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

THE WHITE HOUSE

WASHINGTON

June 12, 1996

MEMORANDUM TO LEON PANETTA

FROM: Marcia Hale
Carol Rasco CHR
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:

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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.

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

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- o <u>Status</u> -- 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.

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- 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.

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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.

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7. The Clean Water Act:

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9. Americans with Disabilities Act:

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10. The Safe Drinking Water Act:

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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:

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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.

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 L. Hale

Marcia Hale
Assistant to the President and Director for Intergovernmental Affairs

Attachments

cc:

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(Draft: May 30, 1996)

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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 L. Hale

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:

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 <u>Content</u> -- 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 <u>not</u> 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 existing statutes (e.g. environmental laws) or enacting new statutes with such language.

- o <u>Status</u> -- 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.

Panel of 5 women plus
Evelyn Lieberman —
Madeline Kunin
Elaine Kamarck — 9:15 — 9:45
Lucia Wyman — 9:15 – 10:15
Maggie Williams — 9:15 – ~~10:30~~
Carol Rasco — 5. min
minimal prep
personal
— Talking about themselves, jobs they do
— talk about themselves —
— how ~~they~~ you got there
— who helped you along the way —

Informal in terms of substance.
Leadership from caucus around country — 100–125 women + appointees. —
particular those who came involved with political

Fax

456-6704

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

Division of Legislative Counsel
(Telephone # - 401-8313)

Telefax Transmittal Sheet
(Telefax # - 401-5391)

TO: Kris Balderston

FROM: Jack Kristy

DATE/TIME: 7/19

PAGES SENT (including transmittal) ________

COMMENTS:

ED's Problems with the ACIR report are clearly stated in this letter, which was sent to Marcia Hale on July 5 and 11. Sorry for any confusion.

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-2110

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

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 RELATIONS

June 26, 1996

MEMORANDUM

TO: The Honorable Marcia L. Hale

FROM: William E. Davis
Executive Director Bill

SUBJECT: Confidential Draft of Final Mandates Report

Enclosed is a confidential revision of the ACIR report on federal mandates as required by the *Unfunded Mandates Reform Act of 1995*. This draft is being circulated only to Commission Members and key staff. Suggested revisions must be received by close of business Wednesday, July 3, 1996, for incorporation in the report to be considered at the July 23, 1996, Commission meeting. The docket book for the July 23 Commission meeting will be distributed on July 9, 1996.

The enclosed draft incorporates changes from the preliminary report based on suggestions made during the public comment period and discussions with Commission Members. Highlights of the revisions are listed below with a reference to the page number in the enclosed draft report.

- **Preface** -- A Preface was added to explain limitations on ACIR's studies. (Page 1)

- **Mandate definition** -- A discussion was added on the definition of a "mandate" for ACIR study purposes and on the provision in Public Law 104-4 excluding civil rights and other laws from certain aspects of the *Unfunded Mandates Reform Act* but not from ACIR's study of current mandates. (Page 1-2)

- **Call for review of other federal mandates** -- The section titled "The ACIR Review of Existing Mandates," while rewritten for clarity, retains the recommendation that: "*. . . a review of additional existing federal mandates be authorized as soon as possible.*" (Page 3-4)

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

- **Focus on amending, not repealing, federal laws** -- An explanation is included of ACIR's focus on intergovernmental issues as distinct from national policy goals, general purposes, or implementation issues. The discussion ends by stating *". . . ACIR recommends that mandate relief studies and related efforts focus on how to restructure federal laws to restore comity between governments . . . not on the elimination or repeal of federal laws."* (Page 5-6)

- **Six common issues retained with some revision** -- The six common issues are retained with revisions to clarify points or shift emphasis. The most substantive changes were made in issue 4, concerning litigation against state and local governments, and issue 6, concerning federal policy coordination. Highlights of the changes made are as follows.

  1. Detailed procedure requirements: language was added to highlight EPA's Project XL as an example of providing more flexibility in mandate implementation. (Page 6)

  3. Federal failure to recognize state and local governments as governments: for clarity, the subtitle and the wording of the recommendation were revised to include the phrase "co-makers of national policy." (Page 6-7)

  4. Authorization of lawsuits against state and local governments: the recommendation was changed to call for a study to examine the constitutional and intergovernmental issues raised by laws authorizing private rights of action against state and local governments. (Page 7)

  6. Insufficient communication on or ineffective coordination of federal policies: the recommendation was changed to call for a coordination mechanism to assist state and local governments along with an arbitration process to resolve policy issues which arise between federal agencies and between the federal government and state or local governments. (Page 7-8)

- **Recommendations on individual mandates revised; ADA deleted** -- Based on public comments and suggestions from Commission members, revisions have been made in all the discussions and recommendations related to individual mandates reviewed in the preliminary report. Also, this section was reorganized so that the narrative on the individual mandates opens with a statement of ACIR's recommendation followed by: (1) a description of the mandate; (2) a background discussion on why the mandate was enacted; (3) a discussion of the issues and concerns raised to ACIR about the mandate; and, (4) the rationale for ACIR's recommendation. The following lists summarizes major changes in individual mandate recommendations.

