commitment to restore balance to the intergovernmental partnership. The bill requires Congress to show how much mandates over $50 million per year will cost State and local governments, to require Congress to identify a specific funding source for these mandates, and if it does not meet these critieria, Congress must explicitly waive the requirement that there be no unfunded mandates.

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

23-Feb-1996 10:42am

TO: Elizabeth E. Drye

FROM: Diana M. Fortuna
Domestic Policy Council

SUBJECT: ACIR and disability

You probably know this, but on the ACIR report's recommended changes to ADA and IDEA, I am very wary/skeptical of the notion that we can compromise our way out of this. Since these are civil rights laws, the community is understandably very paranoid about losing any ground on them. They are viewed as sacred, and changing them is touching the "third rail" of disability politics. Certainly any legislative change is viewed as a horrible setback; also the President said last year at the 5th anniversary of the ADA that he would veto any substantive change to the ADA in a heartbeat -- and he said it in front of 100 disability advocates. We are perceived by that community as having a pretty good record on enforcing these 2 laws.

AFSCME®
American Federation of State, County and Municipal Employees, AFL-CIO
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Telex 89-2376
Facsimile (202) 429-1293
TDD (202) 659-0446

January 31, 1996

The Honorable William J. Clinton
President
United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

On January 24, 1996, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) released a preliminary report entitled, "The Role of Federal Mandates in Intergovernmental Relations." On behalf of AFSCME's 1.3 million members who work in state and local governments, I urge your attention to recommendations in this report, including repeal of OSHA, the Family and Medical Leave Act, and the Fair Labor Standards Act, as they apply to state and local governments.

We believe that ACIR has adopted a highly partisan position in this debate. According to information we have been provided by the ACIR, a conference and public hearing to respond to the report's recommendations will be held on March 6-7, 1996. The Federal Register reports that the conference is intended to satisfy the public hearing requirement. Yet, a registration fee is being charged for the conference, so that only those members of the public willing to pay an admission fee can be part of a public hearing!

The conference announcement adds to the sense of partisanship around this debate: "Feeling the Burden of Federal Mandates? Lighten the Load! Attend the ACIR Conference on Federal Mandates." This sort of rhetoric only feeds into the hands of those who would remove important federal protections that apply to air, water, workplace safety, rights for the disabled, and minimum wage protections for state and local employees.

Substantively, the ACIR recommendations reflect more the current conventional wisdom of intergovernmental relations than any reasoned conclusions resulting from honest debate. The thinking seems to be that if the federal government is going to reduce the deficit, it will not provide adequate funds for many of the programs that insure a safe environment and safe workplace for Americans. Therefore, states and cities should be free from these requirements.

We share your view that adequately funding these programs is the highest priority for Congress and that states and cities in their role as employers should be treated no differently than private companies. When Congress itself has been moving to provide its employees the protections of the laws it passes, this sudden reversal of policy is somewhat ironic. Providing exemptions for one sector will surely lead to demands for exemptions by the other. In the end, a "race to the bottom" will cause us all to lose the important safeguards we worked for years to enact.

We trust that you will direct your attention to the process and substance of the current ACIR debate, including having your Administration's representatives on ACIR (Carol Browner, Marcia Hale, and Richard Riley) use their positions to protect these important laws.

Sincerely,

GERALD W. MCENTEE
International President

GWMcE:hb

EXECUTIVE OFFICE OF THE PRESIDENT

29-Feb-1996 06:01pm

TO: (See Below)

FROM: Elizabeth E. Drye
Domestic Policy Council

SUBJECT: ACIR letter — The new draft, as promised in this e-mail!

I'd like to propose that we send the draft letter to Governor Winter without any attachment, and instead let agencies send letters directly to ACIR with their detailed comments if they wish to do so. DOJ has already sent a detailed letter, and apparently DOL is planning to send one. I just don't think we can represent their concerns adequately in a 4 page attachment.

I'll add a paragraph to the letter on environmental issues, so that the letter to Governor Winter touches on all the major areas of concern -- labor, disability, and environment -- and will make it clear that we have many additional concerns Marcia would like to discuss with him. I'll send this new draft to you within the next hour. I'm not planning to do any further work on the attahcment unless we decide that I should.

I've bounced this idea off of Dan Chenok, Kris Balderston, and our DOJ contact, all of whom agree.

Distribution:

TO: Marcia L. Hale
TO: Kathryn Higgins
TO: Sally Katzen
TO: Marilyn Yager
TO: Jennifer M. O'Connor
TO: Daniel J. Chenok
TO: Kris Balderston

CC: Diana M. Fortuna
CC: Deborah L. Fine
CC: Melanne Verveer

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, 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 cursory and often 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.

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, compliance deadlines, with a few exceptions, are being met, 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). 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.

I have additional concerns about many of the draft report's recommendations, and would be happy to discuss these with you. I look forward to working with you to improve the draft.

Sincerely,

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

cc:

THE WHITE HOUSE

Elizabeth,

Here's the draft critique by Citizens for Sensible Safeguards of ACIR.

Marilyn

On January 24, 1996, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) released a preliminary report, entitled "The Role of Federal Mandates in Intergovernmental Relations," which recommended drastic reductions in state and local responsibilities with respect to many of the nation's most important environmental, occupational, health, and civil rights laws.

Though presented as the balanced recommendations of a bipartisan, nonpolitical panel, the ACIR report is in fact a highly political, one sided document whose goals are scaling back or eliminating many of our most significant public protections - in the short term with respect to state and local governments, and in the long term perhaps for the general public as a whole.

ACIR concedes early in its preliminary report that, constitutionally, it is the responsibility of Congress to determine the proper roles for federal, state and local governments. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Supreme Court made that clear. The report further concedes that in making its decision the court "recognized that clear lines defining the appropriate scope of federal activities could not be drawn and, instead, left it to the political process to determine appropriate governmental roles." The Commission apparently took these instructions to heart and, rather than release a balanced report, chose instead to enter the political arena and proactively shape the policy debate.

The Report's Specific Recommendations

In its report the Commission examined 14 mandates placed on state and local governments out of more than 200 called to its attention, and recommended that seven be repealed and seven be retained "with modifications." The report calls for exempting state and local governments from having to comply with the following laws:

- Fair Labor Standards Act: "The public accountability of elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers."

- Family and Medical Leave Act: "Leave policies of state or local governments should be determined solely by the employment policies of these governments."

- Occupational Safety and Health Act: "[A]llow all states to set their own health and safety standards, taking into consideration their priorities and budgetary constraints."

- Drug and Alcohol Testing of Commercial Drivers: "The law is inconsistent in that it includes some employees, such as public works drivers, but excludes law enforcement and emergency workers from testing requirements ... [F]or small rural communities ... costs of compliance are disproportionately high relative to potential findings."

- Metric Conversion for Plans and Specifications: "[L]ocal contractors and suppliers are not used to working with metric measurements. As a result, the potential for mistakes in the bidding and construction process is significantly increased."

- Boren Amendment to Medicaid: "[S]tates should be allowed to conduct reimbursement rate negotiations with Medicaid service providers without preconditions set by federal law."

- Required Use of Recycled Rubber (already repealed)

The report calls for retaining the following seven mandates with "modifications":

- Clean Water Act: "[E]ither a return to substantial federal sharing in the costs of clean-up, or a relaxation of inflexible standards and deadlines".

- Individuals with Disabilities Act: "Either increase federal funding to the 40 percent authorized level or relieve states from prescriptive and costly administrative mandates."

- Americans With Disabilities Act: "Either provide increased federal funding ... or modify some deadlines and requirements."

- Safe Drinking Water Act: "[R]epeal some of the most onerous provisions, including mandatory additional tests for contaminants."

- Endangered Species Act: "[E]xemptions to ESA should be applied more extensively to minimize social and economic impacts."

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

- Davis-Bacon Related Acts: "[A]pply Davis-Bacon provisions only in projects with total dollar cost in excess of $1 million and in which the federal grant funding for the project exceeded 50% of the total project costs."

The Commission's recommendation that seven mandates be repealed, and seven retained "with modifications" conveys a false sense of balance. Recommendations for the first three of the seven mandates to be retained "with modifications" amount to "no money, no mandate." In times of reduced availability of federal resources, these recommendations must be viewed as further exemptions. The report, as a result, is not balanced in any sense of the word, and should be recognized as such.

Common Concerns Underlying ACIR's Recommendations

The Commission outlined six broad concerns with unfunded mandates in general, each of which contributed to its conclusions for the particular mandates it reviewed. These general concerns with unfunded mandates include:

(1) Detailed procedural requirements: According to the report, the federal government should stop imposing "exact standards and detailed requirements" and instead limit its involvement to providing "research and technical advice." State and local government are best suited to determine how to achieve program goals, and would do so if only the federal government would allow them much needed flexibility.

Unfortunately, this benign view of state and local intentions ignores reality. Many of the mandates reviewed by the Commission were applied to state and local governments precisely because, when left to their own devices, they chose to do nothing. Several environmental programs, including the Clean Air Act, came into existence only after states refused to participate in earlier voluntary programs.

The recommendation also ignores the high degree of flexibility that many of these programs already contain. The Safe Drinking Water Act, for instance, includes a state waiver process that allows certain states to opt out of testing for certain contaminants that are not likely to be found in a particular region. The Commission, moreover, falsely claims in its report that "alternative, less expensive technology to address specific risks is not permitted in some instances. Sometimes, the treatment requirements do not relate directly to specific existing and measurable contamination." This simply is not true. Virtually none of EPA's rules require the use of specific technologies to address drinking water contaminants. Instead, the EPA sets general water quality standards and lets state and local governments determine the best ways to reach them.

(2) Lack of federal concern about mandate costs: According to the report, too many mandates are developed with little or no regard for the costs imposed on state and local governments.

Again, for several of the reviewed mandates, this simply isn't true. The Safe Drinking Water Act requires all EPA drinking water standards to be based upon "feasible" technologies, explicitly "considering costs." The law also authorizes variances and exemptions for systems facing economic or other compliance difficulties.

The costs associated with these programs are also often overstated. The report cites a Congressional Budget Office review of the Safe Drinking Water Act to support its attack on that program. In doing so, however, it failed to note the study's central finding: "To date, the SDWA has resulted in fairly modest costs for most households. Although the SDWA has been cited as a particularly burdensome mandate, available data do not indicate that it has imposed high costs."

