

ADVISORY COMMISSION ON  
INTERGOVERNMENTAL RELATIONS

***FEDERAL MANDATE RELIEF  
FOR STATE, LOCAL, AND TRIBAL  
GOVERNMENTS***



A COMMISSION REPORT  
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**January 1995** **A-129**

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**DEVELOPMENT, IMPLEMENTATION, AND EVALUATION OF  
FEDERAL MANDATE RELIEF LEGISLATION**

**STATEMENT ADOPTED BY THE  
ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS  
JANUARY 13, 1995**

This statement responds to an April 1994 request from the Clinton Administration to provide information and guidance on the mandate relief legislation and related concepts being considered in the 103rd Congress. It is based on the work of two Task Forces convened by the Commission during the Fall of 1994. These Task Forces included federal legislative and executive staff members familiar with the issues, representatives of the affected state, local, and tribal governments, and other knowledgeable experts. The Task Force statements are designed to be helpful to the Congress as well as to the Administration.

The Task Forces considered the issues surrounding

- The definition of mandates;
- The principles and processes involved in seeking relief for state, local, and tribal governments;
- Guidelines for evaluating existing mandates and implementing mandate relief legislation; and
- The quantification of mandate costs and benefits.

The Commission commends the Congress and the President for developing and supporting initiatives to provide relief from federal mandates for state, local, and tribal governments, and offers the following findings and recommendations to facilitate further legislative and executive action to achieve this goal.

## FINDINGS

**□** *The nation's state, local, and tribal governments urgently need relief from the burdens of unfunded federal mandates. Over the past two decades, in particular:*

- The number and cost of federal mandates has increased substantially
- The number of federal preemptions of state and local authority has increased substantially.
- Conditions attached to federal grants have increased while the voluntary nature of state and local participation in these programs has become more problematic.

These federal actions, taken together, have:

- Increased state and local government costs;
- Limited their ability to raise revenues; and
- Too often, specified inefficient methods of compliance with federal regulations.

The trend toward greater use of unfunded federal mandates has shifted the costs of implementing federal policies to the state, local, and tribal governments.

**□** *Federal mandates provide many important benefits to the nation, but they have become too burdensome and costly.*

The campaign for mandate relief that began in 1993 does not challenge the objectives of constitutionally justified and nationally necessary mandates. Instead, this campaign focuses on the increasing shares of state, local, and tribal budgets that are consumed by federal action, and the loss of control by these governments over their expenditures and compliance mechanisms.

• ***The proposed mandate relief bills would make significant improvements in the Congressional fiscal notes process, but would not provide complete relief from all federal actions that increase the costs of state, local, and tribal governments.***

The bills would:

- Improve the quality and timeliness of cost estimates;
- Explore offsetting benefits and cost reductions;
- Provide for intergovernmental consultations in the legislative and rulemaking processes,
- Initiate national debates in the legislative process over relative priorities when identifying sources of funding for new mandates; and
- Introduce a stronger sense of accountability in the Congress.

***Even after enactment and implementation of the pending mandate relief legislation, the federal government will be able to increase unreimbursed costs of state, local, and tribal governments.***

The exclusions in the proposed bills and the ability of the Congress to override protections against enacting new mandates by a simple majority would allow enactment of new unfunded mandates and other cost inducing legislation.

## RECOMMENDATIONS

*The Congress and the President should enact mandate relief legislation in early 1995 and implement it expeditiously in full consultation with the state, local, and tribal governments.*

• *1 Key provisions of federal mandate relief legislation should include:*

- The consensus definition of mandates** contained in the draft legislation,
- Use of cooperatively developed **financial estimates, intergovernmental consultations, national debates on governmental priorities, and Congressional roll call votes throughout the legislative process** to hold the Congress accountable for its mandate policies;
- Use of **sound financial estimates and intergovernmental consultations by federal agencies** as they develop regulations to implement federal mandates, to minimize added burdens on state, local, and tribal governments;
- A review of existing federal mandates, with recommendations to the Congress and the President** for reducing their burdens on state, local, and tribal governments; and
- Continual monitoring of the results** achieved through implementation of the mandate relief legislation, with recommendations to the Congress and the President for improving the results.

*3. Implementation of federal mandate relief legislation should be guided by the following principles:*

- Federal government restraint in mandating, using mandates only when constitutionally justified and clearly necessary;**



- **Mutual trust and respect among** the federal, state, local, and tribal governments;
- **Active partnerships among** the federal, state, local, and tribal governments in developing and debating mandate legislation, estimating the costs and benefits of mandates, reviewing and reforming existing mandates, developing agency regulations to **implement** mandates, and implementing compliance with mandates;
- **Federal avoidance of unilateral shifts of functional responsibilities** to state, local, and tribal governments without regard to the funding implications,
- **Maximum flexibility to** allow state, local, and tribal governments the greatest possible choice of means in complying with federal mandates in their own circumstances; and
- **Federal technical assistance** in the mandate compliance process to help empower the state, local, and tribal governments to make **more** effective and **more** efficient use of good science and good practices.

□ *The critical role of benefit and cost estimates in the mandate relief process, and the difficulties in making sound estimates, should be recognized. The following realities should be incorporated into the process as follows:*

- Direct benefits and costs, and clearly **identifiable cost savings to governments complying with federal mandates, should be estimated**. It is not feasible, at the present time, to net out general benefits because of difficulties in capturing and allocating them among types of **governments**. However, every effort should be made to identify benefits associated **with** federal mandates.

□ **The differential effects of benefits and costs on different types of communities or on individual governments should be a part of impact estimating,** but such effects cannot now be calculated. Improved information systems to permit the calculation of them should be developed.

□ **To inform the Congress about the benefit and cost implications of proposed legislation, a progression of estimates should be made at:**

(1) An early stage, before any committee action and perhaps even before a committee bill has been drafted;

(2) A middle stage, when a specific committee bill has been developed and begins to move toward markup; and

(3) A late stage, after full committee markup and extending until the bill is passed.

Uncertainties in these estimates should be brought to the attention of policymakers.

□ **Developing benefit and cost estimates to determine appropriate reimbursement amounts cannot be done with great accuracy during legislative consideration.** Estimating can and should be improved by developing new tools and resources. Nevertheless, precise amounts can be known only after agency rule-making.

□ **Consultations with state, local, and tribal governments beginning at an early stage in impact assessment are essential** to improving the quality of estimates.

0 **Estimates of the benefits and costs of enacted mandates do not exist,** and calculating them will require substantial resources and time. It may be impossible to differentiate clearly the specific benefits and costs attributable to federal, state, local, and tribal actions.

**5. Congressionally debated provisions calling for the following four types of studies in conjunction with federal mandate relief legislation are necessary and desirable for the effective achievement of mandate relief goals:**

- A review of existing statutory and administrative mandates, including recommendations for reform;
- Annual reports on federal court rulings that impose mandates;
- Regular reports monitoring and evaluating implementation of the legislation, and recommending improvements; and
- Baseline estimates of the costs of existing mandates.

***The Commission supports the authorization of these studies and reports, and is eager to assist the Congress in preparing them.***



**FINAL STATEMENT**  
**FEDERAL MANDATES TASK FORCE I**  
**FEDERAL MANDATE RELIEF**  
**FOR STATE, LOCAL, AND TRIBAL GOVERNMENTS:**  
**DEFINITIONS, PRINCIPLES, PROCESSES, AND EVALUATIONS**

**EXECUTIVE SUMMARY**

In response to an April 1994 request from the Clinton Administration, the Commission convened two task forces to provide guidance on the mandate relief initiatives being considered in the Congress. Task Force I was assigned the issues surrounding (1) the definition of mandates; (2) the principles and processes involved in seeking relief for state, local, and tribal governments; and (3) guidelines for evaluating the implementation of mandate relief legislation. Task Force II was assigned the issues surrounding the quantification of mandate costs and benefits.

Task Force I found that America is experiencing an era of fiscal constraint affecting governments throughout the federal system. As a result, the budgets of our federal, state, local, and tribal governments must be viewed together as a single public budget bounded by voter preferences and resource limits that make it impossible and inappropriate to shift costs from one government's budget to another without new revenues and/or overall adjustments in the priorities of the total public budget.

The federal government, therefore, must exercise restraint in its enactment of unfunded mandates on state, local, and tribal governments. The mandate relief bills proposed as of mid-December 1994 take positive steps in this direction.

The definition of mandates in the proposed bills includes (1) traditional unfunded direct order mandates carrying criminal or civil penalties; (2) cost-inducing conditions attached to nine major federal entitlement programs that provide \$500 million or more annually for state, local, and tribal governments; and (3) caps, reductions, or elimination of federal funding for these entitlement programs.

Explicitly excluded from the cost estimate and relief requirements of the proposed bills are (1) civil rights laws; (2) individual constitutional rights; (3) rules against waste, fraud, and abuse in grant programs; (4) requested emergency assistance or relief; (5) national security and treaty matters; and (6) emergency legislation.

The proposed bills would improve the Congressional fiscal notes process by:

- Requiring better and more timely cost estimates;
- Providing for a point of order against applicable unestimated or unfunded mandates contained in proposed legislation;
- Requiring a roll call vote to be recorded in any Congressional committee report on a federal mandate covered by the mandate relief legislation; and
- Restraining unfunded mandating through fewer enactments or adequate funding.

The threshold for cost estimates and a point of order against proposed mandates is \$50 million in direct aggregate costs for state, local, and tribal governments.

The mandate relief bills do, however, exclude costly conditions in approximately 31 federal programs under which \$500 million or more is provided annually and the federal government's 560+ smaller federal aid programs.

The proposed bills would not eliminate federal mandates, including unfunded mandates, on state, local, and tribal governments. Therefore, it is still necessary for the Congress and the Executive Branch to adhere to principles of intergovernmental cooperation and sound judgment when enacting or promulgating new mandates or revising statutes and rules.

Consequently, mandates should be enacted only with full accountability through recorded roll call votes at all stages of Congressional action, from committees to the floor, and with full disclosure to taxpayers of the true costs and benefits of implementation. The Congress and citizens should be informed of budget costs, social and economic costs and benefits, and expected cost savings from mandate compliance.

Congressional and executive consideration should be given to the principle of “no money, no mandates,” even if the Congress elects not to be bound by such a statutory rule in every case. Pay-as-you-go rules also should apply to federal intergovernmental mandates as they do to other federal policies, and protections provided for state, local, and tribal government budgets should be as tough as those provided for the federal budget.

Because effective governance in our federal democracy requires genuine power sharing, mutual cooperation, and real partnership among the federal, state, local, and tribal governments, legislative enactments, promulgations of regulations, and implementation of federal mandates require timely and meaningful consultation and collaboration with elected

officials, who should be exempted from the *Federal Advisory Committee Act*.

