THE WHITE HOUSE

WASHINGTON

June 12, 1996

MEMORANDUM TO LEON PANETTA

FROM: Marcia Hale
Carol Rasco
Sally Katzen

SUBJECT: Advisory Commission on Intergovernmental Relations (ACIR) Draft Report

Governor Winter, ACIR's Chairman, has asked Marcia Hale to confidentially review a new draft of ACIR's unfunded mandates report. Although this draft addresses some of our previous concerns and is apparently acceptable to Governor Winter and possibly to other Democratic Commission members, we recommend that the three Administration officials on the Commission -- Marcia Hale, Secretary Riley, and Administrator Browner -- oppose the report and work to ensure other Democratic members oppose it. This memo seeks your approval of this approach.

**Background**

o ACIR's Congressional Charge -- The Unfunded Mandates Reform Act directs ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates and identifying specific mandates that should be addressed.

o Previous Administration Position -- In January, the Commission voted to release a draft report for public comment. Federal Agencies commented extensively on the draft. In addition, on March 1, 1996 Marcia Hale wrote to Governor Winter stating the Administration's strong objections to the report's analytic approach and policy conclusions (letter attached). The letter indicated the draft report:

  o did not adequately speak to ACIR's Congressional charge to establish a broad conceptual framework for considering individual mandates;

  o did little to further consensus on fundamental questions such as how to measure the costs and benefits of mandates;

  o presented misleading analyses of 14 Federal health, safety, environmental, worker protection, and civil rights laws and recommended unacceptable changes to most of these laws;

  o failed in its analyses to consider the views of or effects on working men and

women as directed by Congress; and

- o went beyond the scope of the Act by suggesting changes to disability civil rights statutes excluded by the Act.

**Revised Draft**

- o Content -- The new draft, although less egregious in its recommendations (attached), contains the same fundamental flaws. For example, the report:

  - o still largely fails to consider benefits (the final page acknowledges ACIR did not consider the benefits of mandates on working men and women);

  - o to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 7 statutes -- Occupational Safety and Health Act (OSHA), Omnibus Transportation Employee Testing Act (drug and alcohol testing), Clean Water Act (CWA), Individuals with Disabilities Education Act (IDEA), Americans with Disabilities Act (ADA), Safe Drinking Water Act (SDWA), and Clean Air Act (CAA) -- and recommends new bureaucratic structures to assist states;

  - o argues (unconvincingly) that two disability civil rights statutes -- ADA and IDEA -- are within the Commission's scope and recommends unacceptable changes to ADA;

  - o proposes more moderate but still problematic changes to 5 statutes -- the Fair Labor Standards Act (FLSA), Transportation Employee Testing Act, CWA, ADA, and Davis-Bacon related acts; and,

  - o recommends a study of laws that provide private rights of action against state and local governments and recommends that the study be concluded prior to reauthorizing any existing statutes (e.g. environmental laws) with such provisions or enacting new statutes with such language.

- o Status -- Governor Winter is ready to ask Commissioners to vote to approve the report. The Commission sunsets at the end of this fiscal year, is short on funds, and is eager to conclude its work.

**Recommendation**

Administration officials should oppose the revised draft and urge other Democratic members to oppose it.

**pros**

- o This document is not good government and is not consistent with the Administration's message on unfunded mandates. It is a one-sided presentation of a complicated issue that stresses costs and calls for more

Federal spending.

- o We are being urged by labor, environmental and disability groups to repudiate the report; fiscal conservatives could also criticize us for supporting it.

- o The Administration already has a strong record on unfunded mandates. We've issued executive orders and taken strong actions to implement the Unfunded Mandates Reform Act. We've also proposed changes to address certain specific burdens identified in the report (e.g. reporting requirements in IDEA) and have provided enhanced technical assistance and flexibility under numerous statutes.

**cons**

- o Some Democratic Commission members may support the report, isolating Administration Democrats.

- o We could be criticized for not acting aggressively to address the burden of unfunded mandates.

- o We could be criticized as being inflexible given improvements in this draft.

Attachments

ADVISORY COMMISSION
ON INTERGOVERNMENTAL RELATIONS

# Members of the Commission

**Private Citizens**
Peter Lucas, Director of Legislative Affairs,
Massachusetts Bay Transportation Authority, Boston, MA
Richard P. Nathan, Director, Nelson A. Rockefeller Institute of Government, Albany, NY
William F. Winter, CHAIRMAN, Senior Partner, Watkins, Ludlam & Stennis, Jackson, MS

**Members of the U.S. Senate**
Bob Graham, Florida
Dirk Kempthorne, Idaho
Craig Thomas, Wyoming

**Members of the U.S. House of Representatives**
James P. Moran, Virginia
Donald M. Payne, New Jersey
(Vacancy)

**Officers of the Executive Branch, Federal Government**
Carol M. Browner, Administrator,
U.S. Environmental Protection Agency
Marcia L. Hale, Assistant to the President
and Director of Intergovernmental Affairs
Richard W. Riley, Secretary,
U.S. Department of Education

**Governors**
Arne H. Carlson, Minnesota
Howard Dean, Vermont
Michael O. Leavitt, Utah
Bob Miller, Nevada

**Mayors**
Victor H. Ashe, Knoxville, TN
Gregory Lashutka, Columbus, OH
Edward G. Rendell, Philadelphia, PA
Bruce M. Todd, Austin, TX

**State Legislators**
Paul Bud Burke, President, Kansas Senate
Art Hamilton, Minority Leader, Arizona House of Representatives
(Vacancy)

**Elected County Officials**
Randall Franke. Commissioner, Marion County, OR
Gloria Molina, Supervisor, Los Angeles County, CA
John H. Stroger, Jr., Commission President, Cook County, IL

800 K Street, NW, Suite 450, South Building, Washington, DC 20575
*Telephone:* (202) 653-5540 *Fax:* (202) 653-5429

# The Role of
# FEDERAL MANDATES
# in Intergovernmental Relations
**(Draft: May 30, 1996)**

## RECOMMENDATIONS ON INDIVIDUAL MANDATES:

### 1. Fair Labor Standards Act:

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

### 2. Family and Medical Leave Act:

Retain state and local government coverage under the FMLA.

### 3. Occupational Safety and Health Act:

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

### 4. Drug and Alcohol Testing of Commercial Drivers:

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

### 5. Metric Conversion for Plans and Specifications:

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

**6. Medicaid: Boren Amendment:**

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

**7. The Clean Water Act:**

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

**8. Individuals with Disabilities Education Act:**

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

**9. Americans with Disabilities Act:**

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

**10. The Safe Drinking Water Act:**

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

**11. Endangered Species Act:**

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

**12. The Clean Air Act:**

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

**13. Davis-Bacon Related Acts:**

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

**14. Required Use of Recycles Crumb Rubber (Repealed)**

Commend the Congress and the President for repealing this federal mandate.

## RECOMMENDATIONS ON COMMON ISSUES:

**1. Detailed Procedural Requirements:**

In general, state and local governments should be permitted, through statutory language, flexibility in choosing the methods 3used to comply with a federal mandate. Federal agencies should assist state and local governments by providing research and technical advice on implementation approaches and methods to save the state and local governments design and adaptation costs, whenever possible. The focus of federal statutes, regulations, and policies should be on results, not process.

**2. Lack of Federal Concern About and Fund of Mandate Costs:**

As requires by the Unfunded Mandates Reform Act, the federal government should take federal, state, and local costs of policy implementation into consideration before enacting a law containing a federal mandate on state and local governments. In addition, the federal government should assume some share of mandate costs as an incentive to restrain the extent of the mandate and to aid in seeking the least costly alternatives.

**3. Federal Failure to Recognize State and Local Governments as Governments:**

Federal laws are regulatory policies should recognize that state, local, and tribal governments are co-makers of national policy who, in contrast to interest groups and private entities, are led by elected officials who must account to the voters within their respective jurisdictions just as do the President and the Members of the US Congress.

**4. Authorization of Lawsuits Against State and Local Governments to Enforce Federal Law:**

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

**5. Inability of Very Small Local Governments to Meet Mandate Standards and Timetables:**

The federal government should increase the number of laws and regulation that allow for deadline extensions or requirement modifications for very small governments that cannot meet existing time limitations or cannot afford compliance with national standards.

**6. Insufficient Communication on or Ineffective Coordination of Federal Policies:**

The federal government should establish a coordination mechanism to assist state and local governments through the federal policy maze. The coordination mechanism should be designed to avoid the conflicts of interest that arise in a lead agency process because a lead agency usually has program as well as coordination responsibilities. Desk officers could be assigned for each state as a single point of contact or ombudsperson for questions on federal policies and common rules could be drafted to implement mandates under the jurisdiction of multiple federal agencies. In addition, an arbitration process could be developed to make binding decisions on issues related to federal mandates that arise among federal agencies or between the federal agencies or between the federal government and state or local governments.

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-Jul-1996 12:16pm

TO: Sally Katzen
TO: Elizabeth E. Drye

FROM: Daniel J. Chenok
Office of Mgmt and Budget, OIRA

CC: Marcia L. Hale

SUBJECT: Final votes

The final tally was 13-7 (Kempthorne voted yes) against the report.

The motion to have the Chair recommend whether to continue after consultation with Congress and the President was passed unanimously.

THE WHITE HOUSE

WASHINGTON

July 19, 1996

INFORMATION

MEMORANDUM TO THE PRESIDENT

FROM: Marcia Hale
Carol Rasco
Sally Katzen

SUBJECT: Pending Vote on the Advisory Commission on Intergovernmental Relations' (ACIR's) Unfunded Mandates Report

## I. SUMMARY

The Advisory Commission on Intergovernmental Relations (ACIR), chaired by Governor Winter, will vote on a final report on unfunded mandates Tuesday, July 23, 1996. The Administration commented extensively and critically on previous drafts of the report. Although this draft addresses some of our previous concerns, the three Administration officials on the Commission -- Marcia Hale, Secretary Riley, and Administrator Browner -- will oppose the report and are urging other members to oppose it. The decision to oppose the report was difficult; the vote is likely to be close and partisan. Governor Winter may call you between now and Tuesday to discuss the report.

## II. DISCUSSION

### Background

The Unfunded Mandates Reform Act directed ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates and identifying specific mandates that should be addressed. ACIR circulated a draft report last spring. On March 1, 1996, Marcia Hale wrote to Governor Winter stating the Administration's strong objections to the report. The draft report: (1) did little to further understanding of fundamental questions such as how to measure the costs and benefits of mandates or how state mandates affect local governments; (2) presented one-sided, misleading analyses of 14 Federal health, safety, environmental, worker protection, and civil rights laws and recommended unacceptable changes to most of these laws; and (3) failed in its analyses to consider the views of or effects on working men and women as directed by Congress.

### Reasons for Opposing Report

The new report still fails to respond to the broad questions the Congress posed to

ACIR about unfunded mandates. It remains a one-sided report that in places inaccurately characterizes requirements of current statutes and our approach to implementing them. The final draft recommends more moderate but still unacceptable statutory changes to provide relief to state and local governments while failing to adequately consider the effect of those changes on citizens and the environment. For example, the report proposes to:

- Amend the Individuals with Disabilities Education Act and significantly increase Federal funding (disability and civil rights groups oppose this recommendation; we have argued that civil rights statutes are exempt from consideration by ACIR);

- Amend Davis Bacon-related laws (requiring prevailing wages be paid to employees under certain federally-funded contracts) to consider exempting projects in which federal participation is a lower percentage of total project costs (labor opposes).