What about program benefits? In a era when regulations are routinely subject to cost-benefit analysis, the report completely ignores this half of the equation. One review of the Occupational Health and Safety Act (OSHA) found that OSHA coverage of all public and employees would save state and local governments at least $600 million annually through reduced medical and workers' compensation costs. The Endangered Species Act, singled out by the Commission for its adverse impacts on development and construction, also increases biodiversity and, as a result, reduces crop loss and is a significant source of cures for human disease.

(3) Federal failure to recognize state and local governments' public accountability: According to the report, "[f]ederal laws should recognize that state and local governments are led by elected officials who must account to the voters for their actions, just as the President and Members of Congress."

This sounds wonderful in theory, but ignores the reality that cause many of these laws to be applied to state and local governments in the first place. When Congress applied the Fair Labor Standards Act to state and local governments in 1974, several responded by going to court, temporarily succeeding in having the law overturned. At present there are 13 states that either do not have a minimum wage that applies to state and local workers, or have one that is less than the federal minimum wage. There are also 32 states that lack overtime provisions for these workers.

State and local irresponsibility was the primary reason the Safe Drinking Water Act was enacted - a response to widespread disease and contamination problems which were caused by states failing to voluntary adopt safe drinking water standards.

On other issues states and local governments have little incentive to address particular issues because the benefits apply broadly, beyond their borders. Midwestern states have less incentive to alleviate air pollution caused by coal-burning power plants because many of the benefits accrue not to their residents, but those in adjoining states. In the case of the Endangered Species Act, particularly with respect to migratory birds, poor conservation efforts in one state can have significant negative impacts even if the efforts by its neighbors are exemplary.

(4) Lawsuits by individuals against state and local governments to enforce federal mandates: The report recommends that "only the federal agency responsible for enforcement of a law should be permitted to sue state and local governments." Unfortunately, federal enforcement is not always enough to ensure full compliance with the law. Sometimes federal enforcement is lacking due to resource constraints, and in some instances, regrettably, enforcement shortfalls are deliberate. Provisions allowing ordinary citizens to sue state and local governments are, thus, critical to continued proper enforcement of many of our most important public protections. Proper enforcement of the Individuals with Disabilities Education Act (IDEA), for instance, is in large part dependent upon suits brought by parents against state and local school systems that otherwise refuse to provide their children with an appropriate education.

(5) Inability of very small governments to meet mandate standards and timetables: The Commission's report argues that "deadlines should be extended and requirements modified for very small governments." Improved flexibility, however, should not be an excuse for a lack of enforcement. A substantial portion of the nation's citizenry lives in small towns, and they are equally deserving of public protections. Moreover, the report itself spend little time distinguishing between large and small governments when reaching its conclusions for most of the programs it reviewed.

(6) Lack of coordinated federal policy with no federal agency empowered to make binding decisions about a mandate's requirements: The report recommends that a single federal agency be designated "to coordinate each mandate's implementation and to make binding decisions about that mandate." Improved coordination is always a worthy goal, but the continued applicability of specific public protections should not be contingent upon the designation of a particular agency to oversee its enforcement. Sometimes coordination between agencies is an unavoidable and, in fact, desirable outcome.

Conclusion

Federal mandates are widely misunderstood in today's political climate. In the abstract they are often condemned as burdensome, inflexible, and generally unneeded. But when the debate shifts from generalities to the specifics of particular programs, public support for dramatic deregulation usually shifts dramatically. Everyone is for eliminated burdensome and unneeded regulations. No one is for eliminating needed public protections that safeguard our environment, health, and safety.

The ACIR report has, to a certain extent, done the American public a great favor by crystallizing exactly what eliminating "unfunded mandates" really means.

The laws and public safeguards reviewed by the Commission should be preserved, not weakened. They protect millions of Americans from hazardous workplace conditions, discrimination, and an unhealthy environment. They remain as important today as when they were passed. This report is deeply flawed, both in its basic assumptions and in its specific recommendations, and deserves to be condemned as such by Congress, the president, and the public.

FAIR LABOR STANDARDS ACT

ACIR Recommendation

The ACIR recommends repealing provisions of the Fair Labor Standards Act (FLSA) covering state and local government employees. Other options described by ACIR include:

- amend the FLSA to provide state governments with regulatory and enforcement authority similar to that granted to the federal government;

- replace the FLSA provision allowing individuals to sue state and local governments over FLSA issues with language restricting FLSA suits to those brought by the federal government as a part of its enforcement responsibilities; and

- amend the FLSA to resolve the issues most often subject to intergovernmental controversies.

Coalition Response

There is absolutely no justification for singling out state and local government workers for exclusion from the minimum wage and overtime protections of the FLSA. Discriminating against such employees as secretaries, clerks, laborers and nurses' aides, by excluding them from coverage while their counterparts in the private sector continue to enjoy the Act's protections would be fundamentally unfair and without merit.

<u>History of FLSA Coverage</u>

The FLSA was enacted in 1938. It proclaimed Congress's intent to ensure "the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers ..." The overtime provisions of the Act were conceived to prevent employers from requiring employees to work excessive hours and to stimulate job growth.

In 1966, Congress extended coverage to a limited number of state and local government employees, mostly in schools and hospitals. In 1974, Congress expanded FLSA coverage to all state and local governments, thereby declaring that public employees should be entitled to the same standards of decency as other workers. Some state and local government employers disagreed and went to court seeking to have FLSA coverage declared unconstitutional. The Supreme Court sided with the employers in its June 1976 *National League of Cities v. Usery* decision. However, in 1985, this ruling was overturned. In its *Garcia v. San Antonio Transit Authority* decision, the Supreme Court finally guaranteed FLSA protections to all state and local government employees. The Court rejected as "unsound in principle and unworkable in practice" efforts to distinguish between governmental and proprietary functions.

In 1995, Congress passed the Congressional Accountability Act in recognition that its employees should be entitled to the same wage and hour protections as the rest of the U.S. labor force. In extending coverage to its employees, Congress also acknowledged the importance of a universal and uniform wage and hour public policy.

<u>Current Employment Policies</u>

Current state government wage and hour legislation suggests that while some state and local government workers may not be harmed under the ACIR recommendation, many will suffer. For example, 13 states, or roughly one-third, currently either do not have a minimum wage law applicable to state and local government workers or have one in which the rate is less than the federal minimum wage. With regard to overtime protections, 32 states, or about two-thirds, do not have overtime provisions in their laws that apply to state and local government workers.

While the status of state government wage and hour laws is not included in its report, ACIR maintains that public employee unions will provide wage and hour protections for workers if FLSA coverage is repealed. Unfortunately, this contention is belied by reality. Currently, only slightly more than one-third of all state and local government employees are organized. Furthermore, almost 5.5 million state and local government workers are without protections because they are currently denied collective bargaining rights.

The Issue of Control

ACIR contends that under FLSA, "a state or local government cannot amend its personnel policies to accommodate situations unique to government employment or to reduce budgets." This is false. There is nothing in the Act that denies any employer the flexibility to change work schedules, work shifts, operation schedules and hiring practices for the purpose of controlling overtime hours worked by employees.

State and local governments typically budget in advance for overtime costs. The control of overtime costs, like most budget expenditures, is dependent on proficient management.

Review the Regulations

ACIR maintains correctly that there have been conflicting court decisions regarding various aspects of the Act's regulations. However, this is no justification for repealing cover for state and local government employees. The U.S. Department of Labor (DOL) is currently studying these regulations. The DOL has been responsible for administering and enforcing the FLSA for almost 60 years. This responsibility has generated a wealth of knowledge and expertise crucial to ensuring that the objectives of the FLSA are met.

To the extent that the DOL identifies problems during its study of the regulations, they can be addressed through the regulatory process. As part of that process, public employer representatives and public employee unions can engage in joint problem-solving discussions similar to those undertaken when the Act was amended to cover state and local government employees.

Coalition Position

There is no justification for repealing coverage for state and local government employees.

For More Information Contact

(Need info)

THE OCCUPATIONAL AND SAFETY HEALTH ACT (OSHA)

The ACIR improperly views OSHA as a mandate since state governments and their political subdivisions are subject to its standards, and enforcement of those standards, if they opt to administer the federal OSHA program within their own jurisdiction. The Commission regards this as a mandate since the U.S. government, as well as state and local governments who opt not to administer their own programs, are excluded from the definition of "an employer" under the Act.

ACIR Recommendation
The ACIR recommends repealing the provisions which extend OSHA to public employees in participating states.

ACIR Options: The ACIR considered three recommendation options concerning OSHA:

1. Make no significant change in the law.
The Commission concedes that OSHA's protective standards and enforcement are "largely responsible for the 57 percent decline in workplace fatalities over the last 25 years." One option considered by the ACIR would be to recommend no fundamental changes to the program for public sector employers. The recommendation does not consider extending coverage to state and local government employees in federally administered states nor to federal government employees.

2. Amend OSHA to give participating state governments as much flexibility with regard to public employees as is authorized for federal agencies.
According to the Commission's report, "[t]he current law allows the heads of federal agencies to develop an occupational safety and health program that is 'consistent with' the federal OSHA program for businesses." The ACIR argues that this requirement allows the federal government great flexibility in developing safety and health programs. By contrast, the ACIR repudiates language in the Act requiring states to establish standards for their employees that are "as effective as the standards" administered by the state for private businesses. The ACIR argues that this does not provide states with the compliance flexibility they need and suggests that the language which applies to the federal government could apply to the states as well.

3. Delete language in the law regarding coverage of public employees.
According to the ACIR report, this option, ultimately recommended by the Commission, "would allow states to establish their own occupational safety and health standards for public employees independent of the federal program," and allow the states who opt to administer their own programs the same flexibility granted to the federal government with its own employees.

Coalition Response: In its assessment of OSHA, the ACIR begins with the premise that the reductions in occupational fatalities, injuries and illnesses are largely attributable to the enforcement of the standards promulgated under the Act. State and local government employees encounter hazards on the job and state governments should have the same responsibilities as private sector employers to provide protections. Coverage of employees under the Occupational Safety and Health Act, including its standards and the rights that workers have to a workplace free from recognized hazards, is an important public policy goal. To exempt local governmental entities from these requirements is, on its face, hypocritical.

The following are reasons to reject the Commission's recommendation.

OSHA Coverage is not a Mandate

The classification of OSHA coverage for public employees as a mandate is incorrect. In fact, there is no federal mandate extending coverage to state and local governments. Instead, coverage is a requirement only when a state voluntarily exercises the option to administer its own OSHA program for private sector employees or if the state chooses to voluntarily cover its public employees (as Connecticut and New York have done). Twenty-seven states have chosen not to cover public employees, and are currently under no mandate to do so.