Mandate legislation and administration should:

- (1) Specify clear goals;
- (2) Ensure practical and workable implementation;
- (3) Provide maximum freedom, discretion, and flexibility to meet performance objectives with creativity and efficiency;
- (4) Emphasize options over waivers that must be granted by federal agencies; and
- (5) Avoid information overload on state, local, and tribal officials.

The federal government and the state, local, and tribal governments should provide for sufficient staff to carry out mandate relief legislation successfully. In addition, more realistic time frames should be established for ACIR’s monitoring and evaluation responsibilities under the proposed legislation.

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# FEDERAL MANDATE RELIEF FOR STATE, LOCAL, AND TRIBAL GOVERNMENTS

## I. Objective

The purpose of this task force statement is to provide useful and practical assistance to the President and the Congress for improving, evaluating, and implementing federal mandate relief legislation, executive orders, and administrative regulations. This statement addresses issues of definition, process, procedure, and funding.

This statement reflects the views of the task force convened by ACIR. The task force's recommendations on how mandate relief should work were informed by the likely course of Congressional action as of mid-December 1994, but were not limited by that information.

## II. Definitions

In recent years, definitions have played a key and often confusing role in debates about federal mandates and other forms of federal regulation affecting state, local, and tribal governments. This confusion has produced widely varying estimates of the numbers and fiscal impacts of federal mandates and their effects on intergovernmental relations.

The definition of "mandates" proposed in the compromise bill worked out in the U.S. Senate has begun to settle the definitional issue—S.993, "The Federal Mandate Accountability and Reform Act of 1994"; H.R. 5 128, "The Federal Mandates Relief for State and Local Government Act of 1994"; and Title X, "Job Creation and Wage Enhancement Act," of the "Contract with America." This definition reads as follows:

(A) any provision in a bill or joint resolution before Congress or in a proposed or final Federal regulation that--(i) would impose a duty that is enforceable by administrative, civil, or criminal penalty or by injunction (other than a condition of

Federal assistance or a duty arising from participation in a voluntary Federal program, except as stated in subparagraph (B)), upon States, local governments, or tribal governments, or (ii) would reduce or eliminate the amount of authorization of Federal financial assistance that will be provided to States, local governments, or tribal governments for the purpose of complying with any such duty; or

(B) any provision in a bill or joint resolution before Congress or in a proposed or final Federal regulation that relates to a then existing Federal program under which \$500,000,000 or more is provided annually to States, local governments, and tribal governments under entitlement authority (as that term is defined in section 3(9) of the Congressional Budget Act of 1974 (2 U.S.C. 622(9))), if

(i)(I) the bill or joint resolution or regulation would increase the stringency of conditions of assistance to States, local governments, or tribal governments under the program, or

(II) would place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding to States, local governments, or tribal governments under the program; and

(ii) the States, local governments, or tribal governments that participate in the Federal program lack authority under that program to amend their financial or programmatic responsibilities to continue providing required services that are affected by the bill or joint resolution or implementing regulation.

The mandates covered by (A) and (B) are those in a bill that, singularly or collectively, would impose annual direct costs of \$50 mil-

lion or more (adjusted annually for inflation by the Consumer Price Index) on state, local, and tribal governments in the aggregate.

Explicitly excluded from cost-estimate and relief requirements in the proposed bills are: (1) civil rights laws; (2) individual constitutional rights; (3) rules against waste, fraud, and abuse in grant programs; (4) emergency assistance or relief requested by state, local, or tribal governments; (5) national security and treaty matters; and (6) emergency legislation.

The definition of mandates included in the proposed legislation is more inclusive than the historic understanding of mandates. Traditionally, mandates have been defined as direct federal orders requiring compliance under pain of civil or criminal penalties. The proposed bills, however, also include as “mandates” conditions attached to nine federal aid entitlement programs. Although some public officials refer to conditions of federal aid as mandates, traditionally they have not been defined as mandates because governments are considered, as a matter of law, to accept federal aid voluntarily and are, therefore, free to refuse participation in, or to withdraw from, federal aid programs. Given the broader definition of mandates included in the bills, the term “mandates” will refer to direct orders as well as to the conditions of federal aid attached to the entitlement programs,

In the spirit of intergovernmental partnership, and in deference to the language of the proposed bills and of Executive Orders 12875, on “Enhancing the Intergovernmental Partnership” and 12866 on “Regulatory Planning and Review,” this statement refers equally to “state, local, and tribal governments.” All three types of government are affected by federal mandates and want to be treated as partners in the mandate relief process. It is recognized, however, that state, local, and tribal governments have different legal and other relationships to the federal government.

Constitutionally, the states are the constituent polities of the federal system. They share the sovereign powers of governance with the federal government and possess all sovereign powers not delegated to the federal government under the United States Constitution. Constitutionally, local governments are legal

creatures of their states; therefore, federal mandates applicable to local governments also apply to the states insofar as states are legally obligated to ensure local compliance. Recognized Indian tribes are domestic sovereign nations subject to federal mandates but only to limited state regulation in accordance with federal statutes and U.S. Supreme Court decisions interpreting the Indian commerce clause, treaties, and federal laws. Federal statutes and treaty obligations pertaining to all or some recognized tribes may make certain applications of mandate relief measures different for tribal governments than for state and local governments. This statement does not examine these differences, but such differences in status will require recognition, where necessary, in legislative and executive implementation of mandate relief legislation.

### III. Findings

The following findings address issues pertinent to (A) the general question of federal mandates and (B) the proposed legislation being considered by the Congress.

#### A. The General Question of Federal Mandates

##### *Financial Relationships*

1. *The fiscal constraints now being experienced by most governments demand that all federal, state, local, and tribal budgets be viewed together as a single public budget bounded by voter preferences and resource limits. It is impossible and inappropriate to shift costs from one government’s budget to another without overall adjustments in the revenues and priorities of the total public budget.*
2. *Unfunded mandates shift the costs of federal policy decisions to state, local, and tribal governments whose budgets are no less constrained than the federal budget. Unlike the Articles of Confederation, the U.S. Constitution authorizes the Congress to levy and*

collect its own taxes so that (1) it is not dependent on voluntary state contributions to carry out its policies and (2) it can be held directly accountable by the voters for the costs of its policies. The Constitution does not contemplate the need for the federal government to rely on independently levied state, local, or tribal revenues to carry out its policies. Instead, the Constitution ensures that the federal and state governments each have concurrent tax authority to finance their own policies.

### **Power Relationships**

3. *Through the Constitution of the United States, the people of the states delegated certain limited powers, enumerated and implied, to the federal government relevant to the general interests of the nation.* Federal statutes, administrative actions, and court orders instituted in accordance with the constitutional delegation of powers are supreme and, therefore, binding on state and local governments and also on tribal governments when they do not conflict with treaty obligations.
4. *All powers not delegated to the federal government are reserved to the states or to the people as explicitly stated in the Tenth Amendment to the U.S. Constitution.* The Constitution recognizes the preexisting plenary powers of the original states and of the tribes as nations, which predated the Articles of Confederation and the U.S. Constitution. The states generally derive their powers directly and independently from their citizens, not by delegations from the federal government. Local governments derive their powers from their states and citizens. The tribes derive their powers of self-government from their original sovereign status as recognized by the U.S. Constitution, treaties, federal statutes, and/or executive orders.
5. *American federalism should be a partnership of shared governance and self-governance for the nation and its diverse communities of people.* Partnerships and

cooperation are necessary for effective and efficient governance. Under many federal mandates, state, local, and tribal governments are essential partners and often co-regulators working with the federal government to achieve nationally mandated goals. State, local, and tribal governments also are regulated parties. There should be active and meaningful intergovernmental consultation and collaboration in enacting and implementing federal mandates,

6. *Federal mandates have produced many social and economic benefits.* Federal mandates covering such matters as the environment, civil rights, the rights of Americans with disabilities, fair labor standards, voting rights, access to health care, and surface transportation clearly have benefited environmental protection, mobility, and the lives of many people. Efforts to achieve mandate relief and intergovernmental fiscal equity should not weaken or undermine mandate objectives essential for the well-being of the nation.
7. *Unfunded mandates, however, obscure Congressional accountability to citizens and reduce efficiency by separating the authority to mandate from the responsibility to pay or share the costs for implementation.* Accountability and efficiency in a federal democracy require close links between the authority of a government to make policy and its responsibility to ask taxpayers to pay for it. Accountability is obscured and efficiency is reduced when the pleasure of spending tax dollars is divorced from the pain of raising those dollars. Under such conditions, the mandating government has little incentive to engage in adequate benefit-cost analyses and to implement sound and efficient policy.
8. *In the spirit of trust and partnership, state, local, and tribal governments should endeavor to manage national initiatives in an efficient and productive manner.* Partnership is a two-way street. Therefore, state, local, and tribal governments have an obligation to address problems that give rise to federal mandates, to work with the federal

government to resolve those problems, and to assist in implementing mandate relief legislation.

### ***Recent Strains in Relationships***

9. *In recent decades, intergovernmental cooperation has been strained by significant increases in federal mandating, especially unfunded mandating.* For example, one count of conservatively defined statutory mandates requiring state and local compliance showed the Congress enacting only one statute in 1931, one in 1940, none in the 1950s, nine in the 1960s, 25 in the 1970s, and 27 in the 1980s. Mandating has been a bipartisan activity, and has thus far continued through the early 1990s.
10. *Federal preemption of state, local, and tribal government powers has increased significantly as well.* Of 439 explicit preemption statutes enacted from 1789 to 1991 by the Congress, 233 (53 percent) were enacted from 1970 through 1991. Some preemptions reduce flexibility or revenue-raising ability for complying with federal mandates.
11. *Cooperation also has been strained by increased conditions of federal aid.* Federal aid conditions date back to the first land grants to states, and most were limited and integrally related to grant purposes. In recent decades, conditions increased in number and scope, including crossover sanctions and crosscutting conditions not directly and substantially related to the specific grant purposes.
12. *Nonparticipation in voluntary federal aid programs is not always fiscally or politically feasible.* Although state, local, and tribal governments can and do decline certain federal aid programs, it is fiscally and/or politically impossible to decline participation in programs such as Medicaid and surface transportation. Furthermore, many conditions of aid are retroactive. Consequently, conditions attached to many federal aid programs are mandates for all practical purposes.

13. *State, local, and tribal governments report that federal mandates have become increasingly burdensome, fiscally and administratively, and are sometimes counterproductive to the effective and efficient achievement of national goals.* The actual costs and benefits of the full range of federal mandates are unknown. The increased number, complexity, and prescriptiveness of federal mandates, however, necessarily impose costs that must be paid out of state, local, and tribal revenues, thus requiring those governments to levy additional taxes and charges or to displace their own spending priorities. Tribal governments and many local governments, however, have tax bases limited by law as well as by economic constraints. In addition, all these governments must legally comply with federal mandates before they are free to satisfy their citizens' priorities.