- Amend the Fair Labor Standards Act to allow state policies to be consistent with either with current law or with comparable policies that currently apply to the Federal government only (labor groups oppose);

- Amend the Clean Water Act to allow EPA to extend compliance deadlines on a case-by-case basis (environmental groups oppose);

The report also:

- recommends a commission study laws that provide private rights of action against state and local governments before Congress reauthorizes any existing statutes (e.g. environmental laws) with such provisions or enacts any new statutes with such language (labor, environmental, and civil rights groups oppose); and

- to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 6 statutes and recommends new Federal bureaucratic structures to assist states.

It was our hope that ACIR would provide a context in which to consider ways to further address state and local governments' concerns while maintaining our commitment to national objectives. We recognize that a vote against the report could be viewed as a vote against the states and for "unfunded mandates." We nevertheless feel that the report presents a one-sided, fundamentally flawed analyses and that we should not support it.

You have a strong record on unfunded mandates. You signed Executive Order 12875 during your first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, you signed the Unfunded Mandates Reform Act. In March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes. As ACIR concludes its work, we will work to ensure that your record and our reasons for opposing the Commission's report are well understood.

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- to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 6 statutes and recommends new Federal bureaucratic structures to assist states.

It was our hope that ACIR would provide a context in which to consider ways to further address state and local governments' concerns while maintaining our commitment to national objectives. We recognize that a vote against the report could be viewed as a vote against the states and for "unfunded mandates." We nevertheless feel that the report presents a one-sided, fundamentally flawed analyses and that we should not support it.

You have a strong record on unfunded mandates. You signed Executive Order 12875 during your first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, you signed the Unfunded Mandates Reform Act. In March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes. As ACIR concludes its work, we will work to ensure that your record and our reasons for opposing the Commission's report are well understood.

# BRIEFING BOOK FOR ACIR MEETING ON UNFUNDED MANDATES REPORT

July 23, 1996
Hall of States

| | |
|---|---|
| TAB A | Opening statement from Marcia Hale opposing report with no amendments |
| TAB B | POTUS Memo summarizing issue |
| TAB C | Letters from Hale, EPA, ED to ACIR opposing report |
| TAB D | Other opposing views from DOL, DPC, and Citizens for Sensible Safeguards |
| TAB E | ACIR Commission member briefing book (includes report at Tab B) |
| TAB F | June 12 WS Chief of Staff memo opposing initial revisions to report |
| TAB G | Letters from Hale & Agencies, Katzen March 22 testimony opposing preliminary report |
| TAB H | Title III of Unfunded Mandates Act authorizing report |
| TAB I | OMB Counsel memo on ACIR funding status |

- DRAFT PRESS STATEMENT --

The President is committed to addressing state, local and tribal government's concerns about unfunded mandates and has taken significant actions toward that end. Regrettably, the Administration must oppose the Advisory Commission on Intergovernmental Relations' (ACIR's) draft final Report: *The Role of Federal Mandates in Intergovernmental Relations*. The report fails to respond to the broad questions the Congress posed to ACIR about unfunded mandates, and instead recommends statutory changes without adequately considering the effect of those changes on working men and women and the environment. The Administration will continue to work with all levels of government to further our understanding of and response to unfunded mandates.

A

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STATEMENT ON UNFUNDED MANDATES REPORT

by

Marcia Hale
Asst. to the President for
Intergovernmental Affairs

-- DRAFT --

The Clinton Administration has a strong record on unfunded mandates. We pushed for passage of the Unfunded Mandates Reform Act that called for this report. I had hoped the Commission's work would help us think more clearly and constructively about unfunded mandates. All of us are searching for ways to better address state and local governments' concerns while meeting the goals embodied in Federal statutes. Regrettably, however, the Administration cannot support the ACIR report.

Before turning to the report, I want to emphasize the significant action the Administration has taken 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 March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes.

Unfortunately, the Commission's draft final report doesn't move us further forward.

As you know, the Unfunded Mandates Reform Act directed this Commission to review the role of unfunded mandates in intergovernmental relations. It directed us:

- to establish a framework for analyzing and discussing mandates;

- to develop measurement tools for evaluating mandates;

- to examine the impact of unfunded state mandates on local governments; and

- to identify specific mandates that should be addressed.

This is a tall order, and as you know the Commission had limited resources. Regrettably, the Commission has focused on specific mandates without establishing a clear framework for analysis. Further, the Commission did not consider the views of working men and women in its assessments as directed by Congress. As a result, ACIR's recommendations do not reflect a balanced or careful consideration of the issues.

It would not be productive to debate the individual recommendations -- each one raises multiple issues and could

consume hours of our time.

For example, the report discusses the costs to states and local governments of citizen suit provisions. It also calls for a study of such laws. But it does not discuss the success such provisions have had in ensuring full implementation of critical federal statutes. Based on this one-sided analysis, the report recommends that Congress hold hostage all legislation with such provisions until the study is completed. Without considering the consequences for people and the environment, the report concludes that Congress should not reauthorize the Safe Drinking Water Act, the Individuals with Disability Education Act, Medicaid law, or a myriad of other statutes with citizen suit provisions, and should not pass any new laws with these provisions, until another Commission has studied the issue further.

The Administration cannot support this approach. Citizen suits have proved highly beneficial in ensuring Federal statutes are implemented as intended by Congress.

In this and other areas of the report the Commission has simply overreached while failing to complete first things first. In short, the report contains a series of recommendations that are not well supported and does not meet Congress's charge that it provide a framework for looking at unfunded mandates in a coherent and balanced way.

The Administration commented extensively on the previous draft ACIR report. We appreciate the Commission's hard work in making revisions to the draft that incorporate many of our comments. Nevertheless, we regrettably cannot support the current draft for the reasons I have stated and as I discussed in more detail in my July 3 letter to Governor Winter. There is no easy way to amend the draft given its fundamental shortcomings. We therefore urge the Commission to vote to disapprove it without amendments.

***

I know the members of this Commission share my and the President's commitment to making further progress in addressing unfunded mandates and improving intergovernmental relations. The Commission has produced a number of reports that have improved our understanding of intergovernmental relations and have led to real improvements in Federal policy as it affects state, local and tribal governments. The Administration has appreciated the ACIR's contributions.

I look forward to continuing this dialogue on unfunded mandates beyond the work of this Commission.

THE WHITE HOUSE

WASHINGTON

July 19, 1996

INFORMATION

MEMORANDUM TO THE PRESIDENT

FROM: Marcia Hale
Carol Rasco
Sally Katzen

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### Reasons for Opposing Report

The new report still fails to respond to the broad questions the Congress posed to

ACIR about unfunded mandates. It remains a one-sided report that in places inaccurately characterizes requirements of current statutes and our approach to implementing them. The final draft recommends more moderate but still unacceptable statutory changes to provide relief to state and local governments while failing to adequately consider the effect of those changes on citizens and the environment. For example, the report proposes to:

- o Amend the Individuals with Disabilities Education Act and significantly increase Federal funding (disability and civil rights groups oppose this recommendation; we have argued that civil rights statutes are exempt from consideration by ACIR);

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- o Amend the Clean Water Act to allow EPA to extend compliance deadlines on a case-by-case basis (environmental groups oppose);

The report also:

- o recommends a commission study laws that provide private rights of action against state and local governments before Congress reauthorizes any existing statutes (e.g. environmental laws) with such provisions or enacts any new statutes with such language (labor, environmental, and civil rights groups oppose); and

- o to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 6 statutes and recommends new Federal bureaucratic structures to assist states.

It was our hope that ACIR would provide a context in which to consider ways to further address state and local governments' concerns while maintaining our commitment to national objectives. We recognize that a vote against the report could be viewed as a vote against the states and for "unfunded mandates." We nevertheless feel that the report presents a one-sided, fundamentally flawed analyses and that we should not support it.

You have a strong record on unfunded mandates. You signed Executive Order 12875 during your first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, you signed the Unfunded Mandates Reform Act. In March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes. As ACIR concludes its work, we will work to ensure that your record and our reasons for opposing the Commission's report are well understood.

THE WHITE HOUSE

WASHINGTON

July 3, 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:

Thank you for sharing with me a revised draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. Although the draft has improved, the revisions to it have not addressed some of the Administration's fundamental concerns articulated in my March 1, 1996 letter to you (attached). The report still fails to respond to the broad questions the Congress posed to ACIR about unfunded mandates, and instead recommends statutory changes without adequately considering the effect of those changes on citizens and the environment. Regrettably, the Administration cannot endorse the draft report.

As you know, the Clinton Administration has taken action on several fronts 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 March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes.

It was our hope that ACIR would provide a context in which to consider ways to further address state and local governments' concerns while maintaining our commitment to national objectives. As you know, the Unfunded Mandates Reform Act directs ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates, identifying specific mandates that should be addressed based on that framework, and investigating the role of unfunded state mandates on local governments. Congress also directed ACIR to consider the views of and the impact on working men and women in evaluating mandates.

ACIR was unable to focus its limited resources in a way that would fulfill these objectives. As a result, we find that ACIR's recommendations do not reflect a balanced or careful consideration of the issues. The report captures states' and local governments' concerns about certain Federal laws but, as acknowledged in the report (p. 33), it does not reflect the views of the working men and women who benefit from these laws.

For example, the report discusses the costs to states and local governments, but not the benefits to the public, of citizen suit provisions. The report calls for a study of laws that provide private rights of action against state and local governments which is appropriate, but the recommendation goes on to state that pending conclusion of the study no new citizen suit provisions should be enacted nor any reauthorized nor should any statutes with such language be reauthorized (p. 7). The Administration cannot support this approach. Citizen suits have proved highly beneficial in ensuring Federal statutes are implemented as intended by Congress.

Further, the report inappropriately reviews a disability civil rights statute -- the Individuals with Disabilities Education Act (IDEA). This and other civil rights statutes do not fall within the scope of the Unfunded Mandates Reform Act. The Administration disagrees with the report's conclusion to the contrary.

Additionally, the report's recommendations have potentially significant adverse budget implications. The report recommends complex new Federal bureaucratic structures and calls for increased spending or technical assistance under six statutes. Although the Administration has supported increased aid to states in implementing Federal laws where appropriate, the Administration is concerned about the open-ended nature of these recommendations.

As you know, the Administration commented extensively on the previous draft ACIR report. We appreciate the Commission's hard work in making revisions to the draft that incorporate many of our comments. Nevertheless, we regrettably cannot support the current draft for the reasons outlined above. Please contact me if you would like to discuss this issue further.

Sincerely,

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

Attachment

cc: ACIR Commission Members

UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

July 5, 1996

William E. Davis
Executive Director
Advisory Council on Governmental Relations
South Building, Suite 450
800 K Street, NW
Washington, DC 20575

Dear Director Davis:

I am responding to your memorandum of June 26 concerning the confidential draft of the final ACIR report on federal mandates, undertaken in accordance with Title III of the Unfunded Mandates Reform Act. I regret to inform you that after carefully reviewing the draft as it pertains to the responsibilities of the Department of Education, I cannot approve the final report in its current form. These are my major concerns:

(1) The draft report (page 7) presents for the first time a one-sided argument in favor of a study of the "constitutional and intergovernmental issues raised by laws authorizing private rights of action against state and local governments," and then goes on to recommend that such a study should be completed "prior to ... any reauthorizations of existing statutes with such language." I cannot agree to the postponement of the reauthorization of the Individuals with Disabilities Education Act (IDEA) until such a study is completed. We have come too far in the reauthorization of IDEA -- which passed the House on June 10 under suspension of the rules and is pending floor consideration in the Senate -- to accept such a recommendation and the likelihood of long-term delay of the important reforms and improvements that the Department, State and local providers, and parents are seeking. Indeed, as you know, many of those reforms are fully consistent with ACIR's recommendations regarding the reduction of administrative burdens and the need for mediation and alternative dispute resolution processes in IDEA.