Since OSHA coverage for public employees is not a mandate, recommendations by the Commission for changes in the law would appear to be beyond its purview.

Assuming however that the Commission has properly characterized public employee coverage under OSHA as a mandate, their recommendation for repeal fails on a number of counts.

Purported "Mandate" Fails to Meet Criteria Established by ACIR

The Commission has established four criteria to define mandates of significant concern, but has failed to establish that OSHA meets any of these criteria.

(i) The first criterion which must be met is that the mandate requires state and local governments to expend substantial amounts of their own resources without regard for state and local priorities. The Commission has failed to present any empirical evidence that a substantial financial burden is levied on any state in covering public employees under the Act.

The Commission has failed to note that although coverage may impose certain compliance costs for the states, that financial burden is accompanied by other federal financial assistance. For those states who have opted to cover their employees, financial assistance is provided by the federal government for the administration of regulatory and enforcement programs which affect both the private and the public sector. Grants which can fund up to 50% of the administration and enforcement expenses are available to states who accept the responsibility of covering public sector workers. Moreover, extending coverage may actually save money (see below).

(ii) The second criterion requires that mandates "abridge the historic powers of state and local government without a clear showing of national need." Again, the Commission's recommendation fails to meet this criterion. A national need for an occupational safety and health act was established by Congress when it passed the law in 1971. Although safety and health conditions in American workplaces have improved since that time, largely because of OSHA's standards and enforcement, significant problems still exist and must be addressed. The fact that more than 150 American workers die each day is continued evidence of a national need. Moreover, there is no abridgement of the historic powers of state and local governments since the decision to administer a state OSHA plan is a voluntary one.

(iii) The third criterion states that a mandate "impose requirements that are difficult or impossible to implement." While the ACIR recounts anecdotal accounts of state and local government confusion over OSHA standards, the ACIR fails to provide any empirical evidence that this is the case. In describing this criterion, the Commission suggests that implementation delays, the issuance of court orders, or the assessment of fines would represent evidence of compliance difficulty, yet no such evidence is presented in the report. It can only be assumed that such an assessment was not undertaken. Moreover, even if such evidence were to exist, we do not believe that it would necessarily override the valid public policy goal of reducing occupational death and injury.

(iv) The final criterion is that a mandate must be "the subject of widespread objections and complaints" by state and local governments. The Commission has again not demonstrated this to be the case. As a matter of fact, the methodology used by the ACIR to determine which mandates to consider does not represent a statistically significant sampling of state and local officials and should not be used to determine if a particular mandate meets this requirement.

Public Employees Face Significant Hazards on the Job

The arguments used by the ACIR concerning OSHA are similar to those used by private employers in their attacks on the agency and the underlying law. The ACIR's recommendation that public employees not be covered by the law is a classic case of "having your cake and wanting to eat it too." The Commission argues that the Act has been successful, but when it comes to states having to comply, it desires a blanket exemption.

Moreover, public sector employment can hardly be considered to be safe vis-a-vis employment in the private sector. Public employees suffer 3.5 times as many work-related deaths as private sector workers and 25% more injuries. Public sector employees perform work that is as dangerous as their private sector counterparts. Public sector employees are not simply employed in relatively benign settings, but hold a number of dangerous occupations including: police officers, corrections employees, sewer personnel, health care workers and sanitation employees. Clerical and office employment is increasingly hazardous, demonstrated by the increase in repetitive motion injuries such as carpal tunnel syndrome. To suggest that these workers should somehow be exempt from largely successful safeguards is a faulty proposition.

It is preposterous to suggest that public employees should not have the same rights as private sector employees, or that state and local governments, in their roles as employers, should not have the same responsibilities as employers in the private sector. We must not exacerbate a dual standard which already exists in states where public employees are not covered. For instance, a nurse employed in a public hospital should have the same protections as a nurse employed by a private facility.

Safeguards Prevent Public Employee Deaths and Injuries

Compliance with OSHA standards saves the lives of hundreds of public employees and spares thousands of workers and their families the pain and suffering of disability and death every year.

Statistics maintained by the National Safety Council demonstrate that work in the governmental sector is as dangerous as work in other sectors. For example, in 1993 the national average fatality rate for all industries is 8/100,000 workers while the rate for government workers is 11/100,000 workers. The rate in manufacturing, widely considered to be a hazardous industry, was 4/100,000 workers. Moreover, in those sectors where OSHA has concentrated its enforcement resources, such as construction and manufacturing, the fatality rate has declined by better than 50% in the last 25 years; conversely, in the government sector, where OSHA has not concentrated resources, the declines have been meager (see National Safety Council, Accident Facts, 1995).

Moreover, several states have found that extending coverage makes a positive difference in reducing workplace injuries and illnesses. For instance, North Carolina experienced a 24% decline in public sector injuries after extending OSHA coverage to that group and a study done by the New York Department of Labor found an 18% average annual reduction in states adopting state-run OSHA programs.

Coverage May In Fact Save Money

In addition to the failure to state an empirical basis for their recommendation, the Commission has not documented any evidence that coverage of public employees represents a significant financial burden on state or local governments. A study by Ruttenberg and Associates found that expanding OSHA coverage to all public employees would in fact save state and local governments at least $600 million annually. (See Ruttenberg and Associates, "Saving Money, Saving Lives: OSHA Coverage for Public Employees", March 1994).

The Ruttenberg study found that for every dollar spent on administrative costs, including federally funded research and evaluation as well as costs of compliance officers and inspections to state and local governments, jurisdictions save more than $10. Many of the savings can be reaped through improved prevention or workplace injuries and illnesses and the concomitant reduction in medical and workers' compensation costs.

Coalition Position

Requirements of the OSHAct concerning state and local governments do not represent a mandate. Instead they represent a state responsibility which accompanies the choice by a state to administer the OSHA program. The provisions requiring coverage of state employees should not be repealed. In fact, a prudent position for the Commission to take would be to equalize the requirements on all governments by extending coverage of the OSHAct to all public sector employees.

This recommendation was contained in legislation to amend the Occupational safety and Health Act during the 103rd Congress (H.R. 3160; S.575) and had broad bi-partisan support. Republicans in both houses who did not favor the legislation introduced substitute bills which contained provisions to extend coverage and the Bush Administration supported such extensions. Additionally, the 104th Congress has recognized the importance of safety and health protections for its own employees and extended coverage to them under the Congressional Accountability Act. The states should do the same.

For More Information Contact

(Need info)

FAMILY AND MEDICAL LEAVE ACT

ACIR RECOMMENDATION
Repeal the Family and Medical Leave Act for state and local governments.

ACIR OPTIONS
(1) Make no significant changes in the law.
(2) Exempt state and local governments from FMLA provisions.
(3) Give state governments independent regulatory enforcement responsibility for compliance with the law.

COALITION RESPONSE
In 1993, Congress passed the Family and Medical Leave Act (FMLA) in response to major demographic changes that prevented families from taking care of young children and sick parents. The FMLA provides a safety net for families -- ensuring that when family or health needs require that employees be out of work temporarily, they do not lose their jobs and the financial security that went with their jobs.

The FMLA extends to all employers having at least 50 employees. Eligible employees can take up to twelve weeks of job-guaranteed unpaid leave each year to care for a newborn, newly adopted or newly placed foster child or a seriously ill child, spouse or parent or to recover from their own serious illness.

The FMLA requires that when an employee returns to work, the employer must reinstate the employee to the former position or the equivalent and restore the employees full employment rights and benefits. The knowledge that they will be able to return to their jobs and their incomes -- and the continuation of their health insurance coverage during their leaves from work -- helps these employees and their families meet their family needs and weather their medical crises.

Yet ACIR proposes to repeal this critical safety net for America's working families in state or local government. In this chapter, we will first discuss the flawed methodology that ACIR used to arrive at this recommendation, and then turn to each of the arguments on which ACIR apparently relied.

<u>ACIR's Methodology in Evaluating the FMLA is Flawed</u>
The first and most serious flaw in ACIR's methodology is its virtual total failure to offer any facts or statistics in support of its claims about the FMLA. Neither its Preliminary Report nor the discussion at its December 19, 1996, meeting offers any factual basis for the ACIR's conclusion that state and local governments should be exempt from the FMLA. Nor, apparently, did the ACIR consult with employee advocates of the FMLA prior to adopting its preliminary recommendations. To the contrary -- the ACIR's report appears to be based solely on unsupported conclusions.

Indeed, the ACIR offers no proof that the FMLA requires states and localities to incur costs at all, much less costs that are "unfunded;" it offers no evidence of "costs" at all, other than an unsupported conclusory assertion. Nor did the ACIR conduct any studies to ascertain the costs that the FMLA created for state and local governments. As discussed below, private employers' costs in implementing the FMLA have been minimal at best; there is no reason to think that state and local governments have incurred any greater costs.

<u>A Compelling Nationaal Purpose Justifies universal FMLA Coverage</u>
A compelling national purpose justifies the FMLA's application to state and local governments: The dramatic increase in the number of women working outside the home in recent decades is well-known. This increase means that most American parents -- in single-parent and two parent households alike -- have both job responsibilities to meet and families to nurture. For the great majority, this system is necessary to make ends meet. At the same time, our society has seen an increase in elderly parents who depend on their adult children for primary care.

Prior to FMLA's enactment in 1993, a large number of employers, including state and local government employers, did not provide employees with any job security during periods of family and medical leave. Until the FMLA, people risked losing their jobs when they had compelling family or medical needs that kept them out of work for a short while; when they had newborn or adopted children; when they were temporarily unable to work because of serious medical conditions; and when they had to care for seriously ill children, spouses, and parents.

For example, a survey released by the Bureau of Labor Statistics in 1990 found that, at that time, only 37 percent of women working in firms with more than 100 employees were eligible for unpaid "maternity" leave upon the birth of a child; only 18 percent of male workers were eligible for "paternity" leave. Prior to the FMLA, many, but not all, states imposed some requirement in this area, but job-guaranteed family and medical leave was not established as a universal labor standard.

Today, the FMLA provides much needed safeguards for state and local employees. For example, in a September 1995 survey of state affiliates, the National Education Association determined that the FMLA improved coverage for family leave for 48 percent of its state affiliates, and improved medical leave coverage for 32 percent.

In fact, FMLA has made a tremendous difference in the lives of millions of American families -- providing them with crucial economic security at a time when job loss can lead to severe economic consequences for families. According to new scientific research by the Family Leave Commission on the effects of the FMLA, two-thirds of employers have changed their policies to comply with FMLA. Each year, at least one to three percent of American employees take specific advantage of FMLA -- and state and local employees are no exception.