When the economy of a state, local, or tribal government experiences a downturn, taxpayers must continue to fund federal mandate compliance and look for reductions in their own programs and services. At the same time, these governments are called on by their citizens to tax, spend, and borrow within various constitutional and/or statutory balanced budget rules, tax and expenditure limits, and debt ceilings not applicable to the federal government. In essence, there is no money left in many of their budgets to finance more federal mandates.

While the costs of one mandate may be small, the aggregate costs of all mandates can be substantial. Federal requirements also have differential fiscal impacts, especially on small, poor, or fiscally weak governments. In some cases, small or fiscally stressed governments are unable to respond to, or even know of, all requirements until enforcement action is taken against them. At times, the costs of complying with federal mandates that are intended to improve a public service compel discontinuance or service reduction.

## Need for Mandate Relief

14. *Although the Congress has enacted effective relief for some specific mandates, on balance, federal mandate relief measures taken over the past 15 years have been largely ineffective.* In a 1993 report, ACIR reviewed federal regulatory relief in the 1980s and concluded that the efforts of the Congress (fiscal notes), the Executive Branch (Federalism Executive Order), and the U.S. Supreme Court (federalism cases) had not effectively curtailed the rising numbers and costs of federal regulations or helped ease compliance significantly.

15. *In the final analysis, pay-as-you-go rules need to be applied to all federal mandates.* There is a need for more open and honest budgeting based on publicly debated inter-governmental priorities for which elected federal, state, local, and tribal officials can be held accountable by citizens.

## B. The Proposed Mandate Relief Legislation

### Improvements

1. *The proposed mandate relief bills reported as of mid-December 1994 have the potential to improve the fiscal notes process.* These bills would improve the quality and timeliness of cost estimates, explore offsetting benefits and cost reductions, provide for intergovernmental consultations, initiate debates over relative priorities when identifying sources of funding for new mandates, and introduce a sense of Congressional accountability by requiring separate debates and votes on points of order raised when unfunded mandates are proposed in either house of the Congress.

### Applicability

2. *The definition of mandates stipulated in the proposed bills includes three categories of federal "mandates" that have been of greatest concern:*

- Traditional unfunded direct-order mandates carrying criminal or civil penalties;
- Cost-inducing conditions (including certain crossover sanctions) attached to nine major federal entitlement programs where state, local, and tribal governments lack authority to alter their financial or programmatic duties to provide required services; and
- Caps, reductions, or elimination of federal funding for nine entitlement programs (see 5 below).

3. *The mandate relief bills would apply only to newly proposed or reauthorized mandates having an annual direct-cost impact on state, local, or tribal governments of \$50 million or more and that are outside the six exclusions listed above in Section II.* These exclusions leave substantial opportunities for enacting legislation and promulgating regulations that would increase state, local, and tribal costs, and could create incentives to insert mandates in bills that would bring them under an exclusion.

4. *Although the six exclusions in the mandate relief bills are meritorious, unfunded mandates falling under the exclusions should still receive benefit-cost estimates so that citizens and federal, state, local, and tribal officials are fully informed of their expected costs and benefits.* One key principle of the proposed mandate relief legislation is full disclosure of the costs and benefits of federal policies. A requirement for benefit-cost analyses of mandates falling under the six exclusions need not trigger a point of order.

5. *The mandate relief bills would not apply to conditions attached to most of the federal governments approximately 600 grants-in-aid.'* However, they would apply to the nine

\* According to the report of the Senate Committee on Governmental Affairs (100-330, p. 12): "Subsection (l)(A) [of Section 3] exempts legislation or regulation that authorizes or implements a voluntary discretionary aid program to State, local and tribal governments that has no requirements or conditions of participation specific to that program."

large federal-aid entitlement programs having some of the greatest cost effects on state, local, and tribal governments. The **nine** programs are: Medicaid; Aid to Families with Dependent Children (AFDC); Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. Although the legislative history of the Senate bill (S. 993) enumerates these nine programs, it is not clear that the proposed mandate relief bills, if enacted into law, would **still** apply to the nine programs if they are amended to remove them from the entitlement category or are capped or moved into a block grant.

There are approximately 31 other federal aid programs above the \$500 million threshold that would be excluded. Some of these large exempted programs, especially the federal aid highway program, carry many conditional mandates, some of which are costly and not substantially or directly related to program purposes. In the absence of federal legislation or Congressional self-restraint requiring conditions of aid to be directly and substantially germane to program purposes, large excluded federal aid programs **could** become vehicles for circumventing requirements of federal mandate relief legislation.

It appears that the proposed mandate relief bills would apply to crossover sanctions and other conditions attached to these nine programs, when they meet the \$50 million threshold within any one of the nine programs and do not fall under one of the proposed bills' six exclusions.

It is not clear, however, whether the fiscal impact of a condition that cuts across many or all federal grants will be subject to an unfunded mandate point of order outside of the nine federal aid entitlement programs. Crosscutting requirements—such as the environmental impact statement requirement of the *National Environmental Policy Act* of 1969—generally are enacted separately from grant legislation even though many of their financial effects may play out

within grant programs. Thus, the cost estimates for crosscutting bills would combine the effects on many programs and could easily exceed \$50 million in the aggregate. But, it is not clear whether this aggregate estimate would be used.

6 *The bills' \$50 million direct-cost impact threshold (an average annual cost of \$1 million per state) is more favorable to state, local, and tribal governments than the current \$200 million fiscal note threshold. Some de minimis requirement is necessary for the federal government to conduct its ordinary business, although the broad, but still restricted, range of mandates covered in the bills might argue for a lower threshold, perhaps \$5 million annually. Under the current bills, however, if the total direct cost of mandates exceeds \$50 million in any year of a five-year authorization, the entire authorization will fall under the mandate relief statute. Additionally, once the threshold is reached, the statute will apply to the entire amount of the mandate, not just to the amount in excess of the \$50 million.*

Nevertheless, the \$50 million threshold could encourage a proliferation of mini-mandates having sizable cumulative effects on state, local, and tribal governments. New mini-mandates could be fiscally problematic because the proposed bills apply to future mandates; they do not provide retroactive relief or relief from current state, local, and tribal mandate-compliance costs.

7. The bills do not shield state, local, and tribal governments from a number of other federal actions **that** induce costs, such as:
- Prohibitions or preemptions of state, local, or tribal alternatives that could reduce state, local, or tribal costs or create offsetting revenues;
  - Tax policies that make it more difficult or expensive for state, local, and tribal governments to raise revenues, borrow money, fund public-private partnerships, or privatize public functions;

- Court decisions or administrative regulations that impose an implied constitutional or statutory obligation for state, local, and tribal governments to do or not do something;
- Regulatory delays and lax enforcement or nonenforcement of federal laws that have spillover costs for state, local, and tribal governments; and
- Laws that expose state, local, and tribal governments to liability lawsuits.

### Protections

8. *The bills provide state, local, and tribal governments with the new procedural protection of a majority point of order against applicable unestimated or unfunded mandates contained in proposed legislation.* This provision would strengthen the fiscal notes process in the *State and Local Government Cost Estimate Act of 1981*, which lacks a point-of-order rule. The principal concern about the proposed majority point of order is that it may be too weak. A point of order may be waived by unanimous consent or by a majority of those voting, provided a quorum is present. Requiring a majority vote of the members of the Senate or House would offer more protection for state, local, and tribal governments. Even further, a supermajority vote to waive a point of order would ensure that any unfunded mandate enacted by the Congress reflected a broad consensus on the national interest. However, a supermajority point of order could also produce more gridlock in the Congress.
9. *The proposed bills require a roll call vote to be recorded in any committee report on a federal mandate covered by the mandate relief legislation, but recorded roll call votes are not required to be taken on all federal mandates and at all stages of their legislative consideration.* The current provision is an important step toward greater openness and accountability in the

enactment of federal mandates. However, the proposed bills do not provide for recorded roll call votes throughout the process of mandate enactment (including conference reports and amendments offered on the House and Senate floors), nor do they require recorded roll call votes on all mandates or preemptions. These voting provisions could be added to the proposed bills for informational and accountability purposes without altering the scope of the bills' current provisions for mandate relief.

10. *The mandate relief bills do not extend to the Congressional appropriations process, and the procedural mechanisms to protect state, local, and tribal government budgets are not as tough as those the Congress has enacted to protect the federal budget.* Ideally, mandate relief legislation would include the Congressional appropriations process; however, this may be politically impossible to achieve at the present time.
11. *Proposed federal agency backstop provisions could overcome this limitation by signaling appropriators that they will have to fund a mandate if they expect federal agencies to enforce it.* Such potential provisions as Section 10502 of Title X of the proposed "Job Creation and Wage Enhancement Act" would require federal executive agencies to enforce a mandate that would be subject to the proposed bills' point-of-order rule "only to the extent that the head of the agency determines that State and local governments [tribal governments are not mentioned in Section 10502] to which the Federal mandate would apply have been provided Federal resources equivalent to the intergovernmental direct costs of the Federal mandate." Such a provision, however, may be an unconstitutional delegation of legislative powers to the Executive Branch.

Another backstop technique that could be considered to account for lack of follow through in the Congressional appropriations process to fund new mandates is the one used in Massachusetts to determine which state mandates on local governments

are unfunded by the state. This technique uses a mandates commission that makes a finding on funding after the appropriations process has come to an end.

12. *The “federal mandate budget cost control” provision of Title XI of the proposed “Job Creation and Wage Enhancement Act” would incrementally lower the aggregate costs of state and local government compliance with all federal mandates and require a three-fifths vote to waive a point of order against any bill or resolution, or amendment, that would exceed a given year’s mandate budget authority.* During the first six years following enactment, this provision could significantly reduce aggregate state and local compliance costs; however, the provision does not define “all federal mandates.” If the term “mandates” is intended to conform to the definition given in Section 1002 (1) quoted in Section II of this statement, then the cost reductions produced by this provision will be limited. In addition, this proposed provision does not include tribal governments.

This provision also would amend the *Regulatory Flexibility Act* to require each agency that prepares a regulatory flexibility analysis for a proposed rule that establishes or implements a new mandate to submit to the Congress and to CBO and OMB a cost estimate and benefit-cost analysis of any new federal mandate that would have an aggregate direct cost to state and local governments of at least \$10 million for any fiscal year.

#### *Other Issues*

13. *The proposed mandate relief bills apply to federal Executive Branch departments and agencies, but not to independent regulatory agencies.* Many independent regulatory agencies, such as the Federal Communications Commission and the Securities and Exchange Commission, promulgate rules that have significant fiscal impacts on state, local, and tribal governments.