  Fair Labor Standards Act -- the recommendation was revised to call for retention of state and local government coverage but with amendment of the Act to allow state policies to be consistent with either the provisions of the Act or with comparable policies of the federal government under Title 5, United States Code. (Page 8-10)

Family and Medical Leave Act -- the recommendation was revised to call for retention of state and local government coverage under the Act. (Page 10-11)

Occupational Safety and Health Act -- the recommendation was revised to recommend (1) no change in OSHA language regarding state and local governments; (2) an increase in DOL consultation activities; and, (3) an increase in federal funding for training, technical assistance, and compliance. (Page 11-13)

Drug and Alcohol Testing of Commercial Drivers -- the recommendation was revised to call for amendment of the law to permit alternative testing requirements or program certifications in lieu of testing for small governments and an increase in federal technical assistance on transportation safety. (Page 13-14)

Metric Conversion for Plans and Specifications -- the recommendation was revised to commend the Congress and the President for extending the deadline for metric conversion of plans and specifications to the year 2000. (Page 14-15)

Medicaid: Boren Amendment -- the recommendation was revised to insert language specifying that Medicaid reimbursement rates must assure that health and nursing care is provided in conformity with applicable federal and state policies related to quality of care and safety standards. (Page 15-17)

Clean Water Act -- the recommendation was revised to delete the option of giving state and local governments greater authority to develop their own control methods and timetables for implementing federal standards and to suggest amending the Act to give EPA authority to extend compliance deadlines on a case-by-case basis. (Page 17-19)

Individuals with Disabilities Education Act -- the recommendation was revised to delete the reference to individual lawsuits and to encourage, rather than require, increased use of alternative dispute resolution processes. (Page 19-21)

Americans with Disabilities Act -- the recommendation and issue discussion were deleted from the report.

Safe Drinking Water Act -- the recommendation was revised to delete language suggesting a long-term goal of returning to the states full responsibility for safe drinking water. (Page 21-23)

Endangered Species Act -- the recommendation was revised to delete language referring to exemptions and to call for state participation in the recovery process, rather than the listing process. (Page 23-25)

Clean Air Act -- the recommendation was revised to call for no change in existing federal standards but an increase in federal aid and technical assistance to help state comply. (Page 25-27)

Davis-Bacon Related Acts -- the recommendation wording was revised for clarification purposes and the reference to specific dollar or percentage thresholds has been deleted. (Page 27-29)

Required Use of Crumb Rubber -- the recommendation was revised to delete the word "unwarranted." (Page 29-30)

- **Future Actions Related to Federal Mandates** -- A discussion of future actions related to federal mandates has been added as a conclusion to the report. (Page 30-31)

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: RLCR DATE: 12/17/13

~~CONFIDENTIAL~~

Comments Due on Wednesday, July 3, 1996

The Role
of
FEDERAL MANDATES
in Intergovernmental Relations

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

July 1996

Preface

The *Unfunded Mandates Reform Act* (Public Law 104-4) directs the Advisory Commission on Intergovernmental Relations (ACIR) to conduct four studies: 1) a baseline study to examine the measurement and definition issues involved in calculating total costs and benefits to state, local, and tribal governments of compliance with federal laws; 2) a review of the role of federal mandates in intergovernmental relations; 3) a review of the role of unfunded state mandates imposed on local governments; and, 4) an annual review of federal court cases in which a state, local, or tribal government was required to undertake responsibilities or activities, beyond those such government would otherwise have undertaken, to comply with federal statutes and regulations. ACIR was directed to include in its studies consideration of the competitive balance between state, local, and tribal governments and the private sector. Also, the views of working men and women on mandate issues were to be considered in the studies.

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

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

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

Over 500 public comments were received on the preliminary report, more than 40 persons submitted testimony during the public hearing, and over 250 persons participated in the conference on mandates. Both supporting and opposing comments were received on all 13 individual mandates discussed in the preliminary report. In addition, comments were received on mandates in general or on the six common issues mentioned in the preliminary report.

Unfortunately, due to resource constraints, ACIR was unable to systematically solicit the views of working men and women on mandate issues as required by the *Unfunded Mandates Reform Act*. However, ACIR worked closely with Department of Labor staff on labor-related mandates and did give full consideration to comments received from working men and women and labor organizations. Lack of resources also made it impossible for the Commission to analyze the relationship of federal mandates to the competitive balance between state, local, and tribal governments and the private sector.

This final report on existing federal mandates focuses on intergovernmental issues associated with federal mandates. The report discusses and makes recommendations on six common issues related to existing federal mandates and on 13 individual mandates selected by ACIR for specific review. The recommendations on both the common issues and the 13 individual mandates reviewed are based on material gathered during the production of the preliminary report and during the public comment period.