For Velma Parness, a state employee at the University of California Berkeley Extension, the FMLA made it possible for her to work part-time at home when her husband was dying from chronic myelogenous leukemia. In her heartfelt testimony before the Family Leave Commission, Ms. Parness explained:

> What I do know, is what a difference [the FMLA] made in the quality of remaining time we had together . . . I had become the sole wage earner of our family, and carried the family health insurance through my employer. The loss of job and benefits would have been terrible for us . . . Quite frankly, I don't know what I would have done if I didn't have that job to go back to . . .

These experiences are typical of those of many Americans for whom the FMLA has provided job security during the most critical times in their lives.

Thus, the ACIR's self-serving conclusion that no sufficient "national interest" justifies the FMLA's application to state and local governments is completely unsupported. It flies in the face of the findings that in 1993 led Congress to pass the FMLA with strong bipartisan majorities, and President Clinton to sign it as the first legislation of his Administration.

<u>The FMLA Does Not Impose Substantial Administrative Costs on State and Local Governments</u>
The ACIR's claim that the FMLA imposes too many administrative costs on employers is equally flawed. The ACIR asserts, without citation, that the FMLA created new costs in connection with revising leave policies and continuing health insurance benefits. Yet, new scientific research by the Family Leave Commission on costs associated with business compliance with the FMLA establishes a very different picture. The Commission conducted a random-sample, statistically significant survey of private business experience with the FMLA in 1994 and found that:

* eighty-nine percent of employers experienced only a small increase or no increase at all in administrative costs to comply with the FMLA.

* ninety-two percent of employers found it easy to determine employee eligibility under the FMLA;

* seventy-six percent found it easy to comply with the additional record-keeping;

* eighty-one percent found it easy to coordinate state and federal leave policies;

* seventy-eight percent found it easy to coordinate the FMLA with preexisting leave policies; and

* ninety-three percent experienced only a small increase or no increase at all in the cost of continuing benefits during employees' FMLA leaves.

State and local governments had even more extensive family and medical leave policies in place prior to the FMLA's enactment than the private sector: while only 34% of private sector employees had access to job-guaranteed "maternity leave" in 1993, 56% of public-sector employees had such access. Similarly, in a recent survey of state affiliates, the American Federation of Teachers found that "only a small fraction of surveyed locals have actually incorporated the provisions of FMLA into their contracts" because locals were eligible for leave before the FMLA's enactment. Thus, the public sector had <u>less</u> adjustment to do to come into compliance with the FMLA than the private sector -- and therefore incurred <u>fewer</u> costs. There is no evidence whatsoever to suggest that public-sector employees incurred any <u>greater</u> costs as a result of the FMLA.

Moreover, the ACIR is incorrect to suggest that the burdens of implementing the FMLA (if any) are not shared among governments. In fact, under the FMLA, all government employees are essentially treated the same. Indeed, the law does "contain special provisions for federal government employees," but those provisions are <u>more</u> generous for employees than those governing the private sector and state and local governments (as well as the Congress).

Nor has the ACIR offered any evidence to support its claim that the FMLA has created an avalanche of lawsuits against state or local governments. In fact, available evidence shows the contrary. We have found only <u>two</u> lawsuits under the FMLA against state or local employers. And according to the September 1995 survey by the National Education Association, for education employees in some states, the number of grievances and lawsuits filed over family and medical leave were actually <u>reduced</u> after FMLA.

Finally, the ACIR is flatly incorrect that small state and local government employers are overwhelmed by the FMLA's administrative costs. Small state and local governments (those with fewer than 50 employees within a 75-mile radius) are expressly <u>exempt</u> from the statute.

<u>State and Local Governments Actually Have Great Flexibility In Implementing the FMLA</u>

Like other workplace standards that are part of the fabric of the American employment experience, the FMLA sets a <u>floor</u> below which employers' family and medical leave policies may not fall. But that floor is fairly minimal; and once it is met, state and local employers, like private employers and the federal government, have enormous flexibility in establishing family and medical leave policies, and indeed in implementing the FMLA itself. The only limitations on that flexibility are those imposed by their own laws or ordinances or by their agreements with unions representing their employees.

Among the myriad decisions that state and local employers have the discretion to make about provision of family and medical leave are the following:

-whether to cover employees who have not worked for a year or for at least 1250 hours in the preceding year;

-whether and in what circumstances to provide <u>more</u> than 12 weeks of job-guaranteed leave;

-whether and in what circumstances to require medical certifications for leaves based on medical conditions;

-whether to require employees to exhaust accrued paid sick and annual leaves as part of their (otherwise unpaid) family or medical leave;

-whether to allow employees to use accrued paid sick leave while they are on (otherwise unpaid) family leave;

-how to treat benefits (other than health insurance) during leave;

-how to cover employees' work while they are on leave;

- whether to provide wage replacement during leave, and if so, how much and by what means.

Indeed, a number of states have, by state law, taken the opportunity to make such decisions. For example: California decided to conform its family and medical leave law (applicable to private employers as well as to state and local governments [NEED TO DOUBLECHECK THIS]) to the federal FMLA in general, except that California's job-guaranteed maternity disability leave is longer than the FMLA's 12 weeks; [OTHER DIFFERENCES?] Ohio provided state employees with up to four weeks of leave for birth or adoption at 70% pay. These variations show how much flexibility states and localities continue to have in designing and implementing their family and medical leave policies.

Conclusion

In sum, the ACIR's recommendation to repeal the FMLA for state and local employees is based on flawed methodology and incorrect factual assumptions. The FMLA is not a costly burden for states and localities. To the contrary, it provides critical protections for state and local employees. It should not be repealed.

COALITION POSITION

The ACIR should withdraw its recommendation to exempt state and local governments from the Family and Medical Leave Act. None of its other recommended changes for state and local governments should be made.

BOREN AMENDMENT

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

ACIR Recommendation
Repeal the language of the Boren Amendment and insert language making states solely responsible for determining Medicaid reimbursement rates.

ACIR Options

1. Retain current provisions with no significant changes.
2. Delete the federally mandated criteria and makes states solely responsible for Medicaid reimbursement rate determinations.
3. Limit litigation actions to enforce the Boren Amendment.

Coalition Response
The Coalition rejects the ACIR conclusion that Medicaid creates federal mandates, such as the Boren Amendment. The ACIR criteria for identifying mandates of significant concern (on page B-3 of the preliminary report) concludes that "mandates in entitlements" are included because states governments have little discretion over whether or not to participate. ACIR cannot change federal law by simply declaring that specific statutes are mandates.

Medicaid does not create federal mandates. The statute clearly intends that participation by the states is voluntary. In fact, Arizona did not participate in the program until many years after its enactment. The federal law sets up a contractual agreement. If the state wants to receive the billions of dollars in federal funds that are available to each state, then the state must meet certain conditions. The statute sets up federal guidelines, including minimum coverage groups and services, and offers the states numerous options that can be included in the state plan. As each state provides services for its eligible populations, the state submits bills to the federal government. The state pays its designated share of the cost and the federal government pays the rest. The states are not mandated to participate in the Medicaid program and therefore they are not mandated to reimburse providers by a specific methodology.

The Boren Amendment is one provision in the complex, intricately designed federal-state partnership which is called Medicaid.. The Amendment was originally intended to control costs. The Governors supported this amendment because they wanted help in keeping reimbursement rates for hospitals and nursing homes down to a "reasonable and adequate" level. Over time, as medical care inflation increased dramatically, the "Boren Amendment " was used by facilities to demand higher reimbursement rates than the states wanted to pay. The Governors changed their position on this provision and now uniformly cite it as a top priority for repeal.

Recently, the Governors have set their sites on grander reform than simply repealing the Boren Amendment. The Governors would like to see the entire Medicaid "contract" dramatically changed. On February 6, 1996, the National Governor's Association issued an outline which changes the very nature of the federal-state partnership. In the Governors' plan, the states contribute less money and the federal government is limited in its ability to hold states accountable for the billions of federal dollars they receive. The Governors include the repeal of the Boren Amendment in their revision of Medicaid. It is only one item in the complicated changes being proposed.

ACIR should not reach into the middle of the entire Medicaid contract and attempt to repeal one provision by labeling it "a burdensome mandate."

Coalition Position
Retain the current provisions.

CLEAN AIR ACT

ACIR Recommendation

The Commission recommends relaxing some of the Act's deadlines and providing more federal financial aid and technical assistance. The report recommends amending the Clean Air Act to provide only performance goals without providing any guarantee the goals will be met. The Commission advocates eliminating the Act's specific requirements for emission reductions and the sanctions states currently face for failing to deliver clean air.

Coalition Response

The ACIR report acknowledges the repeated, past failure of states to develop control measures to clean their air to healthy levels. States were first required to develop and implement plans to achieve national air quality standards in 1967. As a result of the states failure to do so, plan deadlines were extended in 1970, 1977 and then again in 1990. In 1990, 150 million Americans still lived in areas that violated the federal air quality standards.

Nevertheless, the Commission recommends eliminating improvements made to the Clean Air Act in 1990 to guarantee that harmful air emissions in polluted urban areas will be reduced. While states retain the authority to develop the specific plans for cleaning their air, the 1990 amendments to the Act require some specific emission reduction controls. For the most part, however, what is required of the states is to demonstrate that harmful, smog-forming pollutants are reduced by specified amounts by set deadlines. If these deadlines are missed, EPA is authorized to impose sanctions on the state. These sanctions are not punitive, but are designed to achieve some of the emission reductions the state failed to produce. For example, one sanction requires the emissions to be generated from a new manufacturing facility to be offset by at least 2 to 1 from emission reductions elsewhere before the new facility can be built.

The ACIR report implies that the Act's sanctions should be eliminated. While supporting the goal of clean air, the Commission would do away with the means to achieve it. To eliminate the sanctions would penalize those states which have put the pollution control measures in place to comply with the law and deliver cleaner air to their citizens. In order to make the difficult political choices necessary to reduce harmful air pollution, state and local governments must know that everyone will be playing by the same rules.

Furthermore, air pollution knows no political boundaries. A Midwest state's failure to control harmful emissions from coal-burning power plants within its borders affects citizens in the Northeast and other parts of the country, as well as within the state. The federal government has the duty not only to set national standards, but ensure that they are met.