(2) The draft report's discussion of IDEA is unacceptable for several reasons. First, IDEA should not be included in the report. IDEA, in essence, is a civil rights statute and should not be considered as another federal program for purposes of the report. I am pleased to see that discussion of the Americans With Disabilities Act has been dropped from the draft report and believe that IDEA should be deleted as well.

Second, I cannot support the recommendation that funding for the IDEA Grants to States program be suddenly increased -- over five-fold -- to 40 per cent of the excess costs of special education. I am proud that the President's fiscal year 1997 budget request for Grants to States under IDEA would provide fully $279 million more than the amount provided by Congress for fiscal year 1996 and would reverse the trend of declining Federal participation in the education of students with disabilities. I am sure that we agree the President's budget is a step in the right direction, but I must oppose funding recommendations that are so unrealistic.

Finally, although I appreciate the efforts that have been made in the draft report to acknowledge the accomplishments of IDEA over the years as well as the Department's wide consultation with State and local providers, parents, and other interested parties in developing its reauthorization and reform proposal, the overall tone of the discussion of IDEA remains negative and slanted. This is particularly unfortunate in light of the fact that, apart from the reference to the 40 per cent funding level, the recommendations and the Department's reform and reauthorization goals are remarkably consistent.

In conclusion, it is unfortunate that we have been unable to reach agreement on the current draft. I know that you and your staff -- as well as members of the Department -- have worked hard to find a mutually satisfactory result with respect to IDEA. I regret that it does not seem possible to succeed in the few remaining weeks.

Yours sincerely,

Dick Riley

Richard W. Riley

ADVISORY COMMISSION ON INTERGOVERNMENTAL AFFAIRS(ACIR) MANDATES REPORT: LABOR ISSUES

Summary of DOL Concerns: ACIR continues to ignore the Congressional directive to consider the impact of state and local mandates on working men and women. In the report:

•The recommendations concerning the Fair Labor Standards Act (FLSA) demonstrate a lack of understanding of the requirements placed on Federal Agencies by Title 5 USC as the recommendation would result in additional burdens on local and state government.

•The comments related to the Family and Medical Leave Act (FMLA) disregard several relevant findings of the Commission on Family and Medical Leave.

•Recommendations related to the Occupational Health and Safety Act (OSHA) call upon the Federal government to take on basic state and local government responsibilities and comments related to OSHA standards are unsupported.

• The Davis Bacon recommendations would be detrimental to basic worker protection and they would complicate the application of Davis Bacon requirements.

Fair Labor Standards Act

ACIR Recommendation: Retain state and local government coverage under the Fair Labor Standards Act, but amend the Act to allow state and local governments' compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.

DOL Response:

•ACIR implies that Federal agencies have a lesser standard to meet in terms of employment standards; however, federal agencies are required to comply with both FLSA and Title 5. If the recommendation is to require the same standards for state and local government employees as are required for Federal employees, the effect would be to place additional regulatory requirements on state and local governments which presently do not exist.

•ACIR ignores the steps which both Congress and the Labor Department have taken in order to address particular problems related to state and local governments. For example:

• there are special overtime standards for law enforcement and firefighting personnel and "comp time" provisions.

• special accommodations were included in regulation changes in 1992 that allow state and local governments to continue to claim exemption from overtime for their executive, administrative and professional employees despite the fact that they account for leave on an hour-for-hour basis or that they have systems requiring them to make partial-day deductions from pay when accrued leave has been exhausted.

• the Department of Labor investigates state and local governments essentially on a complaint-only basis.

• the Department of Labor will not file suit against a state or local government to enforce the FLSA unless at least 30-days advance written notice has been given that the pay practices are in violation.

Family and Medical Leave

ACIR Recommendation: Retain state and local coverage under the Family and Medical Leave Act.

DOL Response:

•While ACIR recommends continued coverage for state and local employees, the ACIR reports states that the Family and Medical Leave Commission's study did not survey public agencies. The report however fails to point out that the Employee Survey was a nationally representative sample of public and private sector workers.

•In addition, a separate survey of state family and medical leave policies specifically asked whether public agencies had encountered difficulties in applying the FMLA special rules for employees of schools. For states that had their own family or medical leave provisions, local school administrators state that they encountered no problems in reporting to both state and federal enforcement entities.

•The ACIR report suggests that Federal agencies have more flexibility than state and local governments in the implementation of FMLA; however, unlike the Federal government state and local governments have the authority to:

• deny restoration to certain highly compensated individuals.

• require certifications by health care provider if the employee claims they are unable to return to work because of a

specified condition.

• entitled to recover premiums paid for maintaining health benefits coverage during the period of unpaid leave unless the employees fails to return to work for reasons related to health or other circumstances beyond the control of the employee.

## Occupational Safety and Health Act

ACIR Recommendation: Make no changes in Occupational Safety and Health Act OSHA) language regarding state and local government compliance but increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.

DOL Response:

•Safe workplaces are a fundamental obligation of all employers and the Federal government should not be expected to finance safe work places for state and local governments.

•The ACIR report states that there is a "lack of credible information on the rationale for or the scientific basis of many OSHA standards and requirements." It is irresponsible for ACIR to make this statement and to offer no documentation or even one regulation or standard as an example.

## Davis-Bacon Related Acts

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

DOL Response:

•The Administration has supported bi-partisan reform legislation in the House and Senate to increase dollar thresholds and to reduce the level of paperwork and record keeping requirements.

•The ACIR proposal of adding the percentage threshold to the Davis-Bacon requirements would be detrimental to fundamental worker wage protection. In addition, it would further complicate the administration of Davis-Bacon as it would increase the level of uncertainty as to when and which projects would be subject to

Davis-Bacon.

•The ACIR report suggests that there is often a conflict between Federal Davis Bacon and state prevailing wage laws. This conflict is "inappropriately detrimental to intergovernmental comity." Without specific examples it is difficult to rebut the ACIR assertion, except to note that the Davis Bacon statute is a longstanding Federal law with a simple threshold mechanism. In addition, most state prevailing wage statutes were written to complement and build upon the Federal statute.

Parque

EXECUTIVE OFFICE OF THE PRESIDENT

17-Jul-1996 06:41pm

TO: Marcia L. Hale

FROM: Jennifer L. Klein
Domestic Policy Council

CC: Christopher C. Jennings

SUBJECT: ACIR Report

You had asked for our view on the Medicaid problems in the ACIR report. The major problem is that the report recommends that a study be commissioned to examine private rights of action. Until the study is completed, the report recommends a moratorium on new laws and reauthorization of existing laws that grant private rights of action against state and local governments. We have argued throughout the Medicaid debate that a right of action by an individual heard in federal court is an essential part of the Medicaid guarantee. Therefore, we would oppose the study and the moratorium.

Please let me know if you have any additional questions.

Copy: Cathy Doyle

Title: ACIR

b-6220

# TALKING POINTS ON ACIR DRAFT REPORT

- Although the draft has improved, the revisions have not addressed the Administration's fundamental concerns.

- We're unhappy with the overall approach and oppose many of the specific policy recommendations.

**General Problems**

- The report fails to respond to broad questions posed by Congress to ACIR, such as: how do state mandates affect local governments? How should we measure the costs and benefits of mandates?

- Report is also very one-sided. It focuses on states' and governments' concerns but fails to consider the views of and impact on working men and women in evaluating mandates as directed by Congress.

- Recommends increased technical assistance and financial assistance under 6 statutes (potential budget buster).

**Objections to Recommended Statutory Changes**

- Includes Individuals with Disabilities Education Act (IDEA) -- a disability civil rights statute exempt from consideration under the Unfunded Mandates Reform Act. Recommends Fed. Government fund 40% of implementation costs.

- Recommends amending the Fair Labor Standards Act to allow state and local governments to comply with rules that apply to the Federal government rather than the policies that govern private industry. (Labor will oppose)

- Recommends extending Clean Water Act deadlines. (environmentalists will oppose)

- Recommends that no new or existing citizen suit provisions be enacted or reauthorized until a commission studies citizen suits. Citizen suit provisions have been highly effective in ensuring Federal laws -- particularly environmental and civil rights laws -- are fully implemented.

- Recommends amending Davis Bacon-related laws to set higher dollar threshold and suggests considering exempting projects with a low percentage of Federal funds. (labor will oppose)

- Recommends weakening drug and alcohol testing provisions of the Transportation Employee Testing Act.

# REVIEW OF ACIR JUNE 25 FEDERAL MANDATES REPORT: A REPORT THAT SHOULD BE OPPOSED

Citizens for Sensible Safeguards, a coalition of more than 300 national organizations, has obtained a June 25, 1996 draft of an ACIR report on federal mandates. While CSS has not had time to fully evaluate the draft, it has drawn preliminary conclusions.

CSS strongly opposes the report and actively urges a negative vote by the ACIR Commission Members, which are to meet on July 23, 1996. The June 25 draft demonstrates that the ACIR staff have lost nearly all objectivity in researching and writing a final report. Furthermore, the ACIR efforts to develop a final report have not met the statutory requirements of the Unfunded Mandates Reform Act of 1995 (P.L. 104-4) with respect to addressing certain subjects (Sec. 302(a)(3)) or holding more than one hearing on the preliminary report (Sec. 302(c)(2)).

ACIR issued a preliminary report in January, 1996 to seek public input. The preliminary report was roundly criticized by the public interest community, along with unions representing working men and women. CSS issued a report on March 5, 1996, called *Shirking Responsibility*, that was highly critical of the ACIR preliminary report. Despite the firestorm of protest, the June 25 draft has changed only in a very modest manner.

Our preliminary review indicates two types of problems with the June 25 draft report. The first type deals with the recommendations dealing with specific mandates. Of the 13 specific recommendations, CSS opposes all but four. We oppose some combination of the recommendations and supporting text for the Fair Labor Standards Act, Occupational Safety and Health Act, Davis-Bacon related acts, Individuals with Disabilities Education Act, Endangered Species Act, Clean Water Act, Safe Drinking Water Act, Clean Air Act, and Medicaid Boren Amendment. More detail on the CSS response to specific ACIR recommendations will be developed.

The second type of problems concern the tone of the report and the biased nature of the introductory and conclusionary sections. Before identifying general problems, it should be noted that the ACIR June 25 draft does not comply with the Unfunded Mandates Reform Act. The Act requires ACIR to "investigate and review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, . . . and consider views of and the impact on working men and women on those same matters." The June 25 report does not address the views of working men and women.

## General Problems

1. **The report does not address the tension that may exist between a basic right, as perceived by a citizen, and a mandate, as perceived by a state or local government; ACIR wrongly includes civil and constitutional rights programs as "federal mandates;" and ACIR should advise Congress on the need to narrow the definition of "federal mandate" to not include voluntary programs.** During the single ACIR public hearing,

   witnesses repeatedly testified that what is perceived to be a mandate by state and local governments is a critical right to citizens that live in that state. The report fails to address this dilemma, and is skewed heavily to the viewpoint of state and local governments, instead of the public. For example, safe drinking water is perceived by local governments as a costly mandate imposed upon them, whereas citizens view it as a basic right.

The Unfunded Mandates Reform Act is very clear that laws and regulations enforcing constitutional rights and prohibiting discrimination are not be considered a federal mandate.[1] Yet ACIR persists in including such laws in its analysis. For example, the ACIR makes recommendations on the Individuals with Disabilities Education Act (IDEA) even though the law is designed to prohibit discrimination and the courts have ruled that a free, appropriate public education is a constitutional right. Additionally, the ACIR raises study of more "mandates," such as the "Motor Voter" law which is intended to enforce the constitutional right to vote.

