

PERSPECTIVE

Regulatory Federalism

Federal Regulation of State and Local
Government: A Status Report

Federal Mandates: The Record of
Reform and Future Prospects

Timothy J. Conlan
David R. Beam

The Federal Courts: Intergovernmental
Umpires or Regulators?

The States and Regulatory Flexibility:
Win, Lose or Draw?

James L. Martin

Regulating State and Local Governments
through the Internal Revenue Code

Catherine L. Spain

Environmental Regulations:
Lightening the Load

F. Henry Habicht II

An ACIR Roundtable:
Perspectives on Regulatory Federalism



A View from the Commission



Unfunded federal mandates are the best of both worlds for members of Congress and federal officials.

Unfunded mandates enable the Congress to placate special interest groups or pass legislation with high price tags while avoiding the responsibility of raising taxes. That unpleasant task is simply passed on to city, county, and state governments.

Unfunded mandates enable federal officials to use regulations to force phenomenally expensive requirements on city, state, and county governments. These regulations, of course, require administering, monitoring, and analyzing, which also means an ever larger federal bureaucracy.

The regulations also cause local sales and property tax increases. The most irritating aspect of unfunded mandates is that those who create them avoid, duck, dodge, or otherwise escape the heat that comes with having to pay for these programs. They're willing to take the bows, but not the responsibility.

But times have changed. Gone are the days when mayors, city council members, county executives and county commissioners would simply shrug and say, "Well, Congress says we have to."

Let me share some examples. This year in Knoxville, the city council approved a property tax increase amounting to 27 cents per \$100 of assessed valuation. Eleven cents of that total was attributable to unfunded mandates.

John Lappas is the deputy mayor of Pawling, New York, a village of about 1,800 people. Several years ago, Pawling received a mandate under the *Clean Water Act* to update its sewage treatment plant. Initially slated to cost about \$5 million, the plant came in at \$10 million. The village was left several million dollars in debt.

But the mandate train was still chugging. The village has been mandated to get rid of its reservoir and go to

a groundwater system. The cost, \$1.5 million to \$2 million.

"We're broke," he says. "We're a village of 1,800 people. We're being threatened with huge fines if we don't comply. I guess we'll just have to go to jail. We don't have the money."

Mayor Dirk Kempthorne of Boise, Idaho, has told me a story about a small community in southeast Idaho that was told by EPA that it had to comply with an expensive mandate or pay a \$10,000 per day fine.

The town's answer to EPA was, we don't have the money, we can't pay for the mandate or the fine, so you (meaning the EPA) have just bought yourself a town.

Here in Knoxville, we are looking at what some cities are doing and noting in property tax bills the percentage of property taxes caused by unfunded mandates. That way, the people who created the cost will get the credit they deserve.

We all know why this is happening. The federal government is broke. Members of Congress don't have money to do the kinds of things that get members of Congress reelected. If federal officials don't enforce regulations, they don't have jobs. The more complex the regulation, the more federal officials you need to enforce them.

Unfunded mandates are just back-door tax increases that rob from communities the opportunity to make their own decisions and chart their own course. Unfunded mandates have the potential to bankrupt local communities throughout the United States.

That may not mean much to a federal government that is \$400 billion in the red. But it means a lot to the communities that will be ruined, and to the country they support.

Victor H. Ashe
Mayor
Knoxville, Tennessee

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On the ACIR Agenda

A committee of the whole met on September 16-17, 1992, in San Francisco, California. The full committee will meet in December for final action on agenda items discussed at the meeting.

Following are highlights from the agenda.

Geographic Data Project

Federal, state, and local governments use large quantities of geographic data for tax maps and assessed values, land use and development maps, and demographic and economic statistics; topographic features, endangered species, vegetation, and wetlands data; and maps of facilities. The data are used by public works officials, local assessors, planners, engineers, developers, and environmental protection officials. Governments separately acquire and maintain the same types of costly data, and have difficulty sharing them. The Federal Geographic Data Committee has requested that the Commission initiate discussions for improving the intergovernmental coordination of these data. The U.S. Geological Survey has awarded ACIR \$76,000 to support this effort.

Criminal Justice Report Findings and Recommendations

The Commission reviewed proposed findings and recommendations for *The Role of General Government Elected Officials in Criminal Justice*. The preliminary findings suggest that:

- Crime, as a growing fiscal problem, affects municipal, county, state, and federal governments.
- The federal government's influence in the criminal justice system has been expanding faster than its financial commitment.
- Chief executives and lawmakers of the local, state, and federal gov-

ernments must make a commitment to the process for improving the criminal justice system.