The ACIR report recommends greater flexibility and increased consultation with states in enforcing the Clean Air Act. The Environmental Protection Agency, however, has already done a great deal to provide such flexibility. In early 1994, the Agency backed off of its requirement that states with the most polluted cities install new methods of testing automobile exhaust systems, scientifically proven to be most effective. The Agency also made the Clean Air Act's program to encourage carpooling to work voluntary. In fact, EPA has had to spend so much time responding to pressure to relax the rules that few resources have been left for technical assistance.

Again, along with flexibility must come some guarantee that the necessary emission reductions are happening. The Commission should look for new ways to provide flexibility, while guaranteeing the breathing public results.

The changes made to the Clean Air Act in 1990 have produced dramatic results. Over 50% of the cities that did not meet the air quality standard for urban smog in 1990 (55 out of 98 areas) now meet the standard. Toxic emissions have been reduced by 1.6 billion lbs/yr since 1990 -- more than six times the reductions achieved from 1970 to 1990. This progress would be quickly reversed if the report's recommendations were followed.

Instead of turning back the clock, the ACIR should focus on the many problems that still remain. Almost all states missed the Act's 1994 deadlines for submitting air quality plans for delivering clean air. Two areas in which the Commission could make a contribution would be to promote pollution prevention initiatives and to assist in efforts to streamline the permitting process. Duplicative and conflicting permit requirements should be eliminated, but the requirements must not be relaxed and must remain enforceable by the public as well as state and federal authorities. Such efforts could ease the burdens faced by both state and local governments, as well as the regulated community, while guaranteeing the public cleaner air.

Coalition Position
The Clean Air Act has worked to save lives and make our cities more livable. The Commission should work to improve the implementation of the Act rather than trying to amend it.

For More Information Contact: Sharon Buccino, Natural Resources Defense Council, 202-783-7800

CLEAN WATER ACT

ACIR Recommendation: The Commission recommends restoring funding or allowing state and local governments more authority to set schedules.

Response: The ACIR reports suggests that the history of the Clean Water Act demonstrates that "states and local governments ceded control over water pollution controls to the federal government in return for substantial federal aid." More important is the fact that after over 20 years of state programs, the nation's waters were not improving. In short, the federal government took over precisely because the state governments were not adequately addressing the problem. While the 1972 amendments did provide substantial aid for municipal sewage treatment, the amendments did not provide much aid for individual residential sewage treatment or industrial discharges. Pollution control was intended to be largely under the "polluter pays" scheme.

Nothing since 1972 suggests that Congress's was wrong in its assessment that the states and localities, if left to their own, will not adequately address water pollution. While pollution from discrete municipal and industrial sources is controlled under a federal/state permit program, runoff pollution from diffuse sources was left up to the states in section 319. This section is widely acknowledged to be a failure, with state plans left unimplemented. Municipal stormwater, which according to the most recent EPA and state data is the largest source of estuarine impairment and either the second or third largest source of lake, ocean and wetland impairment, was uncontrolled until the federal government initiated a permit program in 1990. Thus, it is crucial that strong enforceable federal mandates be maintained with respect to water pollution.

The Clean Water Act fails to meet ACIR's own criteria for identifying mandates requiring change. For example, the ACIR set out to identify as mandates those federal statutes providing little discretion. Yet, under the Clean Water Act, states can chose to assume control over the program. 40 states have done so regarding the permit program. Only 2 states have done so regarding the wetlands program. Clearly there is discretion. Local governments, to the extent they are polluters have little discretion to avoid the Act, but to the extent they are governments can chose whether or not to assume control over certain programs, such as industrial pretreatment.

The ACIR was also looking for federal requirements that are the "subject of widespread concern." Clean water and all environmental programs have been under attack in this Congress, but polls consistently show that burden of environmental controls are NOT a matter of concern to most people. On the contrary, environmental protections are one of the few areas where most people want more protections. A poll done by the Wirthlin group in August 1995 found that 72% of the respondents felt that the environment was so important that it should be protected regardless of the cost.

The ACIR report criticizes the ability of citizens to sue to enforce various federal laws. This country would not have seen the dramatic improvement in the quality of its air, water and land over the past 20 years without the citizen suit provisions in the various environmental statutes. All too often, the federal government lacks the resources and the political will to sue state and local governments violating the law. Citizen groups do not have the means to bring frivolous lawsuits, but they must retain the opportunity to go to court to protect their communities when the government does not.

The ACIR report mentions in particular stormwater control which has recently been the subject of much debate and misinformation. In 1987 Congress, after the failure of states and cities noted above to address the problem, required municipalities and industrial facilities to obtain a permit for their stormwater discharges -- the runoff from city streets, and other areas that contains oil and grease, excess nutrients that rob receiving waters of oxygen, toxic heavy metals, dirt and excrement. Municipalities have complained the (1) the cost of the application is too high, (2) that it is impossible to meet numerical effluent limitations (limits on concentrations of specific pollutants) at the outfall of their discharge pipes, and (3) that receiving waters are polluted by other sources besides municipal discharges. The ACIR accepted these criticisms without any analysis as to their validity.

First, many estimates of the cost are inflated by including in the stormwater control costs other municipal planning costs. Since very effective stormwater control can be achieved through site use limitations such as wetland preservation, stream buffers, and local vegetated areas, basic city planning and design can be charged to stormwater control, even when done for many reasons. Yet even these inflated costs come to only approximately $3/person, far less than municipal residents pay for many other services or than rural residents may pay for runoff control.

Second, the ACIR's recommendation is based on an inaccurate picture of current law. Contrary to the ACIR report, state and local governments today are <u>not</u> saddled with stormwater permit requirements that "require compliance with standards that have detailed numerical limits that . . . it may not be feasible to attain." (A-19) <u>In fact</u>, there are no such limits in stormwater permits and neither the EPA nor the environmental community is seeking such limits.

Third, while it is true that receiving waters are polluted by many sources, that is no reason to avoid controlling a significant -- and in many cases the most significant -- cause of water pollution.

ACIR is correct that the law need not be changed to allow state and local governments greater flexibility; it definitely should not be. We also do not disagree that additional federal funding would be appropriate. However, given the importance of pollution control and the poor track record of the state and local governments, requirements must not be relaxed.

CSS Position: The Commission should work to maintain or increase funding and allow flexibility in how, but not whether, to meet goals.

For More Information Contact: Peter Lehner, Natural Resources Defense Council, 212-727-2700

THE SAFE DRINKING WATER ACT

ACIR Recommendation
The ACIR report recommends repealing some of the "most onerous" provisions of the Safe Drinking Water Act and establish a long term goal of returning to the states full reponsibility for safe drinking water standards.

Coalition Response
The report attacks the Safe Drinking Water Act by relying upon old bromides and unverified assertions, and upon statements like "it is perceived" or "it is felt" by state or local officials that there are unreasonable burdens on state and local governments of the Safe Drinking Water Act (SDWA). Generally, the ACIR report offers no concrete facts or citations to document its assertions or state and local governments' "perceptions" and "feelings."

The one supposedly supporting document ACIR notes is the Congressional Budget Office's (CBO) review of the drinking water act, which is cited as bolstering ACIR's assertion that the SDWA is an egregious example of an unnecessary and unfunded mandate. Inexplicably, however, ACIR fails to quote the central finding of the CBO study that appears in large print in bold on page one: "To date, the SDWA has resulted in fairly modest costs for most households. Although the SDWA has been cited as a particularly burdensome mandate, available data do not indicate that it has imposed high costs on most households." CBO, THE SAFE DRINKING WATER ACT: A CASE STUDY OF AN UNFUNDED FEDERAL MANDATE (September, 1995).

The rest of the ACIR essay on drinking water is premised upon incorrect and undocumented anecdotal information. Each major "concern" cited by ACIR is undocumented and generally either demonstrably false or seriously overblown:

1. <u>No Need for Federal Standards?</u>
In developing its theme criticizing the requirement in the SDWA that states adopt federal drinking water standards, ACIR states that "prior to 1974, states generally required local water systems to adhere to the U.S. Public Health Service [USPHS] drinking water standards for regulation of water used by interstate carriers." (ACIR at A-28) Later it says that "[p]rior to the imposition of federally mandated requirements, most states were already imposing Public Health Service Standards on local water systems." (ACIR at A-29)

These assertions are flatly incorrect. In fact, the main reason the SDWA was passed was that states were not adopting federal standards and widespread disease outbreaks and contamination problems were being found. A 1974 House report, for example, noted that federal standards were needed because:

A review of State drinking water standards, performed in 1971, indicated that <u>only 14</u> had officially adopted the USPHS Drinking Water Standards. Enforcement of these regulations is frequently poor. Sufficient surveillance of community water systems by public agencies at all levels of government has likewise been lacking.

H. Rep. No. 1185, 93rd Cong. 2d Sess. at 6-7 (1974)(emphasis added).

2. <u>Rules are Issued Without Consideration of Costs?</u>
The ACIR states that under the SDWA, "[b]ecause there is no federal participation in the costs, it is felt that the requirements are being imposed for a wide variety of risks <u>regardless of cost</u>." (ACIR at A-29, emphasis added).

This assertion also is patently false. The SDWA expressly requires that all EPA drinking water standards shall be based upon the "feasible" technologies, explicitly "considering costs." SDWA § 1412(b). In addition, the statute specifically authorizes variances and exemptions from these cost-based standards for systems with economic or other difficulties complying with these standards. SDWA §§ 1415-1416.

We challenge ACIR to point to a single major drinking water rule issued "regardless of cost"--this would be a direct violation of the law, and has never happened. To the contrary, the public interest community long has complained that EPA is overly obsessed with the costs of its drinking water rules. EPA has been far too lax in its efforts to protect the public from certain drinking water contaminants due to concern about economic impacts (such as arsenic, which has a 54 year-old, very weak drinking water standard set by the USPHS before arsenic was known to cause cancer, a standard EPA has failed to update due primarily to concerns about the economic impact of a strict rule).

The ACIR's assertions that the Act imposes undue burdens without consideration of costs directly contradict other more scholarly efforts to assess whether the SDWA creates extreme costs. For example, as noted above, CBO found that "although the SDWA has been cited as a particularly burdensome mandate, available data do not indicate that it has imposed high costs on most households." CBO, THE SAFE DRINKING WATER ACT: A CASE STUDY OF AN UNFUNDED FEDERAL MANDATE at 1 (September, 1995). In addition, EPA's massive 1993 REPORT TO CONGRESS: TECHNICAL AND ECONOMIC CAPACITY OF STATES AND PUBLIC WATER SYSTEMS TO IMPLEMENT DRINKING WATER REGULATIONS, demonstrated that for most households, the costs of drinking water protection have been very modest indeed (on average less than $20 per household per year). While some small water system customers had to pay more due to the lack of economies of scale, this hardly represents proof that the SDWA is a statute that fails to consider costs. To the contrary, many observers in the public health and environmental community believe that in implementing the SDWA, EPA has been overly cost-conscious.