Even though Sec. 305 of the Unfunded Mandates Reform Act defines "Federal mandate" broadly, it is irresponsible of ACIR not to raise the need for Congress to narrow the definition. Federal programs in which a state or local government -- or any other recipient -- voluntarily chooses to participate in, should not be considered a mandate. A number of court decisions have concluded that the federal government has the right to impose restrictions on recipients of federal funds as a condition of receipt of those funds (see, for example, *Rust v. Sullivan*). By including laws such as the Occupational Safety and Health Act or Medicaid, in which states choose to voluntarily participate, the ACIR June 25 draft presents a false perception of intergovernmental issues.

2. **The ACIR draft is devoid of any reference to the benefits of federal laws.** The June 25 draft emphasizes intergovernmental difficulties with implementing federal mandates, but does not discuss the benefits derived from these public protections. This type of analysis significantly biases the report, adding to its credibility problems.

3. **The ACIR would have us believe that state and local governments should be treated differently than other regulated entities.** Of course there are times when the federal government should work in partnership with state and local governments in designing and implementing initiatives, such as information data collection efforts or service integration activities. However, state and local governments are also employers and polluters. They are no different than any other regulated entity in this respect. (In fact, that is why the U.S. Congress has made federal laws that apply to other Americans also apply to itself.) Providing preferential treatment to state and local governments unfairly tilts the regulatory playing field. Suddenly, employees of state and local governments may receive fewer workplace protections than those workers in the private sector.

Already state and local governments are not required to comply with important federal safeguards. For example, one of the most successful environmental laws, the Emergency Planning and Community Right-to-Know Act, which requires annual disclosure of toxic chemicals to the environment, does not apply to state and local governments, but does apply to federal agencies and many businesses. Instead of providing preferential treatment for state and local governments, the ACIR should be concentrating on where gaps in public

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[1] The definition of "federal mandate" is guided by Sec. 3 of the Act. However, Sec. 305, which is in title III and applies to the ACIR study, overrides Sec. 3 and provides a different definition of "federal mandate" that includes an "enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program." Nonetheless, the definition in Sec. 305 does not override the seven exclusions to the Act listed in Sec. 4. Sec. 4 states that the Act shall not apply to any law or regulation that "(1) enforces constitutional rights of individuals; [or] (2) establishes or enforces any statutory rights that prohibit discrimination on the basis on race, color, religion, sex, national origin, age, handicap, or disability."

safeguards exist and offering recommendations on how to address the unmet need without imposing unnecessary burdens.

4. **The ACIR does not describe why the federal protections were developed in the first place.** The reason federal law is created is to address a felt need -- one that is openly debated and chronicled. The ACIR June 25 draft does not describe why "federal mandates" are created in the first place. In many cases, it is because state and local governments are not addressing the problem. In other cases, it is to develop uniformity throughout the country to ensure that citizens, no matter where they live, are afforded equal protection. Once again, the ACIR bias makes the report sound as though it has become a trade association for state and local governments instead of applying an analytical framework to a difficult issue.

5. **The ACIR draft has enormous credibility problems beyond those identified above.** The June 25 draft is filled with inaccuracies that makes it difficult to give the recommendations any credibility. For example, on page 4 of the draft, it states that "ACIR was unable to review more than the 13 selected mandates " On its face this is inaccurate since the preliminary report reviewed 14, not 13, mandates.

   The description on page 5 dealing with the public comments and testimony that ACIR received on the preliminary report is woefully inadequate. There is no mention about the types of comments that were received and that the preponderance of them were in opposition to ACIR's preliminary report.

   Probably most extreme is the bold conclusionary statement on page 30: "The [ACIR] review of existing mandates has already contributed positively to improvements in intergovernmental relations. Advocacy groups on all sides of various mandate issues have started to rethink their positions, to better articulate their concerns, and to discuss face-to-face with one another." This is simply a self-serving statement that defies the fact that CSS continues to publicly oppose the ACIR actions, not to rethink our positions. There has been no face-to-face communication with the ACIR staff, nor initiative on their part to engage the coalition on our views. ACIR may be correct in stating that it has helped CSS to "better articulate their concerns," but solely because of the outrageous actions taken by this governmental agency and the lack of empirical evidence to justify its conclusions.

6. **The process for developing a final report is inadequate and inappropriate.** Federal agencies received the ACIR report no sooner than June 26 and were asked to submit comments to the ACIR by July 3. Thus, most agencies had less than one week to react to the June 25 draft -- and at a time that was nearing a federal holiday. This is the same approach the ACIR took in releasing it preliminary report -- allowing agency staff to review the report during the holiday season, which also happened to be during a government shutdown.

   The public also has not been adequately included in this process. We criticized the ACIR for initially announcing that a $400 per person conference would serve the statutory requirement for public hearings. ACIR relented and held one public hearing. The statute, however, requires ACIR to hold "public hearings" -- that is, more than one. This has not been done.

   During the public hearing Governor Winter, the chair of ACIR, made several statements about public notification of future ACIR actions on this subject. OMB Watch followed up with a letter to the Governor for clarification on several points. The ACIR responded in a letter that stated that future meetings regarding the development of the final report would be posted in the *Congressional Monitor*, a private publication. We encouraged them to make such

announcements in the *Federal Register* in addition to the private publication. It was not until July 10, after CSS complained that there had been no announcement of a July 23 meeting, that ACIR published in the *Federal Register* an announcement of the meeting to consider the draft report. Thus, the public had less than two weeks notice about the meeting. We find this unacceptable.

7. **The ACIR recommendation "to restructure federal laws to restore comity between the governments" needs clarification, and the recommendations to conduct further studies must be deleted.** On page 2 of the June 25 draft, it states: "ACIR recommends that mandate relief studies, and related efforts focus on how to restructure federal laws and restore comity between the governments in the American federal system, not on the elimination or repeal of federal laws." What CSS opposed in the preliminary report was the notion of exempting state and local governments with compliance of federal laws and protections, thereby creating what CSS called "a crazy quilt of public protections for some, but not for others." ACIR never proposed eliminating or repealing federal laws, just allowing state and local government to be excluded from complying This general ACIR recommendation must affirmatively state that ACIR is not recommending a policy of exempting state and local governments from compliance with federal laws and protections.

Additionally, the June 25 draft recommends a review of "additional existing federal mandates," further study of "laws authorizing private right-of-action against state and local governments," and a review of the Resource Conservation Recovery Act, Superfund, Medicaid, job training services, and "Motor Voter" requirements is needed "as soon as possible." Given the sloppy, one-sided nature of the June 25 draft, we believe these ACIR recommendations should be dropped. On what basis is ACIR mentioning RCRA, Superfund, Medicaid, job training, and Motor Voter Motor Voter, for example, has been subjected to court review and has been upheld. Congress has an appropriate means for reviewing these laws and will debate them in the public eye when up they are up for reauthorization.

CSS strongly objects to the conclusion on page 7 that a study be commissioned to examine issues raised by laws authorizing private rights-of-action. The private right-of-action is the only way individuals can enforce their rights under the law. Rights that are not enforceable are meaningless. We also strongly oppose the recommendation that there should be a moratorium on new laws and reauthorization of existing laws that grant private rights-of-action against state and local governments until this study be completed. Such recommendations have an impact on a wide range of laws, including the Americans with Disabilities Act and most entitlement programs. This section of the ACIR June 25 draft should be dropped.

THE WHITE HOUSE

WASHINGTON

June 12, 1996

MEMORANDUM TO LEON PANETTA

FROM: Marcia Hale
Carol Rasco
Sally Katzen

SUBJECT: Advisory Commission on Intergovernmental Relations (ACIR) Draft Report

Governor Winter, ACIR's Chairman, has asked Marcia Hale to confidentially review a new draft of ACIR's unfunded mandates report. Although this draft addresses some of our previous concerns and is apparently acceptable to Governor Winter and possibly to other Democratic Commission members, we recommend that the three Administration officials on the Commission -- Marcia Hale, Secretary Riley, and Administrator Browner -- oppose the report and work to ensure other Democratic members oppose it. This memo seeks your approval of this approach.

**Background**

- o ACIR's Congressional Charge -- The Unfunded Mandates Reform Act directs ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates and identifying specific mandates that should be addressed.

- o Previous Administration Position -- In January, the Commission voted to release a draft report for public comment. Federal Agencies commented extensively on the draft. In addition, on March 1, 1996 Marcia Hale wrote to Governor Winter stating the Administration's strong objections to the report's analytic approach and policy conclusions (letter attached). The letter indicated the draft report:

  - o did not adequately speak to ACIR's Congressional charge to establish a broad conceptual framework for considering individual mandates;

  - o did little to further consensus on fundamental questions such as how to measure the costs and benefits of mandates;

  - o presented misleading analyses of 14 Federal health, safety, environmental, worker protection, and civil rights laws and recommended unacceptable changes to most of these laws;

  - o failed in its analyses to consider the views of or effects on working men and

women as directed by Congress; and

- o went beyond the scope of the Act by suggesting changes to disability civil rights statutes excluded by the Act.

**Revised Draft**

- o Content -- The new draft, although less egregious in its recommendations (attached), contains the same fundamental flaws. For example, the report:
  - o still largely fails to consider benefits (the final page acknowledges ACIR did not consider the benefits of mandates on working men and women);
  - o to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 7 statutes -- Occupational Safety and Health Act (OSHA), Omnibus Transportation Employee Testing Act (drug and alcohol testing), Clean Water Act (CWA), Individuals with Disabilities Education Act (IDEA), Americans with Disabilities Act (ADA), Safe Drinking Water Act (SDWA), and Clean Air Act (CAA) -- and recommends new bureaucratic structures to assist states;
  - o argues (unconvincingly) that two disability civil rights statutes -- ADA and IDEA -- are within the Commission's scope and recommends unacceptable changes to ADA;
  - o proposes more moderate but still problematic changes to 5 statutes -- the Fair Labor Standards Act (FLSA), Transportation Employee Testing Act, CWA, ADA, and Davis-Bacon related acts; and,
  - o recommends a study of laws that provide private rights of action against state and local governments and recommends that the study be concluded prior to reauthorizing any existing statutes (e.g. environmental laws) with such provisions or enacting new statutes with such language.
- o Status -- Governor Winter is ready to ask Commissioners to vote to approve the report. The Commission sunsets at the end of this fiscal year, is short on funds, and is eager to conclude its work.

**Recommendation**

Administration officials should oppose the revised draft and urge other Democratic members to oppose it.

pros
- o This document is not good government and is not consistent with the Administration's message on unfunded mandates. It is a one-sided presentation of a complicated issue that stresses costs and calls for more

Federal spending.

- o We are being urged by labor, environmental and disability groups to repudiate the report; fiscal conservatives could also criticize us for supporting it.

- o The Administration already has a strong record on unfunded mandates. We've issued executive orders and taken strong actions to implement the Unfunded Mandates Reform Act. We've also proposed changes to address certain specific burdens identified in the report (e.g. reporting requirements in IDEA) and have provided enhanced technical assistance and flexibility under numerous statutes.

**cons**

- o Some Democratic Commission members may support the report, isolating Administration Democrats.

- o We could be criticized for not acting aggressively to address the burden of unfunded mandates.

- o We could be criticized as being inflexible given improvements in this draft.