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

William F. Winter

Chairman

CONTENTS

ACIR REPORT ON FEDERAL MANDATES

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

INTRODUCTION

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

CHANGES IN THE FEDERAL SYSTEM

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

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

DEFINITION OF MANDATE FOR ACIR STUDY PURPOSES

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

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

DETERMINING THE APPROPRIATE FEDERAL ROLE

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

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

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

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

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

KEY QUESTIONS ON MANDATE ISSUES

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

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

THE ACIR REVIEW OF EXISTING MANDATES

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

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

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

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

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

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

Through this process, information was received from over half the states, eight municipal leagues, four state associations of counties, the national associations representing state and local governments and their officials, and directly from a variety of local government officials. More than 200 federal mandates on state and local governments were identified to ACIR. The Commission selected 13 of the mandates for analysis as part of this report. The 13 mandates selected for review all meet one or more of the criteria ACIR adopted for identifying mandates of significant concern.

The selection of the 13 mandates was based on:

(1) The criteria published by the Commission on July 6, 1995;

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

(3) The significance and diversity of issues posed for intergovernmental relations.

Due to time and resource constraints, ACIR was unable to review more than the 13 selected mandates. *Nevertheless, many more of the over 200 mandates identified need to be evaluated and the Commission urges that a review of additional existing federal mandates be authorized as soon as possible.*

COMMISSION ACTION ON THE PRELIMINARY REPORT

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

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

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

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

PUBLIC COMMENTS AND TESTIMONY ON PRELIMINARY REPORT

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

During the public comment period, ACIR was contacted by federal agencies and other officials in the federal executive branch, state and local government officials, Members of Congress, public interest organizations, and private citizens. ACIR received 538 public comments, 47 testimonies, and several packages of additional mandate information. Both supporting and opposing comments were received on all 13 individual mandates discussed in the preliminary report. Also, comments were received on mandates in general or on the six common issues mentioned in the report. The public comments, testimony, and other materials received are available for public review in the ACIR offices, upon request.

FOCUS ON INTERGOVERNMENTAL ISSUES

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

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

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

COMMON ISSUES: DISCUSSION AND RECOMMENDATIONS

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

1. Detailed procedural requirements. State and local governments often are not given flexibility to meet national goals in ways that fit their resources and needs. The imposition of detailed procedural requirements for implementing federal statutes, in many instances, merely increases costs and delays achievement of the national goals. Some federal agencies are initiating reforms to address the issue of inflexible federal requirements. For example, under EPA's Project XL pilot program, communities will get the opportunity to set aside EPA rules if they can design an alternate system that will be both cheaper for the local government and cleaner for the environment. *In general, state and local governments should be permitted, through statutory language, flexibility in choosing the methods used to comply with a federal mandate. Federal agencies should assist state and local governments by providing research and technical advice on implementation approaches and methods to save the state and local governments design and adaptation costs, whenever possible. The focus of federal statutes, regulations, and policies should be on results, not process.*

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

3. Federal failure to recognize state and local governments as governments. State and local governments often are treated as interest groups, as private entities, or as administrative arms of the federal government. Federal policies tend not to recognize state and local governments as government entities subject to public accountability through elections and through the policy processes of a state legislature, county commission, or city council. Views of private entities and non-governmental advocacy groups sometimes have been given more attention than those of state and local governments. *Federal laws and regulatory policies should recognize that state, local, and tribal governments are co-makers of national policy who, in contrast to interest groups and private entities, are led by elected officials who must account to the voters within their respective jurisdictions just as do the President and the Members of the US Congress.*

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

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

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

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

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

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

INDIVIDUAL MANDATES: DISCUSSION AND RECOMMENDATIONS

Fair Labor Standards Act

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

Description

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

Background

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

The amendments bringing the public sector under FLSA coverage treat state and local governments the same as private entities while the federal government is handled somewhat differently. For example, the FLSA makes state and local governments and private entities subject to Department of Labor (DOL) oversight and requires them to have employment policies that are equal to or more generous than DOL regulations. In contrast, the Office of Personnel Management is granted independent FLSA regulatory and enforcement responsibilities within the executive branch and the Office of Congressional Compliance is granted independent FLSA authority within the legislative branch of the federal government. Also, while federal employment policies are required to be consistent with the FLSA, they do not have to be equal to or more generous than DOL regulations as is required of state and local governments.

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

Intergovernmental Concerns

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

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

Recommendation Rationale

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

Family and Medical Leave Act

RECOMMENDATION: ***Retain state and local government coverage under the Family and Medical Leave Act.***

Description

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

Background

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

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

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

Intergovernmental Concerns

State and local governments are not opposed to the FMLA's purposes or goals. Rather, the concerns raised refer to contradictions with state or local laws, potential conflicts with collective bargaining negotiations, inflexibility in DOL implementation policies, and costs associated with the extension of medical benefits and other aspects of the law's implementation. To some extent, state and local concerns are corroborated by comments in the Commission on Leave report which indicate that larger employers, which would include most state governments, are most likely to experience an increase in costs related to FMLA implementation. According to the Leave Commission report, "this, in part, is due to the fact that they are more likely to have leave-takers and to have larger numbers of leave-takers."