The proposed recommendations include informing and involving policy-makers and community agencies in the reform process, improving information and decision-support systems, establishing and supporting criminal justice coordinating councils, and a proposal to conduct a national criminal justice summit to begin dialogue on reform measures.

ACIR Begins Work on Research and Finance Agenda

In June 1991, ACIR formed an outreach committee to develop recommendations for improving the Commission's effectiveness. One of the recommendations, called for the appointment of an agenda committee and a finance committee.

In September, a committee was appointed to begin preliminary work on a new multi-year research program. The members are Ann Klinger (Chair), Lamar Alexander, Dave Duranberger, Daniel J. Elazar, Robert M. Isaac, Samuel B. Nunez, Donald M. Payne and George A. Sinner.

A new finance committee will seek ways to expand budgetary resources and to meet the increased demand for intergovernmental analyses and policy recommendations. Appointed to the committee were David Nething (Chair), Victor H. Ashe, and Mary Ellen Joyce.

Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)

The *Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)* requires changes in the way state and local governments plan and organize the use of federal highway and transit funds. ISTEA requires changes in:

- The boundaries and memberships of metropolitan planning organizations (MPOs);
- The types of planning done by MPOs and state departments of transportation (SDOTs);
- Power sharing between MPOs and SDOTs;
- Coordination among multiple MPOs in the same metropolitan region;
- Conformance of transportation planning to air quality planning in nonattainment areas; and
- Greater citizen involvement.

In the San Francisco Bay Area, a group of 40 managers from local, regional, state, and federal transportation and environmental protection agencies have formed a partnership, as a result of ISTEA, to solve traffic congestion and smog problems. One of their first initiatives was the development of the Joint Urban Mobility Program (JUMP Start) designed to smooth the flow of traffic, reduce automobile emissions, and streamline the planning process.

The Commission invited panelists to discuss the JUMP Start program and the effects of ISTEA on metropolitan planning organizations. The panelists were: Lawrence D. Dahms, executive director of the Metropolitan Transportation Commission; Stephen L. Weir, chairman of the Metropolitan Transportation Commission and Contra Costa County Clerk-Recorder; and Dianne McKenna, supervisor, Santa Clara County.

(continued on page 35)

Next Commission Meeting

The next Commission meeting is scheduled for December 17, 1:00-5:00 p.m., and December 18, 8:30-11:30 a.m., in Washington, DC.

Federal Regulation of State and Local Government: A Status Report

A decade ago, the Advisory Commission on Intergovernmental Relations (ACIR) issued an in-depth report on the emergence of federal regulations aimed at or implemented by state and local governments. In *Regulatory Federalism: Policy, Process, Impact, and Reform* (1984), ACIR probed the shift from an incentive-based (i.e., grant-in-aid) system intended to encourage state and local governments to perform an activity or provide a service to a system requiring state and local action under federal regulation. The trend was first identified in a 1981 ACIR report, *An Agenda for American Federalism: Restoring Confidence and Competence*.

Regulatory Federalism explained that,

state and local governments, like the business sector and private individuals, have been affected greatly by the massive extension of federal controls and standards over the past two decades. These extensions have altered the terms of a long-standing intergovernmental partnership. Where the federal government once encouraged state and local actions with fiscal incentives, it now also wields sanctions—or simply issues commands. The development of new techniques of intergovernmental regulation presents a challenge to the balance of authority in, and the effective operation of, American federalism.¹

Stating that “reform of the new regulatory programs deserves a priority position on the policy agenda of the 1980s,” the Commission listed six major findings:

- (1) During the 1960s and 1970s, state and local governments, for the first time, were brought under extensive federal regulatory controls;
- (2) Federal intergovernmental regulation takes a variety of new administrative and legal forms;
- (3) Although the new forms of regulation have been litigated heavily, by and large, the federal courts have done little to constrain the regulatory proclivities of the Congress or the executive branch;
- (4) The real nature and extent of the impact of federal regulation on state and local governments is still not fully understood;
- (5) Intergovernmental conflict and confusion have hampered progress toward achieving national goals; and
- (6) Past efforts at regulatory reform have given little attention to problems of intergovernmental concern.²

The Reagan Administration initiated a variety of efforts during the 1980s to reduce or eliminate regulatory burdens. Although aimed primarily at the private sector, these relief efforts also benefited the state-local public sector. For the public sector, one important executive branch initiative was the 1987 Executive Order 12612 on Federalism (see page 32).