14. *The proposed bills define state, local, and small governments, but not tribal govern-*

*ments.* This oversight should be remedied in final mandate relief legislation.

15. *The preemption provisions in the bills appear to apply only to mandates.* If a preemption is not defined as a mandate, it will not be covered by the proposed mandate relief statutes. It would be preferable, therefore, to include rules for roll call votes and points of order for all proposed preemptions and to incorporate it in mandate relief legislation. ACIR’s 1992 recommendations on explicit statements of intention and scope for all preemptions are that:

(1) the Congress not preempt state and local authority without clearly expressing its intent to do so; (2) the Congress limit its use of the preemption power to protecting basic political and civil rights, managing national defense and foreign relations, ensuring the free flow of interstate commerce, preventing state and local actions that would harm other states or their citizens, and protecting the fiscal and programmatic integrity of federal aid programs into which state and local governments freely enter; [and] (3) the Executive Branch not preempt by administrative rulemaking unless the Congress has expressly authorized such action and established clear guidelines for doing so, and unless the administrative agency taking such action clearly expresses its intent to preempt. . . .

16. *Effective implementation of the proposed mandate relief legislation will require, among other things, additional funding for the Congressional Budget Office, adequate and perhaps additional trained staff in executive agencies, and active cooperation from state, local, and tribal governments in preparing cost estimates.* Effective implementation of the proposed bills will require objective and thorough benefit-cost analyses, accurate estimates of mandate compliance costs, and Congressional agreement on how to treat range estimates that may be issued by CBO.



## IV. PRINCIPLES TO GUIDE THE DESIGN AND CONSIDERATION OF FEDERAL MANDATES

The proposed bills would not eliminate federal mandates, including unfunded mandates, on state, local, and tribal governments. Therefore, it is still necessary for the Congress and the Executive Branch to adhere to principles of intergovernmental cooperation and sound judgment when enacting or promulgating new mandates or revising statutes and rules. The following sixteen principles are grouped into three broad categories: principles for establishing national policy, principles for strengthening the intergovernmental partnership, and principles for ensuring mandate workability.

### A. Principles for Establishing National Policy

1. *Establish Federal Accountability.* Mandates should be enacted with full accountability through recorded roll call votes at all stages of Congressional action and with full disclosure of the true costs and benefits of implementation. The Congress and citizens should be informed of budget costs, social and economic costs and benefits, as well as cost savings expected to accrue from mandate compliance. The goal should be to combine intergovernmental fiscal fairness with sound national policy.
2. *Promote Debate on National Priorities.* Proposed mandates should trigger broad debate about national priorities not only within the Congress but also across the country. Federal officials should recognize that not every national priority requires federal legislation and that not every federal priority is a national priority.
3. *Recognize Constitutional Limits.* Federal actions must recognize such important federal constitutional requirements as the republican guarantee clause (Article IV, Section 4); the Tenth and Eleventh Amend-

ments; the limited, delegated federal powers enumerated in the U.S. Constitution (e.g., Article 1, Section 8); and the federal and state constitutional obligations to be accountable to the people for policy decisions and expenditures of public funds.

4. *Exercise Federal Restraint.* Mandates should be limited to compelling, constitutionally valid national interests involving such matters as (a) clearly negative interstate **spillovers**, (b) treaty obligations, (c) uniform policy imperatives unattainable by interstate action, (d) redistributive policy necessities, and (e) clear state, local, or tribal failure to protect basic rights.
5. *Achieve National Goals.* Mandate relief efforts should not undercut important and long-established national goals that clearly serve the public well-being. However, all persons and governments have a right to be treated fairly and equitably in the regulatory process. Protecting this right requires careful balancing between uniform protection of fundamental rights; deference to state, local, and tribal democratic processes; public participation and accountability in the regulatory process; freedom from unreasonably costly regulatory burdens; and intergovernmental fiscal fairness.

### B. Principles for Strengthening the Intergovernmental Partnership

1. *Create Mutual Trust.* State, local, and tribal governments can be trusted to act for the public good, meet public needs, and respond to citizen preferences. The principal responsibility of the federal government is not to regulate its governmental partners in response to special interests, but to create the general economic, fiscal, and regulatory conditions needed nationwide for citizens to exercise their proper self-governing powers.
2. *Enhance the Intergovernmental Partnership.* State, local, and tribal governments are not administrative arms of the federal government. The states are coequal constitutional governments elected by and accountable to their citizens. Local governments derive

their powers from their states and citizens, not from the federal government or the U.S. Constitution. Tribal governments represent the original sovereign nations of American Indians and Alaskan Natives. State, local, and tribal governments, therefore, should be free to do what is appropriate pursuant to their constitutional or governmental authority.

3. *Educate Rather than Mandate.* Excessive mandating is counterproductive and undermines the legitimacy of the federal role. Federal officials who perceive a policy need should first seek alternatives to mandates. Because it is often better to educate than to legislate or regulate, mandates should be enacted or promulgated only as a last resort. Consideration also should be given to funding demonstration programs designed to explore likely outcomes before enacting mandates.
4. *Look to the Laboratories of Democracy.* When considering mandates, federal officials and members of Congress should examine the costs and benefits of existing state, local, and tribal policies in the same field to:
  - Determine whether a federal mandate would be more effective, economical, and efficient than multiple standards; and
  - Learn from state, local, and tribal experiences in order to adopt the most workable federal standard.
5. *Enhance Flexibility and Options.* Mandate legislation and administration should provide maximum freedom, discretion, and flexibility to meet performance objectives so as to make the most of management creativity and efficiency. Options for choices should be emphasized over waivers that must be granted by federal agencies.
6. *Create More Block Grants.* The power of block grants to devolve greater freedom to recipients—both by enlarging the scope of expenditure choices and reducing and/or

removing onerous administrative conditions—should be used more fully in creating additional federal block grants. This action would:

- Streamline the grant system;
- Reduce its burdens;
- Cut the large number of overlapping and conflicting programs and requirements; and
- Reduce the number of federal mandates.

This option should be a first-order consideration in designing new federal programs.

7. *Emphasize Goal Attainment.* Mandates enacted by the Congress and promulgated by executive agencies should set forth appropriate, attainable, and measurable performance standards rather than detailed implementation rules, specifications, and other procedural prescriptions.

## C. Principles for Ensuring Workability

1. *Stimulate Power Sharing and Consultation.* Effective governance in the American federal democracy requires genuine power sharing, mutual cooperation, and real partnership among governments. At a minimum, enactments and promulgations of federal mandates require timely consultation with the relevant elected officials of state, local, and tribal governments and, when appropriate, relevant representatives of implementation agencies and the private sector. To ensure timely and adequate consultation, meetings between federal officials and elected state, local, and tribal officials should be exempted from the *Federal Advisory Committee Act*.
2. *Nurture Co-Regulation.* Many federal mandates apply not only to governments but also to the private sector. Frequently, the mandates are enforced, in the first instance, by the state, local, and tribal governments. This co-regulator relationship also sometimes joins federal and state agencies in reg-

ulating local and tribal governments, Thus, this relationship needs to be nurtured to achieve success.

3. *Provide Personal Contact.* Regardless of whether a mandate is funded or unfunded, federal officials need sufficient resources to make helpful personal contacts with state, local, and tribal **officials**. This federal role is increasingly important because, in many states and most local and tribal governments,

- Limited or no budgets for travel and telecommunications restrain public officials' ability to acquire necessary training and assistance; and
- Citizens have come to expect more insistently that their public servants stay home and focus on their responsibilities.

4. *Ensure Workability.* When mandates intended to yield positive benefits are deemed necessary, legislation and regulations should be practical and achievable. Toward this end, they should:

- Have clear and unambiguous objectives, priorities, and requirements;
- Provide options for compliance and, thereby, lessen the necessity for waivers;
- Avoid displacing or reducing the delivery of existing government services or rights protections;
- Allow the most efficient, economical, and scientifically sound methods of allocating resources **and** achieving mandated goals;
- Emphasize long-term continuity and stability in goals and rules to avoid frequent midstream changes that add more costs than benefits and require constant adjustment to changing Congressional and executive moods;

- Provide at least six-months' advance notification before enforcement of final **rules** or rule changes;
- Recognize differences in state, local, and tribal institutional structures, resources, conditions, and service responsibilities;
- Ensure that state, local, and tribal governments are not penalized for good-faith innovative efforts;
- Emphasize cooperation over confrontation, incentives over penalties, and assistance over punitive sanctions;
- Include provisions for technical assistance and adequate information technology for all jurisdictions, but especially for those lacking the technical know-how and administrative capacity to comply with complex mandates without assistance;
- Avoid information overload by recognizing that many local and tribal elected officials are part-time public servants with little or no staff support (thousands of pages of mandate regulations may be no more accessible and manageable to them on-line than on paper);
- Emphasize simple, nonlegalistic language in federal legislation and regulations;
- Include provisions for periodic review or sunseting of legislative and executive regulatory requirements; and
- Designate a federal agency to assist state, local, and tribal governments in complying with each crosscutting regulation.

## V. PRINCIPLES TO GOVERN THE FUNDING OF FEDERAL MANDATES

The proposed mandate relief bills provide political leverage for funding federally induced costs, but they do not require the Congress to fund part or all of such costs. Furthermore, even though broad areas of policymaking are excluded from the bills' cost-estimate and relief requirements, the Congress retains full authority to fund or not fund any mandates fully or partially.

Therefore, the Congress and executive agencies still need to be guided by principles of intergovernmental fiscal equity. These principles include the following:

1. *No Money, No Mandates.* Congressional and executive consideration should be given to the principle of "no money, no mandates," even if the Congress elects not to be bound by such a statutory rule in every case. This concept was driving the legislative momentum for reform in 1994. The federal agency backstop provision, proposed in December, would give effect to the principle that the Congress should not enact mandates without providing funding to cover compliance costs.
2. *Federal Funding.* Congressional and executive policymaking also should be guided by the principle that any policy important enough to require a national mandate is important enough for the federal government to provide full or partial implementation funding. Pay-as-you-go rules should apply to federal intergovernmental mandates as they do to other federal policies.
3. *Net Benefits.* No mandate should be enacted unless its costs and benefits are known and limited, and unless the costs are balanced with benefits at every step of implementation by federal departments and agencies.
4. *Federal Revenue Commitment.* When federal officials enact or promulgate mandates that have intended benefits, they also should share the obligation of raising revenues from citizens to pay for the mandate bene-

fits. This principle is critical for public accountability and policy efficiency in our federal democracy. In providing assistance, consideration also should be given to targeting more assistance to state, local, and tribal governments having weak fiscal capacities.