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

Recommendation Rationale

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

Occupational Safety and Health Act

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

Description

The *Occupational Safety and Health Act* (OSHA) (29 U.S.C. 651-678) was enacted in 1970. It establishes standards for safe, healthy, and productive work environments. State governments and their political subdivisions, as well as the United States government, are specifically excluded from the definition of "an employer" under the act. State governments and their political subdivisions are not subject to OSHA requirements unless a state volunteers to administer the federal OSHA program within their jurisdiction. When a state volunteers to administer the federal OSHA program, it is required to extend OSHA requirements to all public employees in the state. Such states are required to submit a state plan of operations to the DOL for approval prior to taking over administration of the federal OSHA program. If the state plan is approved, the Secretary of Labor is authorized to provide a federal assistance grant of up to 50 percent of costs for administration and enforcement. No funding is provided for program compliance (e.g., training programs, equipment, or facilities modification).

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

Background

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

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

Intergovernmental Concerns

State and local government concerns with OSHA requirements include the lack of federal funds for compliance costs, the perception that the program is more focused on monitoring measures and the collection of fiscal sanctions than on compliance assistance, and the lack of credible information on the rationale for or the scientific basis of many OSHA standards and requirements. In addition, OSHA's credibility is compromised by the perceived or real complexity of the program's requirements, especially for recordkeeping and reporting purposes.

Intergovernmental tensions grow when such concerns are combined with the realization that state and local priorities cannot be met because state and local resources have been used to pay for federal OSHA requirements whose purposes are misunderstood or insufficiently supported by good rationale.

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

Recommendation Rationale

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

Drug and Alcohol Testing of Commercial Drivers

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

Description

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

Background

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

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

Intergovernmental Concerns

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

Recommendation Rationale

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

Metric Conversion for Plans and Specifications

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

Description

The *Omnibus Trade and Competitiveness Act of 1988* (P.L.100-418) requires each federal agency to use the metric system of measurement in its procurement, grants, and other business-related activities, except to the extent that such use is impractical. The act permits the continued use of traditional weights and measures in non-business activities. The *National Highway System Designation Act of 1995* extended the deadline for such conversion to October 1, 2000.

Background

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

To encourage voluntary shifts to the metric system by private businesses, the *Omnibus Trade and Competitiveness Act* required the application of metric measurements to non-business activities related to federal grants to state and local governments. Based on this law, the Department of Transportation (DOT) requires state and local governments to convert local highway construction plans and specifications to the metric system. To accommodate difficulties experienced by state and local governments, DOT has a waiver process to provide exceptions to the metric requirements. Other federal agencies also have metric conversion policies, but, the DOT policies have been the subject of most intergovernmental concerns.

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

Intergovernmental Concerns

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

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

Recommendation Rationale

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

Medicaid: Boren Amendment

RECOMMENDATION: ***Repeal the language of the Boren Amendment and insert language specifying that rate determinations are the sole responsibility of each participating state and that such rates must be established to assure that health and nursing home care is provided in***

conformity with applicable federal and state laws and regulations related to quality of care and safety standards.

Description

The *Boren Amendment*[1] requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons eligible for assistance through the Medicaid program. The law specifies that the reimbursement rates be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards . . . ."

Background

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

Intergovernmental Concerns

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

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

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

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[1] Section 962 of the *Omnibus Budget Reconciliation Act of 1980* (P.L. 96-499) as amended by Section 2173(a)(1) of the *Omnibus Budget Reconciliation Act of 1981* (P.L. 97-35).

Recommendation Rationale

ACIR recommends repeal of the *Boren Amendment* and adoption of statutory language making it clear that rate determinations are the sole responsibility of each participating state. To acknowledge the relationship between reimbursement rates and the quality care given to individuals participating in the Medicaid program, ACIR suggests that the amended law specify that state determined rates must take into consideration a state's responsibility for assuring that the services provided by medical facilities and nursing homes is in conformity with applicable federal or state statutes and policies related to quality of care and safety standards.

The Clean Water Act

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

Description

The *Clean Water Act (CWA)* (33 USC 1251 et seq.) provides a comprehensive national program to protect water quality. The Act requires states to designate the uses of water, to develop water quality criteria to protect those uses, to monitor the condition of waters, and to report on water quality every two years. States may administer a permit program for industrial and municipal pollution discharges and develop programs for the control of pollution from diffuse or nonpoint sources. Local governments are required, either directly by the federal government or indirectly through state implementation of federal laws, to treat sewage to national standards and to control discharges from combined sewers and stormwater drains.

Background

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

Municipal interest groups continued to press for more federal funding for sewage treatment plants, and they were successful in the *Water Quality Act of 1965* and the *Clean Water Restoration Act of 1966*. In addition to providing $3.55 billion of grant funds, these laws formally established a national policy for controlling pollution. The concept of "clean waters" was established as federal policy with the directive that interstate waters would be kept "as clean as possible." Most importantly, the Department of Health, Education, and Welfare [2] was

[2] Subsequently became the Department of Health and Human Services (HHS).

authorized to apply water quality standards to interstate waters and to enforce them if states failed to set their own standards.