Concern about the regulatory and financial burdens imposed on state and local governments was not limited to the executive branch. The Congress enacted the *State and Local Government Cost Estimate Act*,³ which decreed that, “to the extent practicable,” each bill or resolution reported by a House or Senate committee should be accompanied by a fiscal note, if the aggregate annual cost to state and local governments exceeds an estimated \$200 million or if it is likely to “have exceptional fiscal consequences for a geographic region or a particular level of government.”⁴ The requirement is not mandatory, however, nor does it cover measures considered by the appropriations committees.

Regulatory Federalism—A Decade Later

How well have these regulatory relief efforts worked? If the efforts have not provided the desired regulatory relief, why not?

MANDATE BIBLIOGRAPHY

To assist in the study of the mandate issue, ACIR has prepared a bibliography of key reference sources.

Working with the National Conference of State Legislatures, ACIR staff identified more than 60 articles and reports about mandates, both federal and state. The document contains general reference sources, such as ACIR reports or journal articles, and special studies focusing on a state or city or a specific issue (e.g., environmental and Medicaid mandates).

For a copy of the bibliography, which is \$2, please write or call ACIR, 800 K Street, NW, Suite 450, Washington, DC 20575, (202) 653-5540. If you have reports or articles on mandate issues that you would like to have included in the bibliography, forward a copy to Sharon Lawrence at ACIR.

To answer these and other questions, ACIR recently undertook a new study of regulatory federalism, which is the focus of this issue of *Intergovernmental Perspective*.

Setting the stage for the discussion, the first article, by Timothy J. Conlan and David R. Beam, summarizes the results of ACIR's recent study of regulatory federalism in the 1980s. The second article examines the effects of increased regulation on state and local governments by the federal courts.

Where the ACIR report, in general, finds that the regulatory relief measures have met with only limited success, others point out that progress has been made in reducing intrusive federal regulation in some areas.

James L. Martin, director of State-Federal Relations for the National Governors' Association, writes of the accomplishments that are possible with the tools that have been given to state and local governments by the executive branch and the Congress. Catherine L. Spain, director of the Federal Liaison Center for the Government Finance Officers Association, illustrates the difficulties encountered by local officials in their relations with the federal government.

F. Henry Habicht II, deputy administrator of the U.S. Environmental Protection Agency, explains the efforts being made by his agency to reduce the regulatory problems.

The final article highlights roundtable presentations on regulatory federalism by federal government officials and other experts at the ACIR meeting in March 1992.

Notes

¹ U.S. Advisory Commission on Intergovernmental Relations, *Regulatory Federalism: Process, Impact, and Reform* (Washington, DC, 1984), p. 245.

² *Ibid.*, p. 246.

³ 2 U.S.C. Sec. 653(a) and (c). The act was made permanent in 1987 by 2 U.S.C. Sec. 204.

⁴ 2 U.S.C. Sec. 653(a) and (c).



Significant Features of Fiscal Federalism

1992 Edition

Volume II

Revenues and Expenditures

This volume of *Significant Features* presents data on revenues and expenditures for the federal, state, and local governments. *Significant Features* contains a broad picture of changes in the government's role in the economy from 1929 through 1990. Included are:

- ▶ Changes in the composition of expenditures and revenues from 1952 through 1990 and in the level and relative importance of federal grants to state and local governments from 1952 through 1997;
- ▶ ACIR measures of state fiscal capacity and effort;
- ▶ State rankings of state-local revenue and expenditure items; and
- ▶ Individual state profiles.

Volume II also includes updated information on state and local debt and state volume caps on private-activity bonds, state and local public employee retirement systems, federal Medicaid matching ratios, state Medicaid expenditures, education aid, and sources of school district revenue.

Significant Features of Fiscal Federalism, Vol. I, includes federal and state budget processes; federal individual income tax rates; state and local individual income tax rates updated through November 1991; tax rate and base information on social security and unemployment insurance; general sales tax rates and exemptions; state severance taxes; property tax relief programs; federal and state excise tax rates; estate, inheritance, and gift taxes; state and local property transfer taxes; and automobile fees and taxes.

M-180 I	1992	\$20.00
M-180 II	1992	\$22.50

(see page 33 for order form)

Federal Mandates: The Record of Reform and Future Prospects

Timothy J. Conlan and David R. Beam

No issue generates more intergovernmental conflict than federal regulation. On the one hand, many state and local government officials share the concerns voiced by one state legislator that “federal mandates are putting a stranglehold on state budgets.”¹ Even when they recognize the costs, supporters of new federal requirements sometimes claim that they are a necessary response to state and local failures. One congressional aide argued: “Mandates wouldn’t be necessary if [states] were doing what they should have been doing in the first place.”²

President George Bush prominently entered this complex and sometimes arcane debate in his 1992 State of the Union Message, declaring that

We must put an end to unfinanced federal government mandates. . . . If Congress passes a mandate, it should be forced to pay for it and balance the cost with savings elsewhere.