Attachments

**STATEMENT OF SALLY KATZEN**
**ADMINISTRATOR**
**OFFICE OF INFORMATION AND REGULATORY AFFAIRS**
**OFFICE OF MANAGEMENT AND BUDGET**
**BEFORE THE**
**SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL AFFAIRS**
**COMMITTEE ON GOVERNMENTAL REFORM AND OVERSIGHT**
**UNITED STATES HOUSE OF REPRESENTATIVES**

**March 22, 1996**

Good morning Mr. Chairman and Members of the Committee.

I am Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget. OIRA has specified statutory responsibilities and is charged under various Executive Orders with the task of coordinating and reviewing Executive Branch regulatory policy matters.

I appreciate the opportunity to testify on unfunded Federal mandates on this, the first anniversary of the signing of the Unfunded Mandates Reform Act of 1995. This is a very important piece of legislation for the Administration, and one which President Clinton has enthusiastically supported. The Unfunded Mandates Reform Act was a milestone that addressed deep-felt legitimate concerns of State, local, and tribal governments about the difficulty of complying with Federal unfunded mandates.

## Background

From the inception of this Administration, the President has worked hard on issues involving the relationship between the Federal government and State, local, and tribal governments. He believes strongly that government cannot serve people unless there is cooperation -- a real partnership -- among all the levels of government. The difficulty of complying with Federal mandates without additional Federal resources is something that the President experienced first hand as Governor of Arkansas, and it is an issue that he sought to address in one of the first Executive Orders that he signed. Specifically, on October 26, 1993, the President signed Executive Order No. 12875, instructing Federal agencies to:

- refrain from imposing nonstatutory mandates unless 1) funds are provided by the Federal Government, or 2) the agency demonstrates to the Office of Management and Budget (OMB) that it has consulted with State, local, and tribal representatives, heard their concerns, accommodated them to the extent possible, and explained why they could not accommodate any remaining concerns; and

- develop an effective process of meaningful and timely communication with State, local, and tribal officials when developing regulatory proposals that contain significant nonstatutory unfunded mandates.

While Agency compliance with Executive Order 12875 led to significant improvements in how agencies developed regulations having an intergovernmental impact, it could only affect non-statutory unfunded mandates. Yet, a number of -- indeed most -- mandates result from laws under which the agencies have little, if any, discretion. This led to the strong bipartisan support for the Unfunded Mandates Reform Act.

Title I of this Act addresses the legislative branch, and the processes that it should follow before enactment of any statutory unfunded mandates. Title I went into effect this past October, and it is

too early to evaluate its effectiveness. On the other hand, Title II, which addresses the Executive Branch, went into effect upon enactment, March 22, 1995. Title II built on Executive Order 12875, by establishing consultative and analytical requirements for agencies in developing rules. It also includes a requirement that OMB report to Congress on agency compliance with Title II; OMB filed its report today and I am submitting a copy along with my testimony.

Finally, Title III of the Act called for a detailed study on issues by the Advisory Commission on Intergovernmental Relations (ACIR). Many witnesses today are addressing this issue, and therefore let me start there and then speak to agency compliance with Title II.

## ACIR Study

Title III asked ACIR to report on a variety of issues, including:

- What is the role of Federal mandates in intergovernmental relations?
- What is the impact of unfunded mandates on the competitive balance between State, local, and tribal governments and the private sector?
- How do unfunded State mandates affect local governments?
- How can the Federal government best provide flexibility to its intergovernmental partners?
- How can the Federal government best reconcile existing and inconsistent mandates?
- How do we properly define and measure the costs and benefits of Federal mandates?

The reason for addressing these critical questions was a felt need to provide a context -- specifically, an informed analysis -- for this debate. As someone who was involved in the development of the legislation, it was clear to me that the answers to these questions are neither readily apparent nor easily attainable. Congress set a formidable research task for ACIR -- to take a conceptual as well as practical look at the scope and size of unfunded mandates in this country.

ACIR issued a preliminary staff draft for public review and comment on January 5, 1996. We raised serious concerns with ACIR's staff draft report in a March 1 letter from Marcia Hale, Assistant to the President for Intergovernmental Affairs to Governor Winter, the Commission's Chairman (I am attaching a copy of this letter to my testimony). Given Congress' decision to terminate the Commission this year, as well as the limited amount of funding to carry out the study and proceed to shut down, it is not surprising that ACIR's staff draft report did not meet the ambitious Congressional charge.

In the Administration's letter, we noted that the staff draft did not address the legislative request in a number of ways, including:

- it does not develop a sufficient conceptual framework for consideration of unfunded mandates;
- it does not address how State mandates affect local governments;
- it does not address how we should measure the costs and benefits of mandates; and
- it fails to consider the positive impact on working men and women of federal mandates.

In addition, we noted it provides only cursory and often misleading analyses of 14 Federal health, safety, environmental, and labor laws. Several Federal agencies that implement those laws submitted letters directly to ACIR. My colleagues on the panel will discuss the specific statutes within their jurisdiction.

We understand that ACIR received other critical constructive comments, and will likely receive more at a public hearing next week. The Administration looks forward to working with ACIR staff to produce a revised report for Commission consideration, which we expect will reflect these important comments and concerns.

## OMB Report

Today is not only the first anniversary of the Act. Not coincidentally, it is the date specified in the legislation for our report to Congress on agency compliance with Title II of the Act, called for by Section 208.

This report has given us the opportunity to review Administration activities since passage of the Act. As the report sets forth, agencies have given serious thought to, and established real processes for, intergovernmental consultation involving both unfunded mandates as defined by the Act and issues affecting State, local, and tribal governments generally. These consultation processes built on Director Rivlin's September 21, 1995, guidance to agencies called for by Section 204 of Title II, which discussed several general themes that agencies should consider as they engage in discussions with their intergovernmental partners.

- intergovernmental consultations should take place as early as possible, beginning before issuance of a proposed rule and continuing through the final rule stage, and should be integrated explicitly into the rulemaking process;

- agencies should consult with a wide variety of State, local, and tribal officials.

- the scope of consultation will necessarily vary with the cost and significance of the mandate being considered -- effective consultation, however, requires significant and sustained attention from all who participate, as well as a degree of trust to allow for frank discussion, focus on key priorities, and clear and unambiguous communication; and

- agencies should seek out State, local, and tribal views on costs, benefits, risks, and alternative methods of compliance, as well as whether the Federal rule will harmonize with and not duplicate similar laws in other levels of government.

The consultation processes that have been established in light of these general lessons are quite varied. As our report discusses, some agencies -- like the Departments of Defense and State -- do not generally issue regulations with intergovernmental effects. Even these agencies, however, have committed to consultations when developing rules or considering policies or programs that involve other levels of government.

Several other agencies -- notably, the Environmental Protection Agency and the Departments of Education and Labor -- issue many rules with intergovernmental effects and have done a superb job in setting up effective avenues of communication with State, local, and tribal governments. These are outlined in detail in Chapter 1 of our report.

The report demonstrates that the Administration's commitment to involve State, local, and tribal governments as early as possible goes beyond rules covered by the Act. We take seriously our responsibility to consult with other levels of government on all rules and significant policy or program decisions that may affect them. Our report includes a myriad of examples where agency activities benefitted from hearing the views of their intergovernmental partners, and incorporating those views into their decision making.

The report also shows that these processes are not just paper-driven exercises. Two rules in the last year met Title II's $100 million expenditure threshold for State, local, and tribal governments. Both were promulgated by the Environmental Protection Agency. Chapter 2 of the report contains a lengthy description of the consultative processes undertaken by the agency for these rules, and, most importantly, demonstrates agency ascertainment of concerns and the many changes made to accommodate those concerns.

The EPA experiences discussed in our report illustrate what the Unfunded Mandates Reform Act is all about. Everyone should recognize that regulations have provided important benefits for health, safety and the environment. At the same time, we must hear the concerns of our intergovernmental partners, react to those concerns, and incorporate them into the analyses that

inform our decision making so that costs to all those affected by the rule -- and especially to State, local, and tribal governments -- are minimized while the benefits to all are maximized.

I appreciate the opportunity to appear here today before you, and to unveil our report. I look forward to any comments you may have, and am happy to answer any questions at this time.

THE WHITE HOUSE

WASHINGTON

March 1, 1996

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

Dear Governor Winter:

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

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

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

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

For example, the preliminary staff draft recommends that Congress repeal the Family and Medical Leave Act's (FMLA) applicability to state and local governments. The Clinton Administration opposes this recommendation. The draft report asserts that the FMLA has "created unfunded costs related to extending medical insurance coverage to employees while on leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities..." The report cites no supporting evidence for this claim, however. Further, the report does not acknowledge the substantial benefits to employers, families, and individuals of implementing FMLA requirements. In addition, the Administration strongly opposes the recommendations that would weaken other labor protections including proposed changes to OSHA, the Fair Labor Standards Act and Davis-Bacon-related acts.

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

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

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

I am also concerned about the process for seeking public comment on the staff draft. I urge you to ensure full public participation in the Commission's deliberations. I understand the ACIR is sponsoring a March 6-7 Conference on Federal mandates and is charging an admission fee. In my opinion, charging a fee in this context is inappropriate since it creates a barrier to full public participation. I strongly endorse an accessible public meeting to seek comment on ACIR's activities.

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

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

Sincerely,

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:

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

February 8, 1996

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

Dear Governor Winter:

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

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

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

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

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

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

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

Sincerely,

Janet Reno

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General Washington, DC 20035

# The Role of Federal Mandates in Intergovernmental Relations A Preliminary ACIR Report January, 1996

## AMERICANS WITH DISABILITIES ACT (ADA)

The U.S. Advisory Committee on Intergovernmental Relations (ACIR) has published a preliminary report pursuant to title III of the Unfunded Mandates Reform Act of 1995, which requires ACIR to study the effect of Federal mandates on state and local governments and to recommend changes. Although the Unfunded Mandates Act expressly provides that "the Act shall not apply to any Federal regulation that establishes or enforces any statutory rights that prohibit discrimination on the basis of . . . disability," the Americans with Disabilities Act (ADA) and its implementing regulations are addressed in this report.

**Summary: DOJ Response to ACIR Report**

The report expressly recognizes that the ADA mandate is necessary because national policy goals justify its use; however, it recommends significant modifications in the implementation and enforcement of the Act. Those recommendations are based on some significant misperceptions of the ADA requirements. The law and its implementing regulations and this Administration's enforcement policies already address ACIR's concerns.

The ACIR's assertion that the ADA is "one size fits all" legislation" replete with "rigid requirements" simply misses the mark. The ACIR report fails to recognize the inherent flexibility of the ADA and its implementing regulations. For example, states and localities are only required to provide "program access" rather than total retrofit of all facilities; states and localities may use the law's "undue financial or administrative burden" defense in complying with the program access and effective communications requirements. This defense also provides states and localities additional flexibility in meeting compliance deadlines.

The ACIR's misperceptions and specific recommendations are discussed below.

1) **ACIR concern: The ADA creates problems for state and local governments because of expensive retrofitting and service delivery requirements.**

The ADA does not require expensive retrofitting or impose expensive service delivery requirements. As a result of the extensive negotiations that accompanied the passage of the ADA, the Act includes a number of provisions designed to ensure a fair and balanced approach to the implementation of the Act, including the cost of implementation. The statute includes specific limitations that recognize the need to strike a balance between the right of individuals with disabilities to participate in public activities and the legitimate financial and operational concerns of state and local governments.

The ADA does not require "expensive retrofitting." Title II of the ADA prohibits discrimination on the basis of disability by state and local governments, but it does not prescribe rigid requirements to achieve that objective. The ADA requires state and local governments to provide "program access." This means that they are required to make their programs and activities, not every existing building, accessible to qualified individuals with disabilities.