The *Federal Water Pollution Control Act Amendments of 1972* included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in permits as needed to meet state standards, and significant grant assistance to support construction of municipal sewage treatment facilities. The 1972 Amendments were intended to establish an intergovernmental partnership to deal with water pollution issues; as a practical matter, however, the legislative changes resulted in state and local governments ceding control over water pollution management to the federal government in return for federal financial aid.

In 1977, some additional amendments were made to the *Federal Water Pollution Control Act*[3]. Some changes in the law were made in 1981 including changes related to grant assistance for sewage treatment facilities provisions. Then, in the *Clean Water Act Amendments of* 1987, federal financial assistance was changed from direct grants to capitalization of state loan funds. Under the State Water Pollution Control Revolving Funds program, money used for wastewater treatment construction is repaid by loan recipients to the states to be used for future construction loans to other communities. Although states were to have greater flexibility in exchange for a phase-out of federal assistance, the 1987 amendments added several requirements, including requirements for state programs to control nonpoint sources of pollution and requirements for municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs.

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

Intergovernmental Concerns

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

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

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[3] A provision in this amendment specified that the law may be referred to as the *Clean Water Act.*

for small communities will be needed to continue meaningful progress towards compliance with federal stormwater and nonpoint source pollution controls and other water quality requirements.

Recommendation Rationale

ACIR recommends retaining a national clean water program while recognizing that increased federal financial assistance and increased authority for EPA to approve alternative program methods, schedules, or standards would facilitate achievement of national goals in many areas unable to meet current law requirements. Adjustment of the implementation provisions of the *Clean Water Act* would give the EPA greater flexibility in addressing priorities. Also, increased federal financial assistance for clean water programs would preserve the partnership between federal, state, and local governments in this important national policy area. State and local governments traditionally have been concerned about reducing pollution and have demonstrated their willingness to work constructively with federal officials to design realistic programs that can be completed within their technical and budgetary constraints.

Individuals with Disabilities Education Act

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

Description

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

Background

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

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

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

Intergovernmental Concerns

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

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

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

children and the large burden borne by State and local educational agencies in meeting those needs.

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

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

Recommendation Rationale

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

The Safe Drinking Water Act

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

Description

The *Safe Drinking Water Act* (SDWA) (42 USC 300 et seq.), enacted in 1974, regulates drinking water standards for 58,530 community water systems serving 25 or more persons on a regular basis. The law directs the Environmental Protection Agency (EPA) to establish maximum levels for chemical, radiological, and microbiological contaminants in community water systems. The law also establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and establishes enforcement and public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.

Background

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

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

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

Intergovernmental Concerns

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

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

Intergovernmental tensions also are raised significantly when federal financial support fails to keep up with the increasing cost to comply with federal drinking water requirements. The lack of federal financial assistance for compliance is particularly troublesome for small systems, as is the lack of adequate implementation flexibility. State and local officials allege that, in defining what level of drinking water protection is affordable, the SDWA looks to the capability of the larger systems. According to EPA estimates, however, of the 200,000 public water systems in the nation, approximately 60,000 are community water systems that serve a residential population of roughly 232 million year-round (about 92% of the population). Eighty-seven percent of these community water systems are small systems serving between 501 and 3,300 individuals or very small systems serving fewer than 500 individuals.[4]

Therefore, tests which have nominal costs per customer for large systems may, in some instances, be extremely costly per customer for small or very small systems and may be beyond a system's technical capacity to comply. According to EPA estimates, small systems will require investments of nearly $3 billion through the end of the century to comply with all regulations and an additional $20 billion to repair, replace, and expand the basic infrastructure to deliver drinking water. While variances and exemptions are permitted in some circumstances, the procedures required to obtain such variances or exemptions may be difficult for some communities to meet.

Recommendation Rationale

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

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

Endangered Species Act

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

Description

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

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[4] *CRS Issue Brief,* Safe Drinking Water Act: Implementing the 1986 Amendments, February 7, 1996, page CRS-3.

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

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

Background

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

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

Intergovernmental Concerns

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

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

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

Recommendation Rationale

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

The Clean Air Act

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

Description

The *Clean Air Act (CAA) of 1970* (42 USC 7401) enacted a series of related programs designed to protect health and the public welfare from emissions polluting ambient air. The CAA requires states to submit for federal approval a state implementation plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The act specifies how to measure different types of pollution, the standards that must be met for each type of pollution, the specific compliance measures that may be taken, and the deadlines for those actions. Some federal financial assistance for planning and implementation is authorized in the law, but each state must provide assurances that "the State or general purpose local governments will have adequate personnel, funding, and authority under state and, as appropriate, local law to carry out such implementation plan."