5. *Federal Funding for Administrative Costs of Grants.* Full federal funding should be made available for all reasonable and appropriate administrative costs in federal aid programs as an incentive for the federal government to keep those requirements simple and efficient. OMB Circulars A-87 and A-102 make administrative costs eligible for cost sharing under most federal grant programs, but the federal share frequently is less than 100 percent.
6. *Federal Funding of Grant Conditions.* The costs of meeting all the conditions (including crossover sanctions) attached to a federal grant program should be eligible for funding within the program, to the extent that they are not funded by some other federal means. The greater the level of federal micromanagement of mandate requirements—such as strict deadlines, inflexible uniform standards of compliance, and repeated intervention—the greater the federal fiscal obligation to assist state, local, and tribal compliance.
7. *Federal Compensation for Spillover Costs.* Members of Congress and executive agencies should be fully cognizant of the impacts of all federal actions that induce costs for state, local, and tribal governments, and should weigh carefully the positive and negative impacts of various policy choices and priorities against the intended benefits. The greater the intended or unintended spillover costs of federal policies, the greater the federal fiscal obligation to compensate costs that exceed state, local, and tribal benefits.
8. *Consideration of Indirect Effects.* Considerations of mandate costs should include not only direct budgetary costs but also indirect effects as well as social and economic costs and offsetting benefits and savings. Such

considerations should be made only after meaningful consultation with elected state, local, and tribal officials and their designated representatives.

9. *Consideration of Variable Impacts.* The variable impacts of the costs and benefits of federal mandates on other governments in different regions should be given close scrutiny. The greater the financial and technical burdens on individual governments because of their size or particular circumstances, the greater the federal obligation to help fund or otherwise ease compliance.

## VI. GUIDELINES FOR IMPLEMENTING FEDERAL MANDATE RELIEF LEGISLATION

The proposed mandate relief bills (as of mid-December 1994) call for:

- (1) CBO estimates of the fiscal impacts of proposed mandates;
- (2) Congressional committee statements on whether mandates should be partly or entirely funded by the federal government;
- (3) Committee identification of existing and new sources of federal financial aid;
- (4) Committee descriptions of other quantifiable and qualitative costs and benefits of proposed mandates; and
- (5) Committee statements on whether mandates are intended to preempt state, local, or tribal law.

The bills also call for:

- (1) Better executive agency consultation with elected state, local, and tribal officials on proposed regulatory mandates;
- (2) Cost-benefit assessments (quantitative and qualitative) by agencies of regulations expected to induce annual, aggregate state, local, and tribal costs of \$100 million or more;

- (3) Estimates, where feasible, of the costs of mandates in future time periods and of any disproportionate budgetary effects of mandates on particular regions, or state, local and tribal governments, or rural or other types of communities;
- (4) Greater agency technical assistance for compliance to local governments with less than 50,000 residents; and
- (5) Pilot programs for helping small governments explore more flexible, alternative methods of mandate compliance.

### A. Process Guidelines

Effective implementation of these rules and processes will require:

1. *Parliamentary Procedures.* Establishment of general parliamentary procedures in the House and Senate to provide protections for state, local, and tribal budgets comparable to those available for the federal budget, including recorded and published roll call votes at all stages of consideration of bills containing proposed mandates.
2. *Statements of Intent.* Clear statements of mandate intentions, including scale and estimated costs and benefits, so as to trigger national debate on federal priorities and require the Congress to announce clearly whether and why it is willing to mandate more spending by other governments.
3. *Consultation.* Well institutionalized and open processes for timely and thorough federal consultation with elected state, local, and tribal officials and with their citizens, as well as coordination with the fiscal officers of these governments;
4. *Consideration of Costs and Benefits.* Rules and procedures in Congressional committees and federal agencies to ensure accurate identification and full consideration of mandate costs and benefits.
5. *Treatment of Cost Estimates.* Agreement by both houses of the Congress on

the treatment of range or point estimates of mandate costs issued by CBO.

6. *Staff Capacity.* Adequate and well trained committee and agency staff to make the required statutory and regulatory determinations, especially the intergovernmental benefit-cost assessments of proposed mandates;
7. *Authorization and Appropriation Links.* Adequate consultation among relevant authorization and appropriation committees to prevent gridlock and conflict over sources and mechanisms of funding mandates, and to link short-term mechanisms and appropriations to long-term mandate goals and standards that must be achieved over many years;
8. *Coordination.* Continual coordination among Congressional committees, CBO, and federal agencies; and
9. *House Rules.* Resolution of parliamentary procedures in the U.S. House with respect to the role of the House Rules Committee in the legislative process affecting mandates.
10. *Oversight.* Adequate Congressional and Presidential oversight to ensure compliance with statutory requirements.

## **B. Partnership Guidelines**

The following guidelines, which are intended to foster a stronger intergovernmental partnership, should be applied whenever mandates are enacted, reauthorized, or promulgated:

1. *Demonstrated Need.* Mandating should be limited to demonstrated needs and widely recognized national purposes in accordance with the principles outlined above in Section IV. Federal officials should clearly document significant market failures or problems of national scope that state, local, or tribal governments are unable or unwilling to solve effectively, either independently or through voluntary intergovernmental cooperation. Mechanisms other than mandates should be

explored before concluding that a mandate is necessary.

2. *Clearly Defined Problem.* Mandates should focus on clearly defined problems identified through thorough research, investigation, and hearings by relevant Congressional committees and executive agencies in close consultation with state, local, and tribal governments.
3. *Least Burdensome Mechanisms.* If there is a demonstrated need, the Congress and federal agencies should consider a full range of options and select the least burdensome mechanism able to achieve the objective, with state, local, and tribal actions taken in their own situations. The Congress should not enact rigid, inflexible mandate prescriptions that direct the rulemaking process. Federal agencies should not regulate more prescriptively than the plainly stated requirements of the law.
4. *Consultation.* As an integral part of considering options, the Congress and federal agencies should actively consult with elected state, local, and tribal officials to elicit their perspectives on feasible procedures and requirements and to build a foundation for effective intergovernmental cooperation. Consultation should be early, open, and long enough to generate well considered and documented responses.
5. *Aggregate Burdens and Benefits.* To foster the most effective implementation, the Congress and federal agencies should consult and regularly update a systematic inventory of all regulatory demands and associated costs and benefits for state, local, and tribal governments. Aggregate requirements as well as existing responsibilities and services should be taken into account when considering additional mandates.
6. *Compliance Assistance.* An effective intergovernmental partnership requires that federal officials support development and adequate funding of applied demonstration and compliance assistance programs, and promote education, training, technical assis-

tance, and information sharing among all the partners involved in mandate implementation.

### C. Efficiency Guidelines

The net benefits of necessary federal mandates should be optimized by employing resources as efficiently as possible. To do so, the Congress and federal agencies should consider the following:

1. *Good Science.* When appropriate, federal mandates should be based on, or revised in response to, the generally accepted findings of well established, peer-reviewed science. If scientific knowledge is inadequate, Congressional committees and executive agencies should support research to remedy deficiencies before issuing permanent standards or requirements, unless emergency circumstances clearly require immediate action that is likely to be effective.
2. *Risk Analysis/Prioritization.* Committees and agencies should make full use of risk analysis to help evaluate various threats to public health and safety as well as exposures to financial liabilities, and should allow the affected state, local, and tribal governments to schedule their most serious problems for priority attention.
3. *Regulatory Alternatives.* Once problems are prioritized, federal officials should allow affected state, local, and tribal officials to consider a full range of regulatory alternatives and use the most cost-effective ones available to address their compliance needs. The Congress and federal agencies should especially consider innovative and potentially more cost-effective options, such as greater use of market incentives, tiered standards for jurisdictions of different sizes, and expanded use of properly designed performance standards (with quantifiable measures of outcomes) in place of rigid technical requirements. The search for alternatives should be made in consultation with affected state, local, and tribal governments.

4. *Economic Analysis.* Regulatory options should be subjected to careful economic analysis in order to ensure that direct and indirect costs, as well as benefits, are fully considered when selecting the most efficient alternative for compliance.

### D. Effectiveness Guidelines

To help ensure more effective mandate implementation, the Congress and federal agencies should consider the following:

1. *Cooperative Rulemaking.* The Congress and federal agencies should engage in early, active, and full consultation with state, local, and tribal governments, independent technical and professional organizations, and other appropriate entities that will be involved in or responsible for mandate implementation. One promising method is to make greater use of negotiated rulemaking, which brings together implementing agencies and affected parties to negotiate the text of a proposed rule. This process often generates more practical rules, greater commitment and acceptance, a wider range of technical options, and less subsequent litigation and delay. To facilitate state, local, and tribal participation, the sites of negotiated rulemaking should not be limited to Washington, DC.
2. *Final Rule Compliance.* Federal officials should not require tribal compliance with mandates prior to the issuance of final rules. At least six months should be allowed after the issuance of final rules for state, local, and tribal governments to make the necessary changes in laws, budgets, and administrative processes. This period should be lengthened, as necessary, to accommodate state legislative calendars.
3. *Performance-Based Compliance.* The Congress and federal agencies should provide maximum flexibility to state, local, and tribal partners by using performance-based goals to allow for variations in the severity of problems addressed by a mandate and the wide differences in jurisdictional capabilities, and to allow innovation and experi-

mentation with alternative compliance strategies.

4. *Prioritization of Responsibilities.* The Congress and federal agencies should recognize and be responsive to the full range of state, local, and tribal responsibilities so that the goals of each particular federal mandate can be prioritized, and feasible standards and procedures can be devised by committees and agencies in consultation with state, local, and tribal governments.

#### E. Guidelines for Balancing Competing Values

To help balance the often competing values of fairness, equity, efficiency, and accountability, the Congress and federal agencies should:

1. *Minimize Uniformity.* Restrict uniform requirements and standards to the minimum level necessary to ensure the protection of basic individual and constitutional rights and the achievement of mandate objectives.
2. *Equity and Ability to Pay.* Ensure that mandate responsibilities are fairly distributed in terms of region, jurisdiction, and ability to pay. Consider the differences in ability of state, local, and tribal governments, taxpayers, and various classes of citizens to pay for federal mandates as well as differences among jurisdictions in the gravity of problems intended to be solved by a mandate.
3. *Plain Language.* Write legislation and regulations in plain, nonlegalistic language that can be readily understood by effected parties, and make regulations easily available to the affected parties.
4. *Measure Performance.* Monitor the performance of rules and regulations on a systematic basis in cooperation with state, local, and tribal governments in order to promote public accountability, evaluate accomplishments, ensure effective implementation, assess evolving needs and priorities, and encourage continuous improvement.

5. *Publicize Performance.* To the extent possible, make the results of performance measurements publicly available by region, state, and/or local or tribal jurisdiction. The purposes of publicizing this information are to educate the public and hold government accountable.