3. <u>Unnecessarily Testing of Tap Water?</u>
ACIR says--without supporting documentation--that "problems arise because of what are perceived as requirements to test for contaminants ... in instances where the risks are relatively low and the costs are significant." (ACIR at A-29).

The factual basis of the "perceived" unreasonable testing and treatment requirements is not specified or documented. However, it should be noted that with respect to drinking water testing, there is much flexibility available, including the availability of state waivers, grandfathering, and composite sampling to reduce monitoring burdens. For example, if a system is found to be unlikely to find the contaminant it can get a state waiver. Use waivers can be issued if the contaminant wasn't used in the area, and susceptibility waivers can be issued if the system is protected geologically or otherwise from contamination. ACIR fails even to mention that waivers are available, and to the extent they are not available in some states, that is the fault of the states for not developing or implementing a waiver program.

4. <u>Unnecessary Treatment of Drinking Water?</u>
In addition, ACIR says--again without supporting documentation--that "problems arise because of what are perceived as requirements to... treat surface water in instances where the risks are relatively low and the costs are significant." (ACIR at A-29). This accusation is untrue and insupportable. First, it is not mentioned that state officials and the drinking water industry strongly supported the surface water treatment requirements in the SDWA Amendments of 1986.

Second, ACIR does not mention that independent of the SDWA's 1986 amendments, many states already required all surface water systems to filter their water, and that over 90 percent of the surface water systems in the nation already filter their water. Thus, the supposedly unnecessary surface water treatment generally is necessary, according to a consensus of state and industry experts. Indeed, a coalition of state and water industry experts recently banded together to recommend that surface water systems go beyond current EPA rules to protect citizens against *Cryptosporidium* and other microbes because EPA's rules don't go far enough.

Third, ACIR does not mention that the SDWA and its rules specifically allow surface water systems with high quality, protected source water can avoid filtration if the state finds it is not necessary. SDWA § 1412(b)(7)(C).

5. EPA Prohibits the Use of Cheaper Alternative Technology?

In a similar vein, ACIR asserts without support that "alternative, less expensive technology to address specific risks is not permitted in some instances. Sometimes, the treatment requirements do not relate directly to specific existing and measurable contamination." (ACIR at A-29)

Precisely what this assertion could be referring to is unclear, but it appears to belie a lack of understanding of the SDWA. Virtually none of EPA's rules require a water system to use a specific technology to address a contaminant. Instead, under the Act EPA sets "Maximum Contaminant Levels" (MCL) which water systems can meet using any technology or water source protection measures they choose, so long as the drinking water meets the MCL. The one significant exception to this rule is the surface water treatment rule, which does state that certain surface water must be filtered, but does not require the use of any particular technology, so long as certain contact time and other water treatment technique parameters are achieved (such as a certain level of turbidity). Thus, it is not clear exactly what the complaint is targeted at, but it appears to miss its target.

6. Lack of State Discretion Regarding Enforcement?

The ACIR states that "concerns are expressed about being held equally accountable for violations that are genuinely health related and for failure to follow exactly prescribed schedules for testing procedures. States lack flexibility and discretion in implementing the law."

This accusation also completely misses the mark. A recent survey indicates that only about 3% of all drinking water violations are ever subject to any formal state *or* federal enforcement action. NRDC, YOU ARE WHAT YOU DRINK (1995); NRDC, THINK BEFORE YOU DRINK: 1992-1993 UPDATE (1994).

Penalties for even the most egregious health standard violations are extremely rare. EPA takes approximately 5 cases to court a year of the more than 100,000 recorded violations, and virtually all administrative actions are taken without collecting any penalties. Id. According to GAO and EPA Inspector General studies, some states have essentially suspended enforcement of certain EPA rules they felt were low priority. Id.; NRDC, THINK BEFORE YOU DRINK (1993).

Thus, you at much greater risk of paying a fine for parking illegally than a water system is of getting a fine for supplying dangerous tap water. Thus, it can hardly be argued with any credibility that states lack enforcement discretion under the SDWA.

Coalition Position

The report proposes a goal of returning to the states "full responsibility" for drinking water standards. The public is clear, however, in its view that federal standards should not be weakened. According to a recent industry poll, just 3 percent of the American public would favor relaxing federal drinking water standards. We believe that past and present history make it clear that there is a continuing need for a federal leadership role in establishing strong drinking water standards, with the states and localities primarily responsible for implementing those standards, subject to meaningful federal oversight.

There is a need for a basic minimum national level of health protection for drinking water. People should be able to live and travel anywhere in the country without worrying about their drinking water quality. Citizens of poorer states should not be forced to substandard drinking water compared to neighboring, richer states. States should not have to compete for industry (or fear driving industry away). Allowing states to set any standards they like could encourage economically-strapped states to look the other way, or set weak drinking water standards, when local industries contaminate their tap water sources. In addition, 50 states should not have to research and reinvent 50 sets of drinking water regulations and regulatory schemes. There is a need for a basic federal role in protecting all Americans from drinking water contamination.

For More Information Contact:

ENDANGERED SPECIES ACT (ESA)

ACIR Recommendations
The ACIR recommends that Congress and the Administration:

1) Retain the provisions of the Endangered Species Act but improve federal funding allocations and the implementation process, particularly to state, local and tribal governments.

2) Amend the ESA to make state, local and tribal governments full partners with the federal government in the preservation of endangered species.

3) Modify the recovery planning and listing policies of the ESA to minimize the social and economic impacts on state, local and tribal governments.

Coalition Response
The ACIR report recommends measures that would drastically weaken the Endangered Species Act, despite solid public support for strengthening this crucial law. Although ACIR rightly calls for expanded roles for state, local and tribal governments in implementing the ESA, this role should be accompanied by strong federal standards and oversight.

At present, the ESA provides mechanisms for the transfer of authority from the federal government to state wildlife agencies through Section 6 cooperative agreements. Although ESA authority transfers through cooperative agreements tend to be limited to scientific research, recent efforts to increase state cooperation and participation in species management have been relatively successful. This effort has been predicated upon the belief that state resource managers often have the best scientific and political resources to manage local habitat, particularly when they possess adequate financial resources

However, when considering which actions are appropriate for state agencies, it is important to remember that all states administering provisions of the ESA must be held to the same federal standards. Because not all states have solid wildlife programs there would be no assurance that one state's successful efforts to protect a species would not be drastically undermined by deleterious actions in other less responsible states. In the case of wide ranging or migratory species, an irresponsible conservation program in one state could have negative repercussions for an adjoining state's programs.

The Coalition disagrees with the ACIR recommendation that "state, local and tribal governments . . . have a consent role before a species is listed." The listing process must remain in the hands of the federal government, without state veto powers, because such decisions are made solely on the basis of the best scientific and commercial data available. State recommendations should be considered during the listing process, but the criteria under Section 4(a)(1) of the ESA must remain as is. Requiring such widespread consensus before any listing decision would deny many imperiled species essential ESA protections. Likewise, requiring listing decisions to be based only on information that has been "peer reviewed" would prevent the vast majority of listings -- most listings are scientifically uncontroversial yet are based in part on non-peer-reviewed data.

The ACIR report states that "the goal should be to reduce the likelihood of economic disruption while ensuring species recovery." This wrongly assumes that species conservation and recovery have an adverse economic impact. The opposite is true - - without biodiversity protection we ensure longterm adverse economic impacts, such as the loss of agricultural crops and cures for human diseases.

Under the ESA, state agencies are already heavily involved in the preparation and implementation of recovery plans. Because recovery plans recommend a range of actions to benefit a species, such as research, protection of critical habitat, captive breeding programs, and reintroduction efforts, qualified state agencies should also have the power to advise on future recovery activities. However, it is crucial that the federal government retain ultimate oversight over recovery plans.

Finally, while the Coalition agrees with ACIR that insufficient funding has contributed to ineffective implementation of the Act, increased funding should not be limited to state, local and tribal governments. Because program funding is often "zero sum," it is likely that funding would merely be transferred to states at the expense of other programs, such as recovery planning and listing.

Coalition Position
Proper implementation of the ESA by state, local, and tribal governments must be accompanied by strong federal oversight. Public citizens must retain their abilities to challenge both the substance and enforcement of state implementation activities. In order to insure effective transfer and implementation of ESA authorities to state agencies, we must increase the amount of funding authorized and appropriated to the states and the federal government under the ESA.

These steps would not only go a long way toward allowing states to experiment with conservation approaches that work best, but also result in more direct and effective species protection efforts.

For More Information Contact
Heather Weiner, Defenders of Wildlife, 202/682-9400.

AMERICANS WITH DISABILITIES ACT

ACIR Recommendation
Either provide increases in federal funding to state and local governments to assist in compliance, including funding for Paratransit, or modify some dealines and requirements to let state and local governments meet ADA goals in a manner that recognizes state and local technical and budget constraints without abridging the national commitment to the rights of individuals with disabilities.

Concerns
This recommendation is based primarily on beliefs that the current law imposed rigid requirements and dealines, and fails to adequately consider the financial and other needs of state and local governments. The report places particular emphasis on the program accessibility and public transportation repuirements structural modifications and paratransit services.

Coalition Reponse
Requirements and deadlines recognizes the financial and other needs of state and local governments. These requirements and deadlines may be modifies, moreover, in extenuating circumstances. Thus, governments making good faith compliance efforts would receive little or no benefit from modified deadlines or requirements. By contrast, governments that have failed to act in good faith would likely use these modifications to furthur delay compliance efforts, thereby abridging the national commitment to the rights of individuals with diasabilities.

<u>The ADA is Goal Oriented and Flexible</u>
The current law is goal oriented. The law limits the scope of its protections by focusing on the goal of Tite II, and furthur limits the scope of its protections by focusing, within each subpart, requirements, and allows substantial discretion in compliance with the requirements that are imposed. This flexibility is especially apparent in the two most criticized requirements: structural modifications and Paratransit.

I. Goals Limit the Scope of the Law's Protection

The overriding purpose of Title II is to provide equal rights, not special rights, by prohibiting discrimination on the basis of disability by public entitles:

Subject to the provisions of this title, no qualified individual with a disability shall, by no reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The ADA does not limits both who the law protects and the circumstances in which the law protects them. The regulations carefully define "disability" and "qualified individual with a disability," and the courts are cognizant that a violation requires that the exclusion, denial, or discrimination is "by reason of such disability." Tofurther protect the government from claims beyond the scope of providing that they have been discriminated against on the basis of disability.