Background

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

The *Clean Air Act of 1963* signaled the beginning of change in the pattern of federal-state-local relations by authorizing national air quality criteria and permitting federal intervention in the state if the state could not deal appropriately with the problems. It also provided grants to states and recognized their need to develop statewide control laws. With the passage of the *Air Quality Act of 1967*, states were required to develop, set, and implement plans to achieve national air quality standards. Increased federal grants accompanied the new requirements. By 1970, however, only 21 states had developed air pollution control plans and a general consensus grew for an expanded federal government role in the control of air pollution. The growing support for federal involvement in air pollution control culminated in the enactment of the *Clean Air Act* (CAA) *of 1970*. The 1970 law provided stronger federal direction by setting federal standards and establishing compliance timetables. In response to concerns that the objectives of the 1970 Act were not being attained, the *CAA Amendments of 1977* extended compliance deadlines for stationary and mobile sources of air pollution and made other clarifications in the law.

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

Intergovernmental Concerns

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

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

Recommendation Rationale

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

Davis-Bacon Related Acts

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

Description

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

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

Background

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

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

Intergovernmental Concerns

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

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

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

Recommendation Rationale

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

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

Required Use of Recycled Crumb Rubber (Repealed)

RECOMMENDATION: ***Commend the Congress and the President for repealing the required use of recycled crumb rubber in asphalt pavement.***

Description

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

Background

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

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

Intergovernmental Concerns

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

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

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

Recommendation Rationale

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

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

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

During the course of the study, over 200 mandates—mandates as defined under Title III of the Act—were identified to ACIR by state and local governments and other organizations. An inventory of these mandates can be found in ACIR's *Catalogue of Federal Mandates on State and Local Governments*. This report concentrates on 13 of these mandates. Other mandates are also in need of thorough review. For example, requirements for identification, management, and disposal of solid and hazardous waste materials under the *Resource Conservation Recovery Act (RCRA)* and the Superfund program were cited by state and local governments as needing review. Also, components of Medicaid caseload eligibility regulations, job training services, and "Motor Voter" requirements are causing significant concerns for state and local governments. *A review of some of these additional mandates should be authorized as soon as possible.*

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

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

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

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

As is now the case with future mandates, the federal government should take a second look at existing federal mandates and the costs to state and local governments of implementing these mandates. In the future, the challenge facing the federal government will be to exercise its ability to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own priorities.

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

- 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.

- 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:

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

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

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

  - 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 <u>Content</u> -- 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 <u>not</u> 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 <u>Status</u> -- 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

Dan Cherok 56974
Rasco 62878

sent to ACIR Commission members (list attached)

AFSCME®

American Federation of State, County and Municipal Employees, AFL-CIO

1625 L Street, N.W., Washington, D.C. 20036-5687
Telephone (202) 429-1000
Telex 89-2376
Facsimile (202) 429-1293
TDD (202) 659-0446

July 18, 1996

Gerald W. McEntee
President
William Lucy
Secretary-Treasurer
Vice Presidents
Ronald C. Alexander
Columbus, Ohio
Dominic J. Badolato
New Britain, Conn.
Henry L. Bayer
Chicago, Ill.
Peter J. Benner
St. Paul, Minn.
George Boncoraglio
New York, N.Y.
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Detroit, Mich.
W. Faye Cole
Houston, Tex.
Jan Corderman
Des Moines, Iowa
Bruno Dellana
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Albany, N.Y.
Chris Dugovich
Everett, Wa.
William T. Endsley
Columbus, Ohio
Stephan R. Fantauzzo
Indianapolis Ind.
Anthony M. Gingello
Rochester, N.Y.
Stanley W. Hill
New York, N.Y.
Carolyn J. Holmes
Williamstown, N.J.
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Harrisburg, Pa.
Roberta Lynch
Chicago, Ill.
J S. Middleton, Sr.
Baltimore, Md.
Michael D. Murphy
Madison, Wis.
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Philadelphia, Pa.
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Honolulu, Hawaii
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Belmont, Calif.
Joseph P. Rugola
Columbus, Ohio
Kathy J. Sackman
Pomona, Calif.
Mary E. Sullivan
Albany, N.Y.
Flora Walker
Lansing, Mich.
Garland W. Webb
Baton Rouge, La.
Jeanette D. Wynn
Quincy, Fla.

The Honorable William F. Winter
Former Governor of Mississippi and
Chairman of Watkins, Ludlam & Stennis
633 North State Street
Jackson, MS 39202

Dear Chairman Winter:

On behalf of the 1.3 million members of the American Federation of State, County and Municipal Employees (AFSCME), we are writing in opposition to the latest draft Advisory Commission on Intergovernmental Relations (ACIR) report that has been circulated. We strongly urge you to vote against this report at the July 23rd meeting.

The new draft fails to address many of the problems that AFSCME and other organizations have raised concerning the January 24th preliminary report. Specifically, the new report continues to rely heavily on unwarranted and unsupported conclusions in calling for sweeping changes in important federal statutes designed to protect working men and women and their families.

It is highly regrettable that the draft report fails to meet basic requirements imposed upon ACIR by Congress to consider any "impact on working men and women." In this regard, it is noteworthy that the ACIR received almost six hundred written and oral comments on the first draft of the report, yet practically none of the views were incorporated in the latest draft. We find this to be an affront to the public and a disservice to taxpayers whose dollars have funded this work.