## VII. ALTERNATIVE ADMINISTRATIVE AND FISCAL MECHANISMS FOR EASING COMPLIANCE WITH FEDERAL MANDATES

Variations in problems demand variations in their solutions. The Congress and federal agencies, therefore, should be alert to alternatives to command-and-control policies and micromanaged implementation. Confining federal policies to least necessary levels of federal intrusion will require consideration and selective, situation-sensitive use of available administrative and fiscal mechanisms during the compliance Process.

#### A. Statutory and Administrative Mechanisms

The choices of mechanisms to help facilitate efficient, effective, and economical state, local, and tribal compliance with federal policies should be made by or in cooperation with state, local, and tribal governments. The mechanisms that should be considered include, but may not be limited to:

1. Preauthorized options for performance-based compliance rather than waivers applied for after implementation.
2. Emphasis on preventing the conditions that generate mandates as a primary strategy to reduce needs for later or deeper federal intervention.
3. Minimal use of interim rules and arbitrary deadlines.
4. Sunsetting of interim guidance documents developed without full intergovernmental consultation to accelerate issuance of final regulations based on full consultation.



5. Cooperative implementation, including demonstration and evaluation partnerships.
6. Flexibility to define, prioritize, and reach mandated objectives through self-determined state, local, and tribal action.
7. Performance-based and market-based compliance strategies.
8. Opt-out provisions for state, local, and tribal governments under specified conditions.
9. Streamlined compliance processes for state, local, and tribal governments.
10. Information about good practices and efficient and effective technologies.
11. Negotiated rulemaking and administrative dispute resolution.
12. Decisionmaking that accounts for the multifaceted and interrelated dimensions and long-term implications of public policies.
13. Ongoing consultation and information sharing, including personal contact, with state, local, and tribal officials.
6. Hold-harmless rules.
7. Non-preemption of state, local, and tribal authority to assess user fees to cover costs.
8. Tax and regulatory rules to make it easier for state, local, and tribal governments to issue bonds and use the proceeds,
9. Payments in lieu of taxes.
10. Payments from federal trust funds supported by dedicated taxes collected for the purpose of meeting federal mandates.
11. Sharing of fines and penalties collected by the federal government.
12. In-kind provision of free training, data, technical assistance, and equipment.
13. Public-private partnerships.
14. Requirements, where appropriate, for creators of problems to pay costs (e.g., the “polluter pays” principle).
15. Adherence to a regulatory budget for state, local, and tribal costs induced by federal mandates and other actions.

## B. Fiscal Mechanisms

A variety of federal fiscal mechanisms is available to help alleviate the costs of federal policies, including:

1. Grants, loans, loan guarantees, and tax expenditures to help fund compliance.
2. Targeted aid for state, local, and tribal governments to help equalize their fiscal capacities or cope with severe financial and/or mandate compliance problems.
3. Payments for services and benefits provided to the federal government by state, local, and tribal governments.
4. Payment for administrative or enforcement costs incurred by state, local, and tribal governments pursuant to federal mandates.
5. Low-cost loan programs begun with federal start-up funds.

## VIII. GUIDELINES FOR REVIEWING EXISTING FEDERAL MANDATES AND MONITORING THE IMPLEMENTATION OF FEDERAL MANDATE RELIEF LEGISLATION

H.R. 5128 (Secs. 502 and 503) would require ACIR to (1) review existing unfunded mandates and recommend ways to reduce their burdens on state and local governments; and (2) monitor and evaluate implementation of the mandate relief legislation.

In performing these tasks, ACIR should measure progress against the principles outlined in this statement and recommend improvements where procedures fall short of the principles. In turn, ACIR should adhere to these principles by engaging in adequate and

timely consultation with federal, state, local, and tribal officials on its monitoring activities, reports, and recommendations.

### **A. Reviewing Existing Mandates**

Under the Section 502 requirement to review existing unfunded federal mandates, ACIR would have to issue a preliminary report within nine months of enactment of the bill and a final report three months later. To accomplish this large task, ACIR should:

1. Consult with the national associations of state, local, and tribal governments to help identify those unfunded mandates most in need of reform and to agree on preliminary criteria for making recommendations in accordance with the principles of this statement.
2. Publish the preliminary criteria to solicit broad public comment.
3. Review the Code of Federal Regulations and the Federal Register to identify further mandates and complexities among mandates.
4. Work with each state ACIR and with representatives of other states to identify federal mandates most in need of reform attention and to refine criteria for making recommendations from the perspective of each state and its local governments, and with tribal governments.
5. Convene regional groups of federal, state, local, and tribal officials to develop preliminary reform recommendations and to refine criteria for making recommendations from the perspective of each region.
6. Convene a national working group to finalize the criteria for making recommendations and to develop a preliminary report of recommendations.

7. Publish a notice of availability of the preliminary report in the Federal Register and hold regional public hearings on the preliminary report as required by the proposed statute.
8. Prepare a final report of recommendations for consideration by members of the Commission and transmittal to the Congress and the President.

These tasks are wide ranging, complex, and time consuming. They cannot reasonably be accomplished within one year of enactment of the proposed legislation. The deadline for completion of this task should be extended at least to two years.

### **B. Monitoring the Implementation of Mandate Relief Legislation**

Given the limited funding available for ACIR's Section 503 responsibility to monitor implementation of the mandate relief legislation and issue biennial reports, ACIR should form both general and policy-specific advisory groups of federal, state, local, and tribal officials to assist in monitoring and to give primary attention to the following priorities:

1. Improvements arising from the mandate relief statute, such as levels of post-relief mandating, funding, flexibility, and other matters pertinent to the principles and processes outlined in this statement;
2. The efficacy of the procedural protections afforded state, local, and tribal budgets under the statute;
3. The aggregate cumulative costs and benefits of federal mandates;
4. The relationships between estimated mandate costs and actual implementation costs; and
5. Recommendations for further improvement.

## BIBLIOGRAPHY

### FEDERAL MANDATES TASK FORCE I

Advisory Commission on Intergovernmental Relations. *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s*. Washington, DC, 1993.

———. *Federal Statutory Preemption of State and Local Authority*. Washington, DC, 1992.

———. *Federally Induced Costs Affecting State and Local Governments*. Washington, DC, 1994.

———. *High Performance Public Works: A New Federal Infrastructure Investment Strategy for America*. Washington, DC, 1993.

Congressional Budget Office. "Environmental Federalism: Allocating Responsibilities for Environmental Protection." Working Paper. Washington, DC, September 1988.

"Contract with America," *Legislative Digest*. September 27, 1994.

Executive Order 12612, "Federalism." October 30, 1987.

Executive Order 12866, "Regulatory Planning and Review." September 30, 1993

Executive Order 12875, "Enhancing the Intergovernmental Partnership." October 26, 1993.

Groups United to Oppose "Unfunded Mandates" Legislation. Letter to U.S. Senators dated April 15, 1994.

Hatch Constitutional Amendment on Unfunded Mandates. November 1994.

"Job Creation and Wage Enhancement Act, Title X." September 23, 1994.

Katzen, Sally. "Guidance for Implementing E.O. 12866." Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies. Washington, DC, Office of Management and Budget, October 12, 1994.

"Guidance for Implementing E.O. 12875, Section 1, Reduction of Unfunded Mandates." Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies. Washington, DC, Office of Management and Budget, January 11, 1994.

Kelly, Janet M. "Anti-Mandates Strategies: Reimbursement Requirements in the States." Washington, DC: National League of Cities, September 1994.

Library of Congress. Congressional Research Service. *Environmental Protection and the Unfunded Mandates Debate*. Washington, DC, September 22, 1994.

National Council on Public Works Improvement. *Fragile Foundations: A Report on America's Public Works*. Washington, DC, 1988.

Panetta, Leon. "Guidance for Implementing E.O. 12866." Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies. October 12, 1994.

———. "Guidance on Implementing E.O. 12875, Reduction of Unfunded Mandates." Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies. January 11, 1994.

Pompili, Michael J. "Environmental Mandates: The Impact on Local Government." Columbus, Ohio: Department of Health, 1993.

U. S. House of Representatives. Amendment to H.R. 5128. Offered by Rep. Henry A. Waxman, October 4, 1994.

———. H.R. 5128: An Amendment in the Nature of a Substitute, "Federal Mandate Accountability and Reform Act of 1994."

U.S. Senate. S. 993: "Federal Mandate Accountability and Reform Act of 1994."

———. Committee on Governmental Affairs, "Summary of the Federal Mandate Accountability and Reform Act of 1994."

"Why We Need Mandates, and How We Should Pay for Them," *The Bond Buyer*, November 2, 1994.

Wilson, Jerome. Letter to the Task Force dated October 25, 1994.

Zimmerman, Joseph F. "State Mandate Relief: A Quick Look," *Intergovernmental Perspective* (Spring 1994).

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*STATEMENT*  
**FEDERAL MANDATES TASK FORCE II**  
**FEDERAL MANDATE RELIEF**  
**FOR STATE, LOCAL, AND TRIBAL GOVERNMENTS:**  
**ESTIMATING THE COST OF FEDERAL MANDATES**

**EXECUTIVE SUMMARY**

This purpose of this Task Force was to explore the technical issues associated with estimating the costs of federal mandates imposed on state, local, and tribal governments, and to recommend practical and acceptable methods for making such estimates.

The Task Force findings are discussed in detail in Section IV, and some of the key findings are summarized below. These findings apply only to the estimation of state and local government costs. The Task Force did not analyze the feasibility or methods of estimating private sector costs.

Mandate cost estimating should begin early in the legislative process and not be limited to a single estimate when legislation is reported out of committee.

Diverse and flexible approaches will be necessary, depending on the uses for which the cost estimates are made. Uncertainties associated with estimates should be clearly identified. Estimates with detail below the total national cost, while desirable, will not generally be feasible at this time.

The general standard for measurement should be direct costs net of any quantifiable savings to state and local governments. It is not feasible to net out general benefits that are not specific to individual governments.

At the time a bill is being considered by Congress, it is impossible to develop cost estimates that are of **sufficient** quality to provide an accurate basis for authorizing or appropriating funds for reimbursement of mandate costs. Cost estimates can be improved by increased consultation with state, local, and tribal governments, federal agencies, and other interested organizations. It is important that these consultations begin early in the process.

Better, more detailed, and more timely estimates than those feasible at the legislative stage are desired by state and local governments. Such improvements will require the development of both better information systems and estimating models.

It will **be** difficult, if not impossible, to calculate the **actual** costs of enacted federal mandates separately from costs attributable to **state** or local actions.

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# ESTIMATING THE COSTS OF FEDERAL MANDATES

## I. OBJECTIVE

The U.S. Office of Management and Budget asked the Advisory Commission on Intergovernmental Relations (ACIR) for guidance on a variety of mandate issues, including ways to estimate the costs. ACIR convened two Task Forces to address related mandate issues. The conclusions of this report on the issues associated with estimating the costs of federal mandates are expected to provide practical and useful guidance to the President and the Congress in the development and implementation of mandate relief legislation.