II. Program Accessibility: Creative Cost-Containment

The requirements of program access apply he broader goal of Title II to the narrower goal of equality in specific programs. The program accessibility concept, adopted from Section 504 regulations, permits significant flexibility in the means of achieving compliance. The standard greatly limits the conditions in which structural modifications are required, and is thus a cost-conscious alternative to the complete retrofit standard considered by Congress during the ADA's development.

The ADA Handbook explicitly states that "structural modifications are required only when there is no other feasible way to make the public entity's program accessible." The Handbook then notes that accessibility may be achieved "by delivering services at alternative sites or making home visits as appropriated."

Moreover, the regulation governing existing facilities requires only that te service, program, or activity be accessible "when viewed in its entirety." One court declined to order the modification of some parks, where similar parks would be accessible once modifies according to the city's transition plan.

Even is a particular building must be rendered accessible, the law does not require that each entrance, room, and floor of the building be so modified. A court declined to order modification of the front door of a City Hall, where the back door of the building was wheelchair accessible. "While the court understands the symbolic value the front door to City Hall holds for the plaintiff, the Title II regulations do not require the City to make it wheelchair accessible, as long as the services, programs, and activities offered in City Hall are otherwise accessible to the plaintiff."

The regulation governing new construction and alternatives makes a similar allowance, requiring only that "part of the facility" be accessible. This regulation provides additional flexibility by permitting governments to chose between two accessibility standards: the Uniform Accessibility Standards, used under Section 504, or the Americans with Disability Act Accessibility Guidelines for Building and Facilities.

III. The Paratransit "Safety Net:" Comparable Service for Eligible Individuals
The paratransit requirements apply the broader goal of Title II to the narrower goal of equality in public transportation. Because of this emphasis on equality, paratransit service is required only when necessary to provide service "comparable to the level service provided to individual without disabilities who use the fixed route system." As the appendix to the regulation explains, paratransit is meant to act "as a safety net for individuals with disabilities who cannot use the fixed route system."

IV. Goal Attainment Schedules: Transition Plans and Paratransit Plans
Just as the ADA focuses on goals, it also focuses on goal-attainment schedules. The law requires government to develop transition plans when structural modifications will be undertaken to achieve program accessibility, and to develop paratransit plans when paratransit is required as a complement to fixed route service.

<u>The ADA Considers Budgetary and Other Needs</u>
The Advisory Commision suggests that the law should be "temporarily or permanently suspended, or made voluntary, for communities without the fiscal capacity to comply," and that the law should take into account other "individual needs" of space and local governments.

The current law does suspend many AdA requirements for governments without fiscal capacity to comply. The law also considers other governments needs, including administrative burdens, the preservation of historic property, and the maintenance of the fundamental nature of a program, service, or activity.

I. Some Conditions in Which ADA Requirements May be Suspended

The proram accessbility regulations governing existing facilities explicitly states that the regulations do not require a public entity to take any action hat would:

- Threaten or destroy the historic significance of a historic property;
- Result in a fundamental alteration in the nature of a service, program, or activity; or
- Result in undue financial or administrative burdens.

II. Undue Burden: A Unique and Viable Defense

Title II is unique among federal civil rights statutes in allowing governments to be relieved of their civil rights obligations if doing so would cause them financial or administrative burdens.

Although the ADA Handbook states that the defense of undue burden should apply only in "the most unusual cases," a recent status report in this defense provides the fllowing conclusions:
The evidence reveals that a number of federal courts have been receptive to state and local governments' concerns about cost. In determining the merits of an "undue burden" defense, the courts have generally addressed the following questions:

1. Are the persons seeking the goods and services disabled as defined by the ADA?
2. What steps, if any, have local and state officials taken sought to accomodate the disabled?
3. Have government officials demonstrated that they have continually sought to accomodate disabled parties?
4. Have state officials presented persuasive proof that providing certain services will be costly, either financially or administratively?

When the state and local officials have given affirmative answers to the questions above, the courts thus far have sided with the "undue burden" defense.

Thus, the governments that are making good faith compliance efforts should feel comfortable with the use of this defense, which suspends requirements for as long as the hardship continues.

III. New Contruction and Alteration: Equal Distribution of Hardship

Like its Section 504 predecessor, the Title II regulation governing new construction and alterations does not provide an undue burden defense. The court in *Kinney v Yerusalim*explained why Congress created this distinction.

Allowed of an undue burden defense for existing facilites serves as recognition that modification of such facilites may impose extraordinary costs. New construction and alterations, however, present an immediate opportunity to provide full accessibility.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

The Unfunded Mandates Reform Act of 1995 (P.L. 104-4) excludes from the definition of unfunded mandates: (1) federal requirements for programs that are voluntary in nature; and (2) federal requirements that enforce Constitutional rights, provide protections from discrimination, provide emergency assistance, are determined to be necessary for national security or for national emergencies. IDEA is thus exempt from the law both because it is voluntary in nature and because it provides a Constitutional protection for students with disabilities. ADA is protected by the Constitutional and civil rights exemptions in the legislation.

The Advisory Commission on Intergovernmental Affairs (ACIR) clearly chose to ignore these eemptions when deciding which mandates to review.

ACIR Recommendation
The ACIR report recommends that either federal funding be increased to cover 40 percent of costs (a long term federal goal) or that states be exempted from prescriptive and costly administrative mandates. The report recommends that alternative dispute resolution practices be required, and that any court challenge based on the federal law be brought by state or federal agencies, not by individuals.

The report also lists the following concerns raised by state and local governments:

(1) IDEA creates administrative and financial burdens on state and local governments.

(2) There is a lack of adequate federal resources to assist states in meeting their obligations to provide "equal protection under the law to students with disabilities."

(3) Local funding agencies are unable to combine IDEA funds with other federal funding streams to provide non-categorical support for students with disabilities.

(4) IDEA has become overly "litigious and adversarial" in dispute resolution.

(5) IDEA usurps the states' authority in education, a "traditional domain of the state and local government. ... IDEA forces states to submit their special education service plans to the federal government for approval..."

Coalition Position
The report recognizes that the federal statute was preceded by landmark court decisions mandating educational rights for students with disabilities and their families. The statute is intended to assist states in meeting their basic constitutional duty to provide education to children with disabilities by funding a percentage of the extra costs of providing that education.

With or without IDEA and funding from the federal government, the requirement to provide a free, appropriate public education continues to be a state responsibility. Many families have been dragged into the "litigious" aspects of IDEA only because the state failed to provide a free, appropriate public education for their child. If implemented, the ACIR recommendation would deny access to courts for these families who have exhausted every other means of eliminating discriminatory practices against their son or daughter to resolve disagreements with the schools.

People with disabilities, parents of children with disabilities, advocates and others vehemently oppose changes that would gut the essential due process protections in the law.

For More Information Contact:

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

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.

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 statue 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 constitutes 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 to 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 $! 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

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PRESS RELEASE

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

"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.

###

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.

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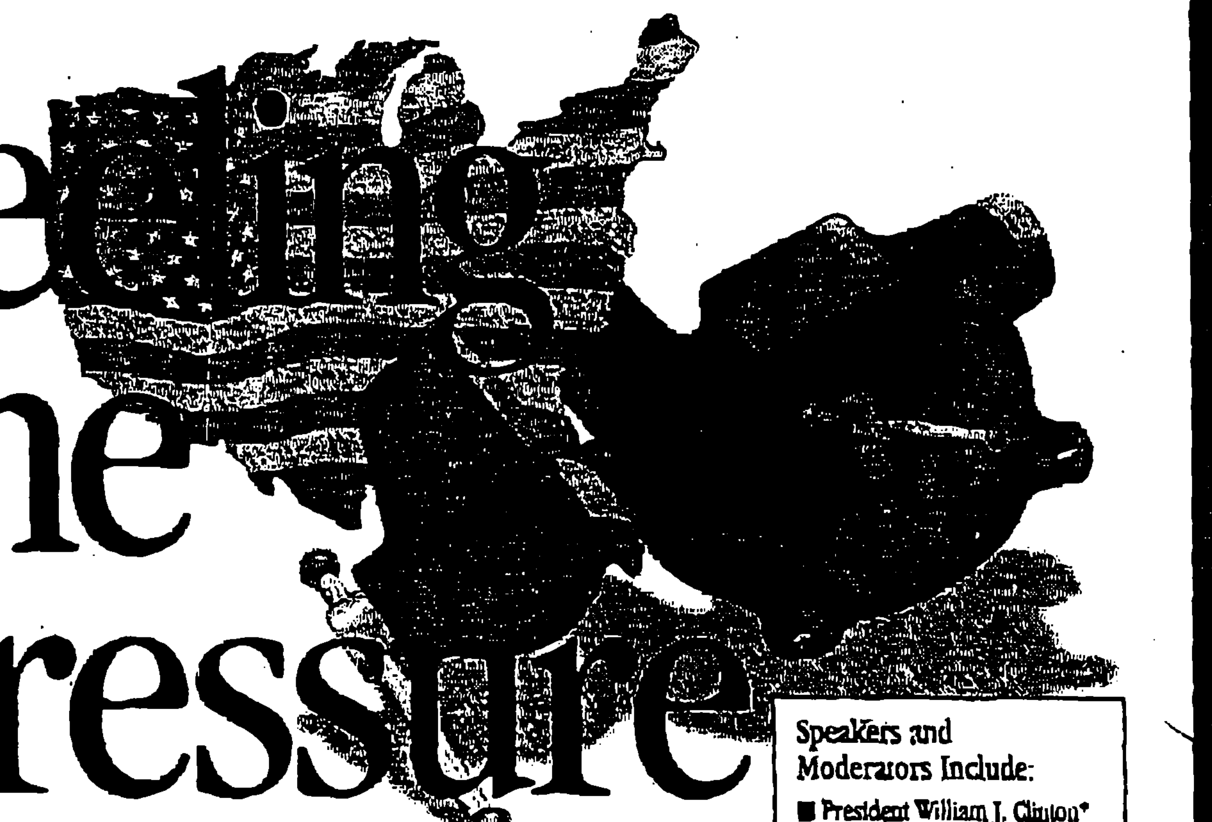
###

Feeling The Pressure of Federal Mandates?