The final report has numerous other problems relating to the unfortunately biased and unbalanced approach it takes on the implementation, cost, and impact of federal laws upon state and local governments. Moreover, it does nothing to advance the mandate debate beyond the shrill cries of those who would simply recommend repeal and emasculation of basic federal laws and protections, without any discussion or consideration of the needs of the public or even of what the impact will be on working people, senior citizens and the disabled.

As a result of these concerns and the many other concerns that have been raised, we urge you to reject this report.

Sincerely,

William Lucy
International Secretary-Treasurer

Gerald W. McEntee
International President

GWMcE/WL:ejb

Citizens for Sensible Safeguards

Post-it® Fax Note 7671	Date	# of pages ▶
To Bill White	From	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 456-6682	Fax #	

July 9, 1996

Ms. Marcia L. Hale
Director of Intergovernmental Realtions
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear Commissioner:

Citizens for Sensible Safeguards, a coalition of more than 300 national organizations, has obtained a June 25, 1996 draft of an Advisory Commission on Intergovernmental Relations report on federal mandates. While CSS has not had time to fully evaluate the report, we would like to share with you some preliminary conclusions, especially since we have heard that there might be a July 23 meeting to discuss this draft.

CSS strongly opposes the report and actively urges a negative vote by Commissioners if this draft were to be considered at a July 23 meeting. This draft demonstrates that the ACIR staff has lost nearly all objectivity in researching and writing a final report. In some respects, the June 25 draft is actually worse than the preliminary report issued earlier this year.

In our February 26 letter and our March 5 report *Shirking Responsibility*, we outlined several specific concerns with the ACIR preliminary report on federal mandates. Among them were the lack of discussion regarding the benefits of federal mandates, the lack of any statistical or scientific basis for recommendations, and the report's call to create a society in which some are worthy of federal protections, and others are not. While some of the specific recommendations have been altered in this newest draft, these basic concerns have gone unanswered. Further, the inclusion of calls for more studies, presumably by the ACIR, makes the June 25 draft wholly unacceptable.

At the heart of our disagreement with the draft is our belief that state and local governments should comply with federal laws that are intended to benefit the public, just as the U.S. Congress now does. On page 2 of the June 25 draft it says: "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 elimination or repeal of federal laws." What we opposed in the preliminary report was the notion of exempting states and localities from compliance with federal laws and protections, thereby creating what CSS called "a crazy quilt of public protections for some, but not for others." Until your report addresses this issue, we will continue to oppose ACIR's actions.

Nearly all of the specific recommendations or the information preceding the recommendation have problems. For example, we strongly oppose the recommendations dealing with the Fair Labor Standards Act, Davis-Bacon, Occupational Safety and Health Act, Individuals with Disabilities Education Act, Safe Drinking Water Act, Clean Air Act, Clean Water Act, Endangered Species Act, and the Medicaid Boren amendment. While the recommendations dealing with the Family and Medical Leave Act have substantially changed, the rationale leading to the recommendation has significant flaws.

1742 Connecticut Ave., NW Washington, D.C. 20009
Phone: (202) 234-8494 Fax: (202) 234-8584
E-mail Address: regs@rtk.net

Beyond the fact that the specific recommendations in the June 25 draft need significant modification, there is a fundamental problem with the tone and underlying philosophy guiding the report. Most frustrating is that the June 25 draft does not adequately or accurately reflect the public comments or testimony that ACIR received. ACIR has ignored the reason why federal mandates were created in the first place and what benefits are derived from them.

Finally, there are many process issues that ACIR has handled poorly. The Unfunded Mandates Reform Act calls for more than one hearing, yet ACIR only held one hearing. ACIR has not reached out to discuss substantive disagreements with the preliminary report. ACIR has not handled itself in an open manner, allowing the public to fully follow the Commission's actions. For example, William E. Davis, the Executive Director of ACIR, stated, in an April 26 letter to OMB Watch, that any further action would be announced in the *Congressional Monitor*, a private publication. We complained that public notices should also be in the *Federal Register*, the government's daily record of activity. To date, there has been no announcement in either publication about a scheduled July 23 meeting of the Commissioners.

These types of actions eliminate any pretense of objectivity and fairness. We recognize the very real problems that states and localities face in dealing with federal mandates. Instead of trying to address the problem and bring people together, the ACIR has done a real disservice in forcing parties into unnecessarily taking strong polarizing points of views. In the process, ACIR has lost credibility itself, making any final report likely to be treated with skepticism, if not outright hostility.

If the ACIR approves the June 25 draft of the final report on federal mandates, it will undermine federal laws and regulatory protections that were put in place for good reason, and it would add to the dangers present in the workplace, the environment, and our civil society,. In light of the biased actions of the ACIR staff, we now question the appropriateness of ACIR undertaking any further work in this area.