## II. BACKGROUND

In recent years, discussions about unfunded federal mandates have assumed that it is possible to estimate with some degree of accuracy the costs imposed on state, local, and tribal governments. Mandate relief legislation considered in 1994 (S. 993 and H.R. 5128) and legislation proposed in the Republican "Contract with America" for enactment in 1995 include requirements for estimating costs and benefits. Although only bills with costs exceeding a threshold amount may be subject to provisions of legislation, it will be necessary to make a detailed review of many more proposed mandate bills in order to determine whether their costs reach the threshold.

The Congressional Budget Office (CBO) is required to estimate the costs for each bill "reported by any committee of the House of Representatives or the Senate (except by the Committee on Appropriations of each House)" that imposes costs on state and local governments totaling at least \$200 million per year or that is likely to have exceptional fiscal consequences for a geographic region or a particular level of government. Over the most recent ten years, CBO reports, an average of 13 bills per year have exceeded the \$200 million threshold

and an average of 74 bills per year have had some costs for state and local governments.

Proposed mandate relief measures are expected to apply to mandates with annual state and local costs of \$50 million or more, although some proposals suggest the threshold for relief may be less than \$50 million. Therefore, enactment of this mandate relief legislation may substantially increase the number of bills that require a formal estimate. Because of the procedural requirements proposed for bills exceeding the threshold, the accuracy of the estimates will be much more important.

The Task Force reviewed previous estimates prepared by CBO to see how the process could be improved, but it did not consider its role to be to evaluate any particular estimate.

With the expectation that limited resources will be available to make cost estimates, it is clear that new approaches must be developed. Additional longer term efforts should be undertaken to create a system that will generate fast, reliable, and detailed estimates. Meanwhile, the Task Force has addressed some of the most pressing issues involved in cost estimating, and suggested appropriate procedures that can be followed in the short term.

## III. THE TASK FORCE

ACIR's goal was to bring together knowledgeable people representing a variety of interests. Information about estimating mandate costs was collected by ACIR and provided to the Task Force. A description of each item provided is included in this report.

Two Task Force meetings were held in the Fall of 1994, attended by representatives of the Congressional Budget Office (CBO), federal executive agencies, state and local governments, and environmental and other interested organizations. The participants were asked to confine their discussion to the technical issues related to cost estimating.

The Task Force participants approached the development of this report in a very positive and constructive way that recognized the importance of the issues being discussed. No votes were taken, but there appeared to be agreement on most points. In the instances where there was clear disagreement, the differences are noted in the report.

Principal attention was directed to the feasibility of cost estimates during the legislative consideration of mandates, but some observations about estimating post-legislative costs also are included in the report. It is apparent that the quality and detail of cost estimates should depend on their use.

Estimates used to measure the costs of reimbursement by the federal government will have different requirements than those for public policy discussions or comparisons of relative costs of alternative proposals. Similarly, the costs and time required to prepare these estimates will be significantly different depending on their use. More resources will be necessary to produce estimates for reimbursements. (See below, however, regarding the Task Force's conclusion that reimbursement-quality estimates are not possible at this time).

No conclusions were reached by the Task Force about estimating nongovernmental mandate costs, although some participants expressed concern that using resources to make such estimates could detract from the quality of government cost estimates.

## **IV. FINDINGS**

### **1. Cost Estimates**

The costs of mandate legislation will depend on the programmatic options and flexibility provided for implementation. No single cost estimating model will be satisfactory to all interests, and diverse approaches may be necessary. Cost estimates should assume the use of all reasonable program options and should consider any flexibility allowed in implementation. The estimates should clearly identify uncertainties and warn users about them. In general, only direct costs should be estimated.

Indirect costs are difficult to estimate with accuracy and consistency.

State and local officials would like cost estimates to show differential effects on different types of communities, and on individual governments. Such detailed estimates are not provided by CBO. These estimates would be costly and time consuming for CBO to prepare because the necessary information is not readily available. Until improved information systems become available, detailed estimates will not usually be feasible during the legislative process.

### **2. Defining Net Costs**

It is necessary to distinguish between savings and benefits. Identified savings should be subtracted from mandate cost estimates, but it is not feasible to net out benefits. Savings are defined as quantifiable amounts that state or local government accounting could recognize as attributable to the mandate, such as federal grants, reduced staffing, lower material costs, or similar amounts. Benefits relate to the general reason for the mandate and are less easily quantified. Benefits are often the key subject of political debate.

One participant disagreed and felt that it is unfair to compare unquantified benefits against quantified costs. If costs are to be measured, then benefits should be measured. Other participants pointed out that costs are specific to individual state or local governments, while benefits may be general and not related to individual governments.

### **3. Time Period Covered by Estimates**

The CBO estimates are based on a five-year time horizon due to their focus on the federal budget. Mandates may require governments to spend for capital costs, operating costs, or a combination of both. When extensive capital spending is required, the full capital costs and subsequent operating costs, if any, may not be reflected within a five-year period. In other instances, there may be large start-up costs, followed by reduced recurring costs. Therefore, the cost horizon should be flexible, but should be as long as necessary to

reflect the full cost implications of the mandate. Capital, start-up, and recurring operating costs should be estimated separately. For purposes of making a single estimate to determine whether a bill exceeds the threshold requirements, capital costs can be shown as annualized costs over a reasonable amortization period, if they are likely to be financed through bonds.

#### 4. Changes in Estimating Schedule and Process

It is assumed that the purpose of these estimates will be to inform the Congress about the cost implications of proposed legislation throughout the legislative process, and not just to trigger mandate control threshold laws, if enacted. It also is important to provide a process through which state and local governments and other interested parties can submit information relative to cost estimates early in the Congressional deliberations.

While the Task Force believes that as much information as possible about costs is desirable during legislative consideration, it recognized that both time and resources available to CBO are limited. Thus, it is necessary to provide different types of estimates at different stages of the legislative process. Legislation follows various routes to final passage and types of estimates should not be tied to specific legislative events. Instead, general legislative stages at which cost estimates will occur were suggested as follows:

- An early stage before any committee action, or perhaps before a committee bill has been drafted.
- A middle stage when specific legislation has been developed and begins to move, usually at the subcommittee markup point.
- A late stage, after full committee markup and extending until the bill is passed.

Cost estimates at each of these stages would build on information developed in a prior stage, and the reliability of the estimates would improve as it became more likely that

the bill would be considered on the floor and adopted. The estimates at each stage would be characterized as follows:

- *Early Stage:* Any mandate cost estimates at this stage will result from consultations by CBO with committee chairs, federal agencies, and state and local officials and associations representing them about which mandate legislation is likely to be seriously considered. The contemplated legislation would be identified at this stage as likely to have costs for state and local governments. These costs might be identified as expected to be minor or major, but should generally not be expressed as a quantified estimate. For those bills with costs expected to be major, CBO should ask knowledgeable parties, including federal agencies and state and local governments, to submit information.

- *Middle Stage:* Cost estimates at this stage should still be considered preliminary. In preparing estimates, information submitted by state and local governments, federal agencies, and other sources should be considered by CBO. However, any gaps in available information and sources of uncertainty should be identified. There should be flexibility in the analysis and presentation of resulting estimates. Estimates will generally consist of a range at this stage.

Some Task Force participants felt that only point estimates consisting of one specific amount should be made at this stage and throughout the process. Proponents of point estimates argued that by providing ranges, opponents and proponents of the legislation would use the extremes of the range to support their positions. Supporters of ranges believe that there are too many uncertainties in the estimates to permit their reduction to a single number.

- *Late Stage:* A single estimate of gross national costs of mandate legislation under consideration should be made at this stage. The Congress will demand a

point estimate prior to final passage of legislation. Users of the estimate should be cautioned that it contains uncertainties, a description of which should accompany the estimate. In most cases, CBO should have developed sufficient information by this stage to enable it to adjust estimates fairly quickly to amendments. In some cases, it may be possible to provide more detailed estimates based on type or size of government, or on geographic or other divisions. In most instances, however, such estimates cannot be made with sufficient reliability to be useful.

## 5. Consultations with State and Local Governments

State and local government officials believe that they can make a positive contribution to CBO's cost estimating procedures. It would be desirable for CBO to consult state and local governments in a more extensive and systematized way, which should improve the accuracy of the estimates but will not immediately increase the level of estimate detail.

Participants discussed whether state and local officials should be asked to provide only factual data, or should do cost analyses. There was no general agreement, but most participants felt it is impractical to do more than collect basic anecdotal information for use by CBO in its analyses, but that additional study should be given to ways to improve the process.

Some states have had success in implementing electronic data systems to provide information and analysis for estimating the costs of state mandates. State and local officials could similarly be expected to participate in a national system for gathering cost information, provided they were assured the results would be used by the Congress. However, those supplying the information would have to be trained and use clearly defined methods, forms, questions, and assumptions.

Such systems might be feasible at the national level, but it would require several years to develop them and would require a sub-

stantial commitment of time and resources because:

- A very large number of local governments may be affected by mandates; and
- Many local governments, especially smaller ones, are not aware of the details about mandate legislation being considered.

## 6. Reimbursement-Quality Estimates

During legislative consideration of a mandate, it will be impossible to develop cost estimates that are of sufficient quality to provide an accurate basis for authorizing or appropriating funds for the partial or total reimbursement of the mandated costs. This conclusion was reached for the following reasons:

1. The final form of legislation cannot usually be predicted because it is subject to amendments until final votes are taken.
2. Even if the form can be assured prior to final passage, there will be uncertainty about the way the regulations will implement the law.
3. Because the actual costs to be reimbursed will be determined by the actions of individual governments employing sometimes alternative methods of compliance, only a careful sampling of affected governments can provide reliable costs. Such a sampling is not feasible given the time and resource constraints at the legislative stage.

## 7. End Point Estimates

If reimbursement-quality estimates could not be made prior to final legislative approval, the Congress would face a practical problem of determining the amounts to authorize and appropriate for full or partial federal reimbursement. Using an "end point" estimate, the final adopted legislation would incorporate a cost estimate as a maximum cost target to be used during implementation. If the implementation cost estimates could not be brought within the legislative ceiling, then the Congress

would have to be notified and given an opportunity to amend the legislation.

The implementing agency would be required to design its regulations so that the expected actual costs incurred by state and local governments would not exceed the maximum amounts estimated in the legislation. Concerns were expressed about the ability of the implementing agency to design regulations so that actual costs would not exceed the legislative estimates.

The Task Force did not agree on the feasibility of using end point estimates, nor did it endorse the concept. Nevertheless, there was agreement that the idea should receive further study.