Program access provides state and local governments with the opportunity to be creative and flexible in their response to the Act. For example, a service customarily provided in an inaccessible location can be moved to an accessible space when a person with a mobility impairment needs access to that service. For existing facilities, physical changes are only required when it is not possible to provide program access in any other way.

In addition, the ADA does not impose expensive service delivery requirements. Although states and localities will undoubtedly incur costs in implementing the ADA, state and local governments are never required to take any action that would result in a "fundamental alteration in the nature of a program, service, or activity" or in "undue financial and administrative burdens."

The ADA requires that new buildings and facilities, and alterations to existing buildings and facilities, be built to be accessible. This sensible requirement recognizes that it is easiest and least expensive to build in access from the start.

2) **ACIR Concern: The ADA statutory language is confusing and ambiguous.**

The ADA is based on the familiar language and requirements of Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits disability-based discrimination by recipients of

Federal financial assistance, including state and local governments. Title II merely extends this prohibition to state and local programs that do not receive federal funds.

Therefore, state and local governments have had over twenty years to become familiar with terms such as "reasonable accommodation" and "undue hardship" and courts have had a similarly long period to develop case law under the Act. The only "novel" term used in the ADA is "readily achievable" and that term applies only to certain private entities covered by title III of the ADA. It does not apply to state and local governments (which are covered by title II).

The purpose of using these familiar terms was to ensure that state and local governments retained the flexibility required to enable each entity to develop its own method of complying with the ADA, in light of its unique circumstances in a changing environment.

ACIR correctly notes that state and local governments have a better understanding of their specific accessibility problems and how to address them. It recommends modifying the ADA to change its orientation from "rigid requirements toward a focus on goals and goal attainment schedules."

The ADA appropriately focuses on the broad goal of eliminating disability-based discrimination. And, by employing some of the concepts criticized by ACIR, it does precisely that. For example, the purpose of the "undue burden" defense is to allow each government to decide what actions to take in light of the resources available for use in the funding and operation of a service, program, or activity.

However, there is an inconsistency between ACIR's recommendation that the ADA be modified to prohibit the imposition of strict and rigid requirements and its criticism of the provisions of the ADA that already give state and local governments the flexibility to adapt to changing local conditions. ACIR should look again at the terms it previously found objectionable in light of the rich history of state and local governmental practices, agency interpretations, and judicial decisions.

**3) ACIR Recommendation: Federal funding for ADA compliance should be increased or the ADA should be modified to allow state and local governments to meet ADA substantive requirements and compliance deadlines in a manner that recognizes their technical and budget constraints.**

The ADA is a civil rights statute. As such, it has been expressly exempted by Congress from this "unfunded mandates" review because it is simply not acceptable to condition the civil

rights of citizens with disabilities on the availability of Federal grants to state and local governments.

The ADA is emphatically not "one size fits all" legislation. As noted above, the ADA regulations provide considerable flexibility to state and local governments in determining how to best implement the law. Rather than imposing inflexible substantive requirements, the title II regulation requires state and local governments to conduct a self-evaluation (to identify problems and facilitate the process of establishing compliance goals) and to develop a transition plan that establishes a schedule for attaining these goals. Every item in the transition plan, including its completion date, is subject to the caveat that it is not required if it constitutes a fundamental alteration or results in an undue burden. Therefore, the compliance deadlines are inherently flexible. In addition, the Department of Justice is now proposing to amend the title II regulation to clarify the compliance deadlines applicable to the installation of curb ramps.

These requirements empower state and local governments and make it possible for each community to create a plan and a schedule for reaching the goals of the ADA that take into account the specific needs of that community and the resources available to meet those needs.

4) ACIR Recommendation: A single Federal enforcement and assistance agency should be designated to coordinate enforcement and technical assistance.

This recommendation is apparently based on the misplaced concern that Federal enforcement of the ADA is uncoordinated and divided among too many departments and agencies of the government. The development and implementation of the ADA enforcement policies applicable to most units of state and local government is, in fact, limited to two Federal agencies: the Equal Employment Opportunity Commission (EEOC), which is responsible for implementing the ADA's prohibition on employment discrimination, and the Department of Justice, which is already responsible for coordinating the implementation and enforcement of all title II requirements except for the requirements that apply only to public transportation providers, which fall within the jurisdiction of the Department of Transportation. ADA lawsuits filed by the Federal government that involve state or local governments will be filed only by the Department of Justice.

The preliminary report correctly notes that eight Federal agencies have been assigned an enforcement role under title II of the ADA. However, the report fails to note that the enforcement authority of these agencies under title II is limited to the ability to investigate complaints of discrimination and to

attempt to negotiate resolutions. All eight agencies are required to follow DOJ's regulation and enforcement policies. As a result, state and local governments are not subject to conflicting or inconsistent standards.

The agencies designated to investigate title II complaints were selected because of their expertise in the regulated subject matter. These agencies have well-established programs to investigate Section 504 complaints against recipients of Federal financial assistance. Because title II complaints frequently allege violations of Section 504 as well, the designated agency system reduces the burden on state and local agencies by allowing a single agency to investigate both violations at the same time.

This system also assures state and local governments that investigations will be carried out by an agency familiar with the nature of their programs and the constraints they operate under. For example, complaints about schools are investigated by the Department of Education; complaints about access to parks are investigated by the Department of the Interior. If all investigations were consolidated in one agency, a great deal of expertise would be lost.

To date, the system has worked well. There is no evidence that consolidating all responsibility for technical assistance and investigations in a single bureaucracy would benefit state and local governments.

5) **ACIR Recommendation: Lawsuits against state and local governments should be limited to actions brought by the federal government.**

This recommendation apparently stems from ACIR's concern that the ability of individuals to sue may create enormous litigation costs and administrative uncertainty for state and local governments. As applied to the ADA, this recommendation is unacceptable because it would mean that Americans with disabilities would be singled out as the only people unable to seek the assistance of the courts to enforce statutorily protected civil rights.

It is preferable to implement the ADA through voluntary compliance or, when disputes arise, through alternative means of dispute resolution. However, Alternative dispute resolution, to be successful, must be accompanied by a strong enforcement policy. If private individuals are unable to sue to enforce their own rights, public entities will have no incentive to comply with the law.

6) **ACIR Concern: The federal government has not provided sufficient technical assistance to help entities comply with the ADA.**

The Federal government has mounted an unprecedented effort to provide technical assistance about the ADA and is actively pursuing opportunities to expand this effort. Each of the Federal agencies that has an ADA policy-making role has established an extensive technical assistance program to provide covered entities with information about how to comply with the ADA.

Technical assistance is developed through Federal grant programs under which private entities develop specialized materials targeted to specific audiences. Through a Department of Justice grant, selected ADA Technical Assistance materials have been distributed to 15,000 libraries nationwide. The Department of Education has funded a regional network of ten Disability and Business Technical Assistance Centers that provide ADA information and guidance to covered entities. In addition, the Department of Justice is considering a proposal to establish an ADA clearinghouse of technical assistance materials.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

MAR 1 1996

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

Dear Governor Winter:

The purpose of this letter is to express the Department of Labor's deep concern over the recommendations set forth in The Role of Federal Mandates in Intergovernmental Relations, the preliminary draft report of the Advisory Commission on Intergovernmental Relations (ACIR). Our comments on the draft's specific legislative proposals are contained in the enclosed memorandum. Two issues are of particular concern to the Department.

As stated, the purpose of this preliminary draft report was to propose "...changes in federal policies to improve intergovernmental relations while maintaining a commitment to national interests" (emphasis added). The report does not achieve that purpose. In fact, the report's recommendations on labor standards would seriously erode intergovernmental relations and irrevocably harm this country's commitment to American workers by endangering their right to a safe and healthful workplace, to minimum wage and overtime pay, and to family and medical leave in case of a serious family illness or birth of a child. If the recommendations in the report were implemented, state and local government workers would become second class citizens -- deemed unworthy of the same basic protections as their neighbors, friends, and family who work in the private sector or for Federal agencies.

DOL is equally concerned that the ACIR has not taken into account Congress's instruction upon adoption of the Unfunded Mandates Reform Act that the Commission actively consider the impact of its recommendations on American workers, and that the Commission formulate its recommended changes in Federal policies to enhance intergovernmental relations with a view toward maintaining a commitment to vital national interests. We strongly urge the Commission to specifically review its draft recommendations with those dedicated public servants whose employment would undergo profound changes by virtue of the report's recommendation.

Thank you for your consideration of our views. I hope that the comments and concerns raised here will assist the ACIR in completing its work.

Sincerely,

Robert B. Reich

Enclosure

# DEPARTMENT OF LABOR CONCERNS RELATIVE TO THE DRAFT REPORT OF THE ACIR

The Department of Labor(DOL) objects not only to the specific findings of this report but also to the method, the criteria and the assumptions the Commission used in making its recommend-dations. The following is a summary of major concerns:

1. The ACIR frequently ignored its own Criteria for Review, which direct the Commission to take into account the positive attributes of mandates, the rationale for their adoption, and the impact of each on working men and women. The report contains no discussion of Congressional Intent in covering state and local workers under these statutes and little consideration is given to how workers might be affected if these protections were taken away from them.

There is also very little recognition of the benefits these laws accord state and local government employees – or their employers. In many cases, the report analyzes these basic labor standards as though the only factor to be considered was their effect on state and local government budgets. The rights and protections of workers are treated as though they are merely another yearly "expense."

2. The ACIR's Criteria ignores the directive of the Unfunded Mandates Act to recommend "terminating Federal mandates" only where they are "duplicative, obsolete or lacking in practical utility." Under the Act, "concern" by state and local governments was not to be the basis for recommending termination of a mandate. The Federal Labor Standards Act (FLSA), Federal and Medical Leave Act (FMLA), Davis Bacon Related Acts (DBRA) and the Occupational Safety and Health Act(OSH Act) are certainly not obsolete – the mere fact that DOL continues finding violations proves their continued relevance and utility. Nor are these statutes duplicative – there are no comparable Federal laws and where corresponding state laws do exist, they are often weaker or less inclusive.

3. Many of the concerns used as justification for examining DOL's programs have no bearing on the unique characteristics of state, local, or tribal governments – in fact, they are the same type of concerns attributed to some employers in the private sector.

4. The ACIR's assumption that collective bargaining agreements can substitute for Federal standards is undermined by the fact that only 40 percent of state and local government workers are represented by a labor union and guaranteed collective bargaining rights.

5. Finally, the special role of public employers is ignored – one would expect these governmental entities to be model employers setting examples for their private sector counterparts. In fact, the Congressional Accountability Act recently applied the FLSA, FMLA and other labor laws to Congress to provide those workers the same protections as the private sector counterparts.

Fair Labor Standards Act (FLSA)

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

By guaranteeing a minimum wage and premium pay when an individual works more than 40 hours week, the FLSA establishes minimum labor standards below which no one should be required to work. There is no reason to deny public servants these fundamental protections and thereby make them 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 Act simply ensures that every employee, regardless of his or her employer, is entitled to minimum protections. Allowing state and local governments to pay less than the minimum wage and to avoid paying premium pay for overtime is unfair to the public workers and could place private employers that observe fair labor standards at a competitive disadvantage.

Congress amended the FLSA in 1985 and gave special accomodations to state and local governments by providing for compensatory time off in lieu of overtime pay, special rules for the use of volunteers, and delay in implementing compliance obligations to allow for a transition period. 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. Despite DOL's efforts, it clear that concern with FLSA can be traced to an inability to adequately monitor compliance and a persistent misunderstanding of the requirements of the Act. These are not reasons for denying workers basic minimum rights, but arguments for strengthening the Department's ability to work with state and local governments, rather than dismantling 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. It would deny basic rights to public servants to be paid the minimumwage and overtime pay when they are forced to work excessively long hours.