Sincerely,

Gary D. Bass

Gary D. Bass
Chair

cc: Bill White

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

1742 CONNECTICUT AVENUE, NORTHWEST
WASHINGTON, D.C. 20009-1171
TELEPHONE: (202) 234-8494
FAX: (202) 234-8584
e-mail ombwatch@rtknet.org

OMB WATCH

MEMORANDUM

Date: July 3, 1996

From: Gary Bass

To: Bill White

Subject: ACIR June 25 Draft Report on Federal Mandates

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 report, I would like to share with you some preliminary conclusions. As CSS members review the draft report, we will refine our conclusions about the June 25 draft.

In its current form, CSS would strongly oppose the report and actively urge a negative vote by Commissioners. This 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)).

Our preliminary review indicates two types of problems with the June 25 draft report. The first type concerns the tone of the report and the biased nature of the introductory and conclusionary sections. The second type deals with the specific recommendations.

<u>**Type I Problems**</u>

1. **The report does not address the conflict between a citizen's right and the definition of mandate; ACIR should advise Congress on the need to narrow the definition of "federal mandate" to not include voluntary programs and laws guaranteeing basic civil and constitutional rights .** 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. As a result, the report is skewed heavily to the viewpoint of state and local governments, instead of the public. For example, how can the Individuals with Disabilities Education Act (IDEA) be classified as a mandate when the courts have ruled that a free, appropriate public education is a constitutional right. If ACIR decides to cover IDEA as a mandate, then why not every other constitutional decision that has an impact on state and local governments (e.g., due process requirements).

   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 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 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 of the public comments and testimony on the ACIR 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 our coalition 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 us on our views. ACIR may be correct in stating that it has helped us 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 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. To date there has been no notice in either publication about a July 23 meeting of the ACIR Commissioners to discuss the final report. We find this unacceptable.

7. **The recommendation "to restructure federal laws to restore comity between the**

governments" needs clarification, and the ones 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." We are pleased that ACIR is not recommending elimination or repeal of federal laws, but, of course, ACIR did not propose such ideas in its preliminary report. What we 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." This general 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.

We strongly object 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. This section of the ACIR June 25 draft should be dropped.

Type II Problems

We are pleased to see some of the recommendations on specific "mandates" change. However, even those that have acceptable recommendations, the descriptions, background, and intergovernmental concerns that provide the rationale for the recommendation have significant problems.

Although we have not had time to review the recommendations in detail, several of the 13 specific recommendations are unacceptable, such as the Fair Labor Standards Act and other labor issues, the environmental recommendations, and IDEA. Organizations within the coalition are now reviewing the ACIR specific recommendations and will be prepared to express more detailed concerns.

THE WHITE HOUSE

WASHINGTON

7/17

Marcia Hale
Sally Katzen
Eliz Drye
Debbie Fine
Bill White
Marilyn Yager

EPA's ACIR comments

Kris

THE SAFE DRINKING WATER ACT

Question: Why is it inappropriate for ACIR to recommend the enactment of amendments to the Safe Drinking Water Act similar to those approved by the Senate in S.1316?

Answer: The Administration is on record for strongly supporting the House Safe Drinking Water Bill, HR. 3604, which passed on June 25, 1996. When the Senate Bill passed November 29, 1995, the Administration said it was an important step towards its goals for reauthorization, and this meant that we recognized that Senate passage was just a first step in the legislative process. In our comments on the ACIR January Preliminary Draft Report, which were transmitted on March 5, 1996, we supported the House Bill and offered the following language: "Congress should enact amendments to the SDWA to address the high per capita costs of small systems, to allow EPA to examine health effects and occurrences of specific contaminants in determining priorities for standard-setting and to consider costs and benefits in standard-setting, to provide more implementation authority for states, and financial assistance to water systems and states to ensure fuller protection of public health and prevent contamination of drinking water."

The fact that a stronger consensus existed among a variety of groups, including environmental groups, in support of the House version, makes it even more problematic that ACIR supports one version over the other. It is particularly inappropriate for ACIR to support one bill over the other when there is a need to get an expeditious consensus on the conference report. The substantive issues, which were raised by ACIR, were comparably addressed by both bills. It is of no benefit to the reauthorization process for ACIR to endorse either bill.

CITIZEN SUITS

Question: Why do you disagree with ACIR's recommendation that a commission be established to study the issue of citizen suits against state and local governments?

Answer: We see no value in establishing a commission to study a "problem" which, we contend, does not exist. We do not view the citizen suit provisions of environmental laws as establishing any kind of "unfunded mandate," and see their inclusion in this report as fundamentally misplaced.

As we have noted before, EPA views citizen suits as an important component of our overall enforcement effort. Citizen suits are a critical check not only on state and local governments, but also on the federal government. We can cite numerous instances where citizen action has forced a reluctant government to take appropriate action to protect public health or the environment. To suggest, as does the ACIR report, that enactment of language authorizing (or reauthorizing) citizen suits be delayed pending the results of an unnecessary study is untenable. We do not believe that establishing another federal commission to study this matter will have any value, and further believe that any delay in reauthorization of citizen suit provisions in existing statutes could have serious consequences. In these times of limited government resources, the ability of citizens to take action to protect their health and their environment is critical, and should not be curtailed.