## 8. Post-Legislative Cost Analyses

In addition to potential costs of new legislation, there are concerns about the costs of mandates that are in effect. Therefore, the feasibility of calculating the actual costs of enacted mandates was considered. Knowledge of the actual costs could enable federal agencies and the Congress to assess the direct and indirect capital and operating cost effects on state and local government finances. By establishing such baseline information, the effects of changes in federal laws on those costs could then be evaluated.

Such calculations would be expensive and time consuming, even if done only periodi-

cally. There also would be a problem in separating the effects from state, local, and tribal local actions and those from federal actions. While it would be possible to calculate the effects of all regulations on costs, it would be **difficult** or impossible to attribute costs specifically to state, local, tribal, or federal government actions.

Any calculations of actual costs of implemented mandates should not be compared to earlier cost estimates prepared during the legislative process. The time elapsed between legislative estimates and actual cost calculations would make such comparisons meaningless.

## 9. Future Improvements

Better, more detailed, and more timely estimates should be possible in the future with additional study. Several suggestions were made:

1. Assess the feasibility and cost of developing a Census Bureau on-line electronic data system that CBO could access for data about state and local government characteristics;
2. Study the feasibility of constructing estimating models in areas of frequent mandate activity, such as the environment; and
3. Consider information systems, using electronic responses from state and local governments or their organizations.

## BIBLIOGRAPHY

### FEDERAL MANDATES TASK FORCE II

There has been a variety of reports, testimony, and analyses related to the issues of costing federal mandates. A sampling of these documents was assembled to provide all of the Task Force participants with a common beginning point for discussing these issues.

Adler, Robert W. Testimony for the Natural Resources Defense Council, before the U.S. Senate, Committee on Governmental Affairs. April 28, 1994.

The Natural Resources Defense Council opposed the proposed legislation to regulate the use of federal mandates. Instead, the Council concluded that "before this issue can be addressed wisely we need a more serious evaluation of the federal-state-local partnership, based on more objective and carefully analyzed information." In regard to estimating mandate costs, Mr. Adler concluded:

It may be extremely difficult for any state or city to identify what it would have spent on a given program absent a federal requirement. Moreover, because absent minimum federal requirements different states or cities usually address issues in far different ways, the bills could cause perverse results. Under some scenarios, only states and cities with the best programs would be covered by federal law, while the worst cities and states would be exempt. Or, in order to include the worst states or cities in a program, Congress would unfairly have to provide them with higher increments of funding than states and cities that have raised taxes or other revenues to comply.

Advisory Commission on Intergovernmental Relations. *Estimating the Financial Effects of Federal Mandates on State and Local Governments*. Working Paper. Washington, DC, March 23, 1994.

This report reviews mandate cost estimation in three national studies (U.S. Conference of Mayors, National Association of Counties, and U.S. EPA), three state studies (Ohio, Tennessee, and Virginia), and four city reports (Columbus, Ohio; Chicago, Illinois; Lewiston, Maine; and Anchorage, Alaska). The studies raised questions about methodology and interpretation of results, including issues relevant to the Task Force, such as:

When both state and federal laws or regulations require similar actions, which government should be considered responsible for the unfunded local mandate?

Should local costs passed through to users in the form of fees and charges be differentiated from costs payable from general taxes?

Should mandate costs incorporated in budget bases or rate schedules be differentiated from future costs that will add to spending or rates?

Should the effects of mandates be shown as a percentage of budgets, own-source revenues, costs per household, or on some other basis to make them more meaningful?

How should future mandate costs that are known but unscheduled and unfinanced be shown to illustrate effects on annual budgets?

Congressional Budget Office. "Cost Estimate for H.R. 2, the National Voter Registration Act of 1993," as ordered by the Committee on House Administration. Washington, DC, January 27, 1993.

This estimate compares the cost to states of complying with the bill's provisions to the cost of practices under existing law. This report describes problems in collecting information about registration practices in 18,000 election jurisdictions and in making assumptions about how implementation of the law would affect state and local costs.

Congressional Budget Office. *Preliminary Analysis of Unfunded Federal Mandates and the Cost of the Safe Drinking Water Act*. Washington, DC, 1994.

This report highlights some important methodological issues in measuring the costs of the *Safe Drinking Water Act*. The important conclusions of the report are summarized as follows:

Mandates generally involve worthwhile goals that most communities share. As a result, communities would probably incur some costs to achieve those goals without mandates. Once mandates are in place, however, those costs are difficult to estimate, . . .

A second measurement issue is how to properly account for federal funds. Calculating the unfunded cost of a federal mandate obviously requires deducting any federal funds that are provided from the cost of complying with the regulation. . . In addition to federal funds that are directly linked to a particular mandate, the federal government provides other general subsidies. . . .

A third measurement issue is the appropriate treatment of capital expenses.

Measuring the costs of federal legislation and mandates is difficult, even after the laws and regulations have taken effect. Measuring costs is even more difficult when mandates are in the form of a legislative proposal. . . . In addition to uncertainty about the final form that the mandate will take, measurements of costs are hindered by the fact that none of the sources of information discussed above are typically available: engineering analyses are usually developed only as the specific regulations are formed, and little, if any, information on the costs that municipalities would actually experience for compliance is available from census data or case studies.

“Job Creation and Wage Enhancement Act, Title X, Federal Mandate Accountability and Reform.” September 23, 1994.

This act is one of the ten proposed in the Republican “Contract with America.” Title X contains a variety of references to mandate costs.

Library of Congress. Congressional Research Service. *Environmental Protection and the Unfunded Mandates Debate*. Washington, DC, September 22, 1994.

Chapter 3 of this report reviews the costs of unfunded environmental mandates in the cost estimation studies of the National Association of Counties, U.S. Conference of Mayors, and the Environmental Working Group, as well as EPA data and other specialized cost data. CRS found that:

There is substantial variation of methods and results among the studies, which make verification and comparisons of estimates difficult.

The debate and reviewed cost studies do not distinguish between costs paid generally by Federal, State, and local taxpayers and the costs specifically paid by users or consumers,

Data collection was irregular across the board, due to lack of time or resources to collect and report information accurately or completely, particularly concerning the needs of small communities.

The more localities that are affected by a regulation, the more difficult it may be to depict costs on a national scale accurately.

Many of the estimates reviewed do not really distinguish between federally induced State and local costs, or demonstrate what requirements are unfunded and how much so.

Policy Planning and Evaluation. *Municipal Sector Study, Impacts of Environmental Regulations on Municipalities*. Prepared for the U.S. Environmental Protection Agency. Washington, DC, September 1988.

This report attempted to estimate for local governments the costs of the cumulative effects of all EPA requirements. It discusses some of the problems of trying to estimate costs of regulations that have not been issued, and the difficulties caused by the diversity in size, organizational arrangements, and physical characteristics of local governments.

Policy Planning and Evaluation. *Municipal Sector Study, Impacts of Environmental Regulations on New Jersey's Municipalities*. Prepared for the New Jersey Department of Environmental Protection. Washington, DC, April 1990.

The State of New Jersey commissioned this study to quantify the cumulative cost of all environmental regulations for the state and for cities and towns. The study addressed two broad questions: (1) What are the impacts of the regulations on household payments (whether paid through taxes or user fees) in different sizes of communities? and “Can environmental services continue to be financed in the same way as they are now?”

Reischauer, Robert D. Testimony for the Congressional Budget Office, before the U.S. Senate, Committee on Governmental Affairs. April 28, 1994.

Dr. Reischauer testified on the problems of estimating mandate costs. He concluded with the following points, which generally parallel the key issues facing the Task Force.

In the situations in which it matters the most, the aggregate cost to states and localities of a particular federal mandate—whether existing or prospective—is frequently very hard to determine with great specificity. Costs may vary greatly from locality to locality. They often depend on future decisions of federal, state, or local government agencies, which are difficult to predict. The estimates also depend largely on information from state and local officials, who usually have a strong interest in having the costs appear as high as possible. And even for existing costs, there is often no clear and consistent basis for identifying how much of a locality’s spending is the result of a specific federal mandate rather than a cost that it would have incurred in any event.

U.S. General Accounting Office. *Legislative Mandates, State Experiences Offer Insights for Federal Action*. Washington, DC, September 1988.

In Chapter 2 of this report, GAO reviews federal and state cost estimation processes and discusses problems encountered in making such estimates. The constraints listed include (1) limited time, (2) inability to use standardized cost estimation approaches because of the diversity of program areas covered, and (3) the lack of meaningful data sources on which to draw for state and local estimates.

U.S. Senate. Committee on Environment and Public Works. "Analysis of the Unfunded Mandates Surveys Conducted by the U.S. Conference of Mayors and the National Association of Counties." Staff Report. June 14, 1994.

The staff reported numerous flaws in the survey results used to support the cost estimates of the cities and counties. They concluded that "it is essential that any estimate of the costs of federal programs be accurate and verifiable. Congress must not act on the basis of unreliable information." Among the staff's findings were the following:

The survey results and cost data provided by the cities and counties cannot be verified by supporting documents.

The survey did not assess the cost of unfunded mandates, but reported the total costs of federal programs without offsetting grant dollars and other federal and state sources of state and local revenues.

The method of extrapolating survey results to the entire nation does not adjust for significant confounding factors, such as the differences in the amount of pollution in different regions of the country.

The cost estimates contained in the survey include substantial amounts of dollars that would have been expended even in the absence of federal programs.

The survey listed unfunded mandates for cities and counties that had incurred no expenses for the activity reported.

U.S. Senate. Committee on Governmental Affairs. "Summary of the Federal Mandate Accountability Act of 1994."

Senate Bill 993 was reported out of committee and appeared to have enough votes for passage, but it was not considered on the floor. It contained language defining mandates and direct costs that was apparently agreed to by state and local representatives, and directs the Congressional Budget Office to prepare cost estimates beyond those currently done. The important definition for Task Force purposes is as follows:

Subsection (4) defines direct costs to mean aggregate estimated amounts that State, local, and tribal governments and the private sector will have to spend in order to comply with a Federal mandate. Direct costs of Federal mandates are net costs; estimated savings will be subtracted from total costs. Further, direct costs do not include costs that State, local, and tribal governments and the private sector currently incur or will incur to implement the requirements of existing Federal law or regulation. In addition, the direct costs of a Federal mandate must not include costs being borne by State, local, or tribal governments and the private sector as the result of carrying out a State or local government mandate. . . .

U.S. Senate. Committee on the Judiciary. "Memorandum on Constitutional Amendment on Unfunded Mandates." Prepared by Edward Whelan, November 1994.

This memorandum discusses a resolution to be offered by Sen. Orrin Hatch on an unfunded mandates constitutional amendment. The memorandum discusses potential arguments against the amendment and responses to those arguments.



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