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 for the suggestion made in the report that Federal agencies have been able to manipulate FLSA regulations in order to meet budgetary restrictions.

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. It guarantees that workers can take job protected unpaid leave for specified family and medical reasons. The report provides no substantive justification for repealing that safeguard with respect to public workers. The report not only the overstates the costs of compliance, but also 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. The 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 administration, hiring, and training, and continuation of benefits required under 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. It is not a mandate because the only state and local government workplaces covered by OSH are located in states where the state legislature has voluntarily agreed to participate.

In any event, we believe–and many states agree– that repeal of the OSH Act with respect to public workers could endanger the health 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. Public 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 are not limited to the health and safety protections for the affected worker; but include public employers, who experience reduced worker compensation costs, higher employee productivity, and reduced liability and insurance costs; and the general public who benefit from a reduction in the exposure to dangerous conditions in public buildings and other facilities.

The ACIR report acknowledges that several of the concerns with the OSH Act rest on misperceptions or a lack of information. For example, the report notes that even in some states that have not volunteered to participate in the Federal Occupational and Safety Administration's program, there is a belief that OSH Act requirements are mandatory. It is difficult to imagine how this makes the case for repeal of the Act. 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) allowing States to use administrative actions instead of 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, and contrary to the ACIR report, 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 suggests that Federal agencies are free from meeting OSH Act requirements, and state and local governments should have the same options. 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 Federal government spends substantial funds to assist state and local governments with local public construction projects through grants and other financial assistance. DBRA prevailing wage requirements, attached to this assistance, ensure that the Federal governments's vast purchasing power does not depress local wage levels or disrupt local economies. However, DOL cannot accept the view of the Commission that DBRA requirements impose an unfunded intergovernmental mandate. The provisions apply by virtue of voluntary participation in these Federal assistance programs.

The ACIR report 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 report also ignores the fact that the DBRA prevailing wage is based on "measures of central tendency", and there will always be contractors who pay lower then the prevailing wages in a community.

ACIR claims that DBRA wage surveys are "voluntary and sporadic," but fails to acknowledge DOL's significant regulatory reforms undertaken over the past decade to ensure that its wage determinations accurately reflect wages paid in the local community. They also claim a scarcity of data leads to importation of non-local rates When there is a lack of recent construction, DOL looks to the surrounding area for wage data, not to "distant" areas as ACIR charges. The report asserts that DBRA may reduce the hiring of local persons with limited experience. In fact, regulatory provisions also encourage apprenticeship and training of persons with limited experience by allowing for exceptions to the journey-level wage under approved training programs.

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 concur in the report's proposal to limit DRBA to projects of more than $1 million which receive over 50 per cent of their financing from Federal funds. These proposals would eliminate prevailing wage protections for thousands of workers under the guise of reform, and make the administration of Davis-Bacon requirements more troublesome for states and local governments.

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.

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

FEB 21 1996

OFFICE OF REGIONAL OPERATIONS
AND STATE/LOCAL RELATIONS

MEMORANDUM

SUBJECT: EPA Concerns on ACIR's Preliminary Report: The Role of Federal Mandates in Intergovernmental Relations

FROM: Shelley H. Metzenbaum
Associate Administrator

TO: Marcia L. Hale, Director of Intergovernmental Affairs

Kathryn Higgins, Cabinet Secretary

Kathleen McGinty, Chairman
Council on Environmental Quality

Carol H. Rasco, Director of Domestic Policy Council

Below is a brief list of our preliminary concerns about the ACIR report. We are still working on an analysis and will provide you with a fuller assessment soon, but I wanted to get over to you now a sense of our serious concerns with this document.

We have several specific concerns about the way the report is written. As you know, we at EPA are strongly committed to and are aggressively reinventing the way we work with state and local governments, but we also feel that it is time to move from a rhetorical discussion of unfunded mandates to a more helpful explication of the strengths and weaknesses of mandates. Because the report as currently written focuses primarily on the problems associated with mandates, the resultant tone is negative and implies federal mandates are always bad public policy.

We obviously take issue with that. The ACIR is supposed to be the nation's intellectual leader in sorting out intergovernmental issues. The report as now written fails to meet this challenge.

A few key suggestions on the general content of the report follow:

For each of the fourteen statutes reviewed:

- The report needs to address why the federal mandate was passed in the first place. For example, the Clean Air Act and Clean Water Act were enacted because voluntary standards had failed; a federal mandate was necessary.
- The report needs to show benefits resulting from that mandate.
- The report needs to reflect what innovations have been implemented over time to make mandates more flexible and to avoid "one-size-fits-all-problem."
- Where specific problems are raised in the report, verification is needed. For example, EPA is frequently mocked for requiring Midwestern states to monitor for pesticides currently used primarily on pineapples. The story is very misleading. The pesticide which can cause male sterility was used on a wide variety of crops in the Midwest and is still present in groundwater today.
- Specific recommendations of the report need to be changed or, alternatively, the report should include a range of options.

A few preliminary suggestions and concerns about the specific recommendations in the report follow:

- Citizen Suits: We oppose the report's recommendation that citizen suits against state and local governments be eliminated. Citizen oversight is a key accountability mechanism in many of our laws, and is an invaluable compliance incentive for all levels of government (including the federal level). The public has a right to participate in ensuring environmental compliance, and citizen enforcement may be less costly in many instances.

- Clean Air Act Financial Aid Penalties: We do not support removing financial aid penalties under the Clean Air Act. In the past, when sanctions were discretionary, compliance deadlines were not met. Now that sanctions are mandatory, compliance deadlines, with a few exceptions, are being met, although we have almost never actually imposed a sanction.

- Single Agency Designation: We question the recommendation that a single agency be designated to coordinate the implementation of each mandate and make binding decisions.

- Health and Safety Standards for States and Localities: It is not fair to have different standards for state and local governments than those applied to private industry and the federal government. Furthermore, extension of this principle to environmental laws could affect health and safety protection for state and local employees, lower health and safety standards for state and local facilities serving the general public, and possibly distort healthy private sector competition with local governments.

- Clean Water Act Cost-Sharing and Timetables: We believe the statement about cost-sharing is factually inaccurate. We already share costs, but also believe that those who contaminate the water should pay to clean it up. It is essential to a sound incentive structure. Also, we do not support blanket elimination of timetables for standards.

- Safe Drinking Water Act: We agree that amendments similar to those enacted by the Senate are appropriate, but strongly oppose establishing a long-term goal of returning to the states full responsibility for imposition and implementation of those standards.

We at EPA remain committed to working with our state, local and tribal government partners to ensure strong environmental protection, while allowing and encouraging flexible and innovative approaches to achieve that objective.

cc: Carol M. Browner
Fred Hansen

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

To: Ann McGuire
Office of Cabinet Affairs

From: Jamienne Studley
Deputy General Counsel for Regulations and Legislation

Subject: ED Comments on ACIR Report

Date: February 21, 1996

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

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

cc: Frank Holleman
Judy Heumann
Jack Kristy
Suzanne Sheridan

# TALKING POINTS: ACIR and IDEA

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

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

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

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

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

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

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

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

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

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

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

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

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

DRAFT

Mr. Phillip M. Dearborn
ACIR
Suite 450 South
800 K Street, N.W.
Washington, D.C. 20575

Dear Mr. Dearborn:

The Department of Transportation strongly disagrees with the Advisory Commission on Intergovernmental Relations (ACIR) preliminary report's recommendation to repeal provisions of the Omnibus Transportation Employee Testing Act of 1991 that subject safety-sensitive state and local employees who drive large motor vehicles to alcohol and drug testing. The recommendation is based on significant misunderstandings of the purpose and scope of the program.

The main purpose of drug and alcohol testing in the motor carrier safety program is to foster safety on our nation's highways by deterring the misuse of alcohol and the use of illegal drugs by "safety-sensitive" drivers. These are drivers who drive large vehicles (i.e., those heavier than 26,001 pounds), vehicles that carry hazardous materials, or passenger vehicles with a capacity of 16 or more persons. From a safety perspective, there is no rational distinction that can be drawn between drivers of these vehicles who are employed by state and local governments on one hand and private companies on the other.

If a person's car is hit by a large truck operated by a driver whose skills are impaired by drugs or alcohol, it is not likely to matter much to that person whether the driver was a private, state, or local employee. There are likely to be few parents who believe that it makes sense to deter substance abuse by drivers of private intercity buses, but not the drivers of their children's school buses. In the absence of a Federal requirement, there may be some state and local government agencies, and there may be some private companies, that take the initiative to create effective deterrent measures, but a patchwork of some effective, some ineffective, and some nonexistent private and public programs could not amount to adequate protection of travelers on the highways.

The report asserts that the law is "inconsistent" because it includes public works and other drivers but "excludes law enforcement and emergency workers" from testing requirements. This assertion is incorrect. Most law enforcement and emergency services personnel are not "safety-sensitive" drivers who are covered

# United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

March 1, 1996

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

Dear Governor Winter:

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

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

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

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

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

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

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

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

Sincerely,

George T. Frampton, Jr.

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

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

GENERAL COUNSEL

July 11, 1996

MEMORANDUM FOR SALLY KATZEN
ADMINISTRATOR, OFFICE OF INFORMATION
AND REGULATORY AFFAIRS

FROM: Robert G. Damus RGD
General Counsel

SUBJECT: Advisory Commission on Intergovernmental Relations (ACIR)

This addresses the question of whether the ACIR must cease operations when they exhaust their appropriations even if they have not finished the study mandated by P.L. 104-4. For the reasons stated below, the answer is yes, they must cease operations, because they cannot exceed their appropriation without violating the Antideficiency Act.

The 1996 appropriation for ACIR provides as follows:

> For necessary expenses of the Advisory Commission on Intergovernmental Relations, $784,000, of which $334,000 is to carry out the provisions of Public Law 104-4, and of which $450,000 shall be available only for the purposes of the prompt and orderly termination of the Advisory Commission on Intergovernmental Relations.

Under this appropriation, ACIR has been provided two separate sums; one is usable solely to the P.L. 104-4 study, and the other is available solely for termination costs. The Antideficiency Act, 31 U.S.C. 1341, absolutely prohibits a federal official from exceeding an appropriation. A direction to carry out some task does not overcome the prohibition. Moreover, a basic principle of appropriations law is that a direction or authorization to an agency to accomplish some purpose does not itself carry with it the funds to carry out the direction; an appropriation must be provided for that purpose. See, GAO Principles of Appropriations Law at Vol. I, page 2-33 (1991).

In this case, Congress (in P.L. 104-4) has directed ACIR to do a study and has provided a specific sum for that purpose. If the funds are exhausted before the study is complete, ACIR cannot continue to expend funds to complete the study. There is also a second limitation that cannot be exceeded: a fixed sum to be used to shutdown ACIR. (That is, Congress terminated ACIR's

in the FY 1997 Treasury-Postal appropriations bill.) If ACIR still has funds available to complete the study, but expending them would incur obligations (e.g., for additional severance pay) that would cause the termination amount to be exceeded, then it must nevertheless terminate obligations at that point, even though the study is left unfinished as a result.

In sum, there are two separate funding limitations on ACIR, and neither of them can be exceeded -- either to finish the P.L. 104-4 study or for any other reason.