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

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

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

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

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

Speakers and Moderators Include:

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

Who Should Attend:

- Elected state and local government officials, state executive branch officials, state legislative staff, federal regulatory agency personnel, Congressional staff, local government agency officials, staff & members of non-profit organizations, private-sector executives & 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
[illegible]	[illegible]
10:30 - 10:45	Break
10:45 - 12:15 p.m.	Concurrent Seminars • *Current Efforts to Reform Federal Regulatory Impacts on State and Local Governments* • *Measuring the Costs and Benefits of Mandates* • *Relieving State Mandates on Local Governments*
[illegible]	[illegible]
2:30 - 4:45	Concurrent Workshops • *Environmental Mandates* • *Labor Mandates* • *Mandates Affecting Individual Rights*
[illegible]	[illegible]

ACIR Conference Day Two

7:00 am	Registration
7:30 - 9:00	Breakfast Program • *What Will Happen in the Congress After ACIR Submits Its Mandate Report*
[illegible]	[illegible]
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*
[illegible]	[illegible]
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 Load
The ACIR Conference on Federal Mandates

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. Senate*

Intergovernmental Principles Emerging from ACIR's Mandate Studies

Hon. Bob Graham**, U.S. Senate

Hon. Richard Nathan**, Director, Rockefeller Institute of Government

10:30 - 10:45 Break

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

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

Current regulatory reform bills would require federal agencies to assess the impacts of proposed 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 Halloran, 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 Lashutka**,
Mayor, City of Columbus, OH

2. Labor Mandates

Moderator:
Hon. Randall Franke**,
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 Load
The ACIR Conference on Federal Mandates

Conference Day Two:

Thursday, March 7, 1996

7:00 am — Registration

7:30 - 9:00 — Breakfast Program

What Will Happen in the Congress After ACIR Submits Its Mandate Report?

Introduction:
Hon. James Moran**, U.S. House of Representatives

Speaker:
Hon. Christopher Shays*, Chairman, U.S. House Subcommittee on Human Resources and Intergovernmental Relations

9:15 - 10:30 — Plenary Session

A Vision of American Federalism for the 21st Century

Introduction:
Hon. Craig Thomas**, U.S. Senate

Speaker:
Hon. Robert Dole*, Majority Leader, U.S. Senate

10:30 - 10:45 — Break

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

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

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

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

Moderator: Dr. Robert Brauneis, 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 burdens 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. Panelists from federal, state, and local governments will:

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

Moderator: Paul Posner, Director, Budget Issues, GAO

Note: this conference program is current as of Jan. 31, 1996. Final program is subject to speaker availability.

12:30 - 2:15 — Luncheon Program

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

Hon. June E. O'Neil, 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.

405-532-75[illegible]

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 ACIR c/o ENC Marketing (24 hours a day).
Or return this form by U.S. Mail.	Tear off this form and mail it to: ACIR Registration, c/o ENC Marketing, 2010 Corporate Ridge, Suite 700, McLean, VA 22102

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, [illegible] & local organizations representing government officials & [illegible] or university/academic staff.

Method of Payment

☐ Check (please make payable to ACIR) ☐ Money order

☐ Approved Purchase Order Number:* ☐ Approved Federal Government Training Voucher SF182*

*Please attach a copy of your approved purchase order or voucher

☐ Bill my organization. ATTN:

☐ Charge my credit card: ☐ Visa ☐ IMPACT Visa ☐ MasterCard

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☐ Mr. ☐ Ms.

Title:

Agency/Department/Organization:

Street Address: Mail Stop/Room No:

City: State: Zip:

Phone: Fax:

Internet/e-mail:

Name as it should appear on your name badge:

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 ACIR's conference.

Your Conference Registration Includes...

- ☑ A copy of ACIR'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 ACIR Federal Mandates Conference. Registrants should call the hotel directly at 202-797-5820 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 first night's prepaid deposit on 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

Preregistration 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 ACIR Conference on Federal Mandates

March 6-7, 1996

Washington Hilton,
Washington, D.C.

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

EXECUTIVE OFFICE OF THE PRESIDENT

29-Feb-1996 06:01pm

TO: (See Below)

FROM: Elizabeth E. Drye
Domestic Policy Council

SUBJECT: ACIR letter — The new draft, as promised in this e-mail!

I'd like to propose that we send the draft letter to Governor Winter without any attachment, and instead let agencies send letters directly to ACIR with their detailed comments if they wish to do so. DOJ has already sent a detailed letter, and apparently DOL is planning to send one. I just don't think we can represent their concerns adequately in a 4 page attachment.

I'll add a paragraph to the letter on environmental issues, so that the letter to Governor Winter touches on all the major areas of concern -- labor, disability, and environment -- and will make it clear that we have many additional concerns Marcia would like to discuss with him. I'll send this new draft to you within the next hour. I'm not planning to do any further work on the attahcment unless we decide that I should.

I've bounced this idea off of Dan Chenok, Kris Balderston, and our DOJ contact, all of whom agree.

Distribution:

TO: Marcia L. Hale
TO: Kathryn Higgins
TO: Sally Katzen
TO: Marilyn Yager
TO: Jennifer M. O'Connor
TO: Daniel J. Chenok
TO: Kris Balderston

CC: Diana M. Fortuna
CC: Deborah L. Fine
CC: Melanne Verveer

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, 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 cursory and often 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.

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, compliance deadlines, with a few exceptions, are being met, 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). 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.

I have additional concerns about many of the draft report's recommendations, and would be happy to discuss these with you. I look forward to working with you to improve the draft.

Sincerely,

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

cc:

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

ACIR Now

Mandates–In the first comprehensive review ever undertaken of existing federal mandates on state, local, and tribal governments (*Unfunded Mandates Reform Act of 1995*), ACIR will make recommendations to the President and the Congress to retain, suspend, revise, or terminate specific mandates. The Commission issued criteria for its review in July 1995, and selected specific mandates for intensive review in September. The preliminary recommendations will be made in December, and the final report and recommendations will be presented in March 1996.

Federal Grants–With its *Block Grant Issue Brief*, FY 1995 updates of *Characteristics of Federal Grants to State and Local Governments* and its *Grant Fragmentation Index*, and testimony before the House Government Operations Committee, ACIR continues to monitor and analyze changes in the system.

Intergovernmental Finance–ACIR keeps track of the intergovernmental fiscal scene annually with *Significant Features of Fiscal Federalism*, and with periodic research reports on such topics as tax systems, tax and expenditure limitations, and local government health care responsibilities.

MISSION AND FUNCTIONS

The Advisory Commission on Intergovernmental Relations (ACIR) is a permanent, independent, bipartisan intergovernmental agency established by federal law in 1959. Its mission is to strengthen the American federal system and improve the ability of federal, state, and local governments to work together cooperatively, efficiently, and effectively. Under its authorizing legislation, ACIR's core functions are to:

- **Convene** federal, state, and local officials and private citizens to consider common problems
- **Monitor** events and conditions in the federal system
- **Investigate** the consequences of changes in the federal system
- **Provide technical assistance** to the executive and legislative branches of the federal government
- **Recommend** changes in law, regulation, and practice to achieve a more desirable allocation of functions, responsibilities and revenues, and to improve relations among the levels of government

CAPACITY

Over its distinguished 36-year history, ACIR has worked *to build a true intergovernmental partnership within the Constitutional framework for the federal system.* Intergovernmental relationships have profound effects on self-government in America, and they are undergoing dramatic changes.

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- **Educate** leaders and the public about the impacts of intergovernmental reforms
- **Promote** stronger intergovernmental communication, cooperation, and coordination as the critical basis for an effective federal system

The Role

of

Federal Mandates

in Intergovernmental Relations

A Preliminary ACIR Report
For Public Review and Comment

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

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CONTENTS

PRELIMINARY ACIR REPORT ON FEDERAL MANDATES

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

INTRODUCTION

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

CHANGES IN THE FEDERAL SYSTEM

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

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

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

DETERMINING THE APPROPRIATE FEDERAL ROLE

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

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

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

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

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

THE ACIR REVIEW OF EXISTING MANDATES

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

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

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

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

The selection of the 14 mandates was based on:

(1) The preponderance of communications identifying the mandates as troubling to state and local governments;

(2) The significance and diversity of issues posed for intergovernmental relations; and

(3) The criteria published by the Commission on July 6, 1995.

BASIS OF RECOMMENDATIONS

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

The criteria also identified a number of specific conditions for which ACIR should make relief recommendations. The specific conditions were: requirements not needing national action or, if needing national action, not federally funded; unnecessarily rigid; unnecessarily complex or prescriptive; unclear goals or standards; contradictory or inconsistent provisions; duplicative provisions; obsolete provisions; lacking in adequate scientific and economic basis; lacking in practical value; or would create undue financial difficulties for the governments.

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

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

COMMON ISSUES

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

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

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

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

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

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

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

SUMMARY OF RECOMMENDATIONS ON INDIVIDUAL MANDATES

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

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

Fair Labor Standards Act

Family and Medical Leave Act

Occupational Safety and Health Act

Drug and Alcohol Testing of Commercial Drivers

Metric Conversion for Plans and Specifications

Medicaid: Boren Amendment

Required Use of Recycled Crumb Rubber

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

The Clean Water Act

Individuals with Disabilities Education Act

Americans with Disabilities Act

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

The Safe Drinking Water Act

Endangered Species Act

The Clean Air Act

Davis-Bacon Related Acts

SUMMARY OF EACH MANDATE

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

Fair Labor Standards Act

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

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

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

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

Family and Medical Leave Act

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

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

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

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

Occupational Safety and Health Act

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

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

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

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

Drug and Alcohol Testing of Commercial Drivers

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

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

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

Metric Conversion for Plans and Specifications

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

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

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

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

Medicaid: Boren Amendment

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

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

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

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

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

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

The Clean Water Act

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

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

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

Fully restoring the successful partnership requires either a return to substantial federal sharing in the costs of clean-up, or a relaxation of inflexible standards and deadlines on state and local governments. If there is not a sufficient national priority to justify federal spending, then state and local governments should be able to use the least costly alternatives and to work within their fiscal constraints. State and local governments traditionally have been concerned about reducing pollution, and they should be given authority to work constructively with federal officials to design realistic programs that can be completed within technical and budgetary constraints.

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

Individuals with Disabilities Education Act

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

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

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

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

Americans with Disabilities Act

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

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

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

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

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

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

The Safe Drinking Water Act

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

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

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

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

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

Endangered Species Act

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

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

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

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

The Clean Air Act

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

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

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

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

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

Davis-Bacon Related Acts

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

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

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

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

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

Required Use of Recycled Crumb Rubber (Repealed)

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

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

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