DRAFT

**ADVISORY COMMISSION ON INTERGOVERNMENTAL AFFAIRS(ACIR) MANDATES REPORT: LABOR ISSUES**

Summary of DOL Concerns: ACIR continues to ignore the Congressional directive to consider the impact of state and local mandates on working men and women. In the report:

*The recommendations concerning the Federal Labor Standards Act(FLSA) demonstrate a lack of understanding of the requirements placed on Federal Agencies by Title 5, USC as the recommendation would would result in additional burdens on local and state government.

*The comments related to the Family and Medical Leave Act(FMLA) disregard several relevant findings of the Commission on Family and Medical Leave.

*Recommendations related to the Occupational Health and Safety Act(OSHA) call upon the Federal government to take on basic state and local government responsibilities and comments related to OSHA standards are unsupported.

* The Davis Bacon recommendations would be detrimental to basic worker protection and they would complicate the application of Davis Bacon requirements.

**Fair Labor Standards Act**

ACIR Recommendation: Retain state and local government coverage under the Fair Labor Standards Act, but amend the Act to allow state and local governments' compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.

DOL Response:

*ACIR implies that Federal agencies have a lesser standard to meet in terms of employment standards; however, federal agencies are required to comply with both FLSA and Title 5. If the recommendation is to require the same standards for state and local government employees as are required for Federal employees, the effect would be to place additional regulatory requirements on state and local governments which presently do not exist.

*ACIR ignores the steps which both Congress and the Labor Department have taken in order to address particular problems related to state and local governments. For example:

* there are special overtime standards for law enforcement and firefighting personnel and "comp time" provisions.

* special accommodations were included in regulation changes in 1992 that allow state and local governments to continue to claim exemption from overtime for their executive, administrative and professional employees despite the fact that they account for leave on an hour-for-hour basis or that they have systems requiring them to make partial-day deductions from pay when accrued leave has been exhausted.

* the Department of Labor investigates state and local governments essentially on a complaint-only basis.

* the Department of Labor will not file suit against a state or local government to enforce the FLSA unless at least 30-days advance written notice has been given that the pay practices are in violation.

**Family and Medical Leave**

ACIR Recommendation: Retain state and local coverage under the Family and Medical Leave Act.

DOL Response:

*While ACIR recommends continued coverage for state and local employees, the ACIR reports states that the Family and Medical Leave Commission's study did not survey public agencies. The report however fails to point out that the Employee Survey was a nationally representative sample of public and private sector workers.

*In addition, a separate survey of state family and medical leave policies specifically asked whether public agencies had encountered difficulties in applying the FMLA special rules for employees of schools. For states that had their own family or medical leave provisions, local school administrators state that they encountered no problems in reporting to both state and federal enforcement entities.

*The ACIR report suggests that Federal agencies have more flexibility then state and local governments in the implementation of FMLA; however, unlike the Federal government state and local governments have the authority to:

* deny restoration to certain highly compensated individuals.

* require certifications by health care provider if the employee claims they are unable to return to work because of a

specified condition.

* entitled to recover premiums paid for maintaining health benefits coverage during the period of unpaid leave if the employees fails to return to work for reasons related to health or other circumstances beyond the control of the employee.

**Occupational Safety and Health Act**

ACIR Recommendation: Make no changes in Occupational Safety and Health Act (OSHA) language regarding state and local government compliance, but increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.

DOL Response:

*Safe workplaces are a fundamental obligation of all employers and the Federal government should not be expected to finance safe work places for state and local governments.

*The ACIR report states that there is a "lack of credible information on the rationale for or the scientific basis of many OSHA standards and requirements." It is irresponsible for ACIR to make this statement and to offer no documentation or even one regulation or standard as an example.

**Davis-Bacon Related Acts**

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

DOL Response:

*The Administration has supported bi-partisan reform legislation in the House and Senate to increase dollar thresholds and to reduce the level of paperwork and record keeping requirements.

*The ACIR proposal of adding the percentage threshold to the Davis-Bacon requirements would be detrimental to fundamental worker wage protection. In addition, it would further complicate the administration of Davis-Bacon as it would increase the level of uncertainty as to when and which projects would be subject to

Davis-Bacon.

*The ACIR report suggests that there is often a conflict between Federal Davis Bacon and state prevailing wage laws. This conflict is "inappropriately detrimental to intergovernmental comity." Without specific examples it is difficult to rebut the ACIR assertion, except to note that the Davis Bacon statute is a longstanding Federal law with a simple threshold mechanism. In addition, most state prevailing wage statutes were written to complement and build upon the Federal statute.

*SEC. 207. PILOT PROGRAM ON SMALL GOVERNMENT FLEXIBILITY.*

*(a) IN GENERAL.—The Director of the Office of Management and Budget, in consultation with Federal agencies, shall establish pilot programs in at least 2 agencies to test innovative, and more flexible regulatory approaches that—*

*(1) reduce reporting and compliance burdens on small governments; and*

*(2) meet overall statutory goals and objectives.*

*(b) PROGRAM FOCUS.—The pilot programs shall focus on rules in effect or proposed rules, or a combination thereof.*

*SEC. 208. ANNUAL STATEMENTS TO CONGRESS ON AGENCY COMPLIANCE.*

*No later than 1 year after the effective date of this title and annually thereafter, the Director of the Office of Management and Budget shall submit to the Congress, including the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives, a written report detailing compliance by each agency during the preceding reporting period with the requirements of this title.*

*SEC. 209. EFFECTIVE DATE.*

*This title and the amendments made by this title shall take effect on the date of the enactment of this Act.*

# *TITLE III—REVIEW OF FEDERAL MANDATES*

*SEC. 301. BASELINE STUDY OF COSTS AND BENEFITS.*

*(a) IN GENERAL.—No later than 18 months after the date of enactment of this Act, the Advisory Commission on Intergovernmental Relations (hereafter in this title referred to as the "Advisory Commission"), in consultation with the Director, shall complete a study to examine the measurement and definition issues involved in calculating the total costs and benefits to State, local, and tribal governments of compliance with Federal law.*

*(b) CONSIDERATIONS.—The study required by this section shall consider—*

*(1) the feasibility of measuring indirect costs and benefits as well as direct costs and benefits of the Federal, State, local, and tribal relationship; and*

*(2) how to measure both the direct and indirect benefits of Federal financial assistance and tax benefits to State, local, and tribal governments.*

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

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

*(1) investigate and review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and con-*

*sider views of and the impact on working men and women on those same matters;*

*(2) investigate and review the role of unfunded State mandates imposed on local governments;*

*(3) make recommendations to the President and the Congress regarding—*

*(A) allowing flexibility for State, local, and tribal governments in complying with specific Federal mandates for which terms of compliance are unnecessarily rigid or complex;*

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

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

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

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

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

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

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

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

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

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

*(b) CRITERIA.—*

*(1) IN GENERAL.—The Commission shall establish criteria for making recommendations under subsection (a).*

*(2) ISSUANCE OF PROPOSED CRITERIA.—The Commission shall issue proposed criteria under this subsection no later than 60 days after the date of the enactment of this Act, and thereafter provide a period of 30 days for submission by the public of comments on the proposed criteria.*

*(3) FINAL CRITERIA.—No later than 45 days after the date of issuance of proposed criteria, the Commission shall—*

*(A) consider comments on the proposed criteria received under paragraph (2);*

*(B) adopt and incorporate in final criteria any recommendations submitted in those comments that the Commission determines will aid the Commission in carrying out its duties under this section; and*

*(C) issue final criteria under this subsection.*

*(c) PRELIMINARY REPORT.—*

*(1) IN GENERAL.—No later than 9 months after the date of the enactment of this Act, the Commission shall—*

*(A) prepare and publish a preliminary report on its activities under this title, including preliminary recommendations pursuant to subsection (a);*

*(B) publish in the Federal Register a notice of availability of the preliminary report; and*

*(C) provide copies of the preliminary report to the public upon request.*

*(2) PUBLIC HEARINGS.—The Commission shall hold public hearings on the preliminary recommendations contained in the preliminary report of the Commission under this subsection.*

*(d) FINAL REPORT.—No later than 3 months after the date of the publication of the preliminary report under subsection (c), the Commission shall submit to the Congress, including the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Governmental Affairs of the Senate, the Committee on the Budget of the Senate, and the Committee on the Budget of the House of Representatives, and to the President a final report on the findings, conclusions, and recommendations of the Commission under this section.*

*(e) PRIORITY TO MANDATES THAT ARE SUBJECT OF JUDICIAL PROCEEDINGS.—In carrying out this section, the Advisory Commission shall give the highest priority to immediately investigating, reviewing, and making recommendations regarding Federal mandates that are the subject of judicial proceedings between the United States and a State, local, or tribal government.*

*(f) DEFINITION.—For purposes of this section the term "State mandate" means any provision in a State statute or regulation that imposes an enforceable duty on local governments, the private sector, or individuals, including a condition of State assistance or a duty arising from participation in a voluntary State program.*

***SEC. 303. SPECIAL AUTHORITIES OF ADVISORY COMMISSION.***

*(a) EXPERTS AND CONSULTANTS.—For purposes of carrying out this title, the Advisory Commission may procure temporary and intermittent services of experts or consultants under section 3109(b) of title 5, United States Code.*

*(b) DETAIL OF STAFF OF FEDERAL AGENCIES.—Upon request of the Executive Director of the Advisory Commission, the head of any Federal department or agency may detail, on a reimbursable basis, any of the personnel of that department or agency to the Advisory Commission to assist it in carrying out this title.*

*(c) ADMINISTRATIVE SUPPORT SERVICES.—Upon the request of the Advisory Commission, the Administrator of General Services shall provide to the Advisory Commission, on a reimbursable basis,*

*the administrative support services necessary for the Advisory Commission to carry out its duties under this title.*

*(d) CONTRACT AUTHORITY.—The Advisory Commission may, subject to appropriations, contract with and compensate government and private persons (including agencies) for property and services used to carry out its duties under this title.*

*SEC. 304. ANNUAL REPORT TO CONGRESS REGARDING FEDERAL COURT RULINGS.*

*No later than 4 months after the date of enactment of this Act, and no later than March 15 of each year thereafter, the Advisory Commission on Intergovernmental Relations shall submit to the Congress, including the Committee on Government Reform and Oversight of the House of Representatives and the Committee on Governmental Affairs of the Senate, and to the President a report describing any Federal court case to which a State, local, or tribal government was a party in the preceding calendar year that required such State, local, or tribal government to undertake responsibilities or activities, beyond those such government would otherwise have undertaken, to comply with Federal statutes and regulations.*

*SEC. 305. DEFINITION.*

*Notwithstanding section 3 of this Act, for purposes of this title the term "Federal mandate" means any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.*

*SEC. 306. AUTHORIZATION OF APPROPRIATIONS.*

*There are authorized to be appropriated to the Advisory Commission to carry out section 301 and section 302, $500,000 for each of fiscal years 1995 and 1996.*

# *TITLE IV—JUDICIAL REVIEW*

*SEC. 401. JUDICIAL REVIEW.*

*(a) AGENCY STATEMENTS ON SIGNIFICANT REGULATORY ACTIONS.—*

*(1) IN GENERAL.—Compliance or noncompliance by any agency with the provisions of sections 202 and 203(a) (1) and (2) shall be subject to judicial review only in accordance with this section.*

*(2) LIMITED REVIEW OF AGENCY COMPLIANCE OR NONCOMPLIANCE.—(A) Agency compliance or noncompliance with the provisions of sections 202 and 203(a) (1) and (2) shall be subject to judicial review only under section 706(1) of title 5, United States Code, and only as provided under subparagraph (B).*

*(B) If an agency fails to prepare the written statement (including the preparation of the estimates, analyses, statements, or descriptions) under section 202 or the written plan under section 203(a) (1) and (2), a court may compel the agency to prepare such written statement.*