Further, in reaction to the similar regulatory concerns voiced by business advocates, the President imposed a 90-day moratorium on new federal rules and requirements. These steps augmented earlier actions that placed the Vice President in charge of a high-level Council on Competitiveness, instructed to ensure that federal rules impose only the minimum necessary burdens on business.

Ironically, in the eyes of most intergovernmental and regulatory policy observers, these events come barely one decade after President Ronald Reagan launched an even more ambitious campaign to roll back federal regulations. Like President Bush, he froze the issuance of new regulations pending further study and review, and he also appointed then Vice President Bush to chair a task force to review existing rules and regulations and suggest modifications. President Reagan also centralized control over the regulatory process within the Executive Office of the President, subjected pending rules to economic analysis to control costs, and appointed dedicated advocates of deregulation to key administrative positions.

The results of the past decade’s effort are not yet plain. Some observers have argued that state and local governments were “the big winners” under the deregulation campaign.³ The administration estimated that it had eliminated millions of hours of paperwork affecting states and localities and had saved them billions of dollars in compliance costs. Yet, state and local officials today protest what some call a continuing “explosion of federal mandates.”⁴

To put these competing views into perspective and to provide a foundation for evaluating the mandate problem, ACIR recently completed a study on *Federal Regulation of State and Local Governments: Regulatory Federalism—A Decade Later*. This article summarizes the study’s principal findings. It inventories the most significant new mandates enacted by the Congress during the past decade, develops a rough estimate of their cumulative costs, and examines the accomplishments of executive branch initiatives to restrain intergovernmental regulation during the 1980s.

Legislative Mandating in the 1980s

In its 1984 report on *Regulatory Federalism*, ACIR counted some 36 federal “mandates” affecting state and local governments as of 1980. Utilizing this same definition of mandates, the Congress passed an additional 27 regulatory statutes and amendments with significant intergovernmental effects between 1981 and 1990.

Table 1 lists and briefly describes this legislation. Some statutes, like the *Drug Free Workplace Act of 1988*, represented new policy concerns for federal regulators. Others, like the *Education of the Handicapped Act Amendments of 1986*, built on and expanded earlier federal initiatives. Certain regulations, like the 1988 *Ocean Dump-*

Table 1
Major New Enactments and Statutory Amendments Regulating State and Local Governments, 1981-1990

Title	Public Law	Regulatory Type*
Age Discrimination in Employment Act Amendments of 1986	99-592	DO
Americans with Disabilities Act of 1990	101-327	CC, DO
Asbestos Hazard Emergency Response Act of 1986	99-519	DO
Cash Management Improvement Act of 1990	101-453	CC
Child Abuse Amendments of 1984	98-457	CO
Civil Rights Restoration Act of 1987	100-259	CC
Clean Air Act Amendments of 1990	101-549	PP
Commercial Motor Vehicle Safety Act of 1986	99-570	CO
Consolidated Omnibus Budget Reconciliation Act of 1985	99-272	DO
Drug-Free Workplace Act of 1988	100-690	CC
Education of the Handicapped Act Amendments of 1986	99-457	CO
Education of the Handicapped Act Amendments of 1990	101-476	CO
Emergency Planning and Community Right-to-Know Act of 1986	99-499	PP
Fair Housing Act Amendments of 1988	100-430	DO
Hazardous and Solid Waste Amendments of 1984	98-616	PP
Handicapped Children's Protection Act of 1986	99-372	CO
Highway Safety Amendments of 1984	98-363	CO
Lead Contamination Control Act of 1988	100-572	DO
Ocean Dumping Ban Act (1988)	100-688	DO
Older Workers Benefit Protection Act of 1990	101-433	DO
Safe Drinking Water Act Amendments of 1986	99-339	PP/DO
Social Security Amendments of 1983	98-21	DO
Social Security: Fiscal 1991 Budget Reconciliation Act	101-508	DO
Surface Transportation Assistance Act of 1982	97-424	CO
Voting Accessibility for the Elderly and Handicapped Act (1984)	98-435	DO
Voting Rights Act Amendments of 1982	97-205	DO
Water Quality Act of 1987	100-4	PP/CC/DO

***KEY**

- CC—Crosscutting Requirement
- CO—Crossover Sanction
- DO—Direct Order
- PP—Partial Preemption (PP).

ing Ban Act, which prohibits any additional dumping of municipal sewage sludge in ocean waters, were relatively simple and direct. Others, like the 1990 *Clean Air Act Amendments*, were lengthy and complex laws that imposed multiple new obligations and requirements on both public and private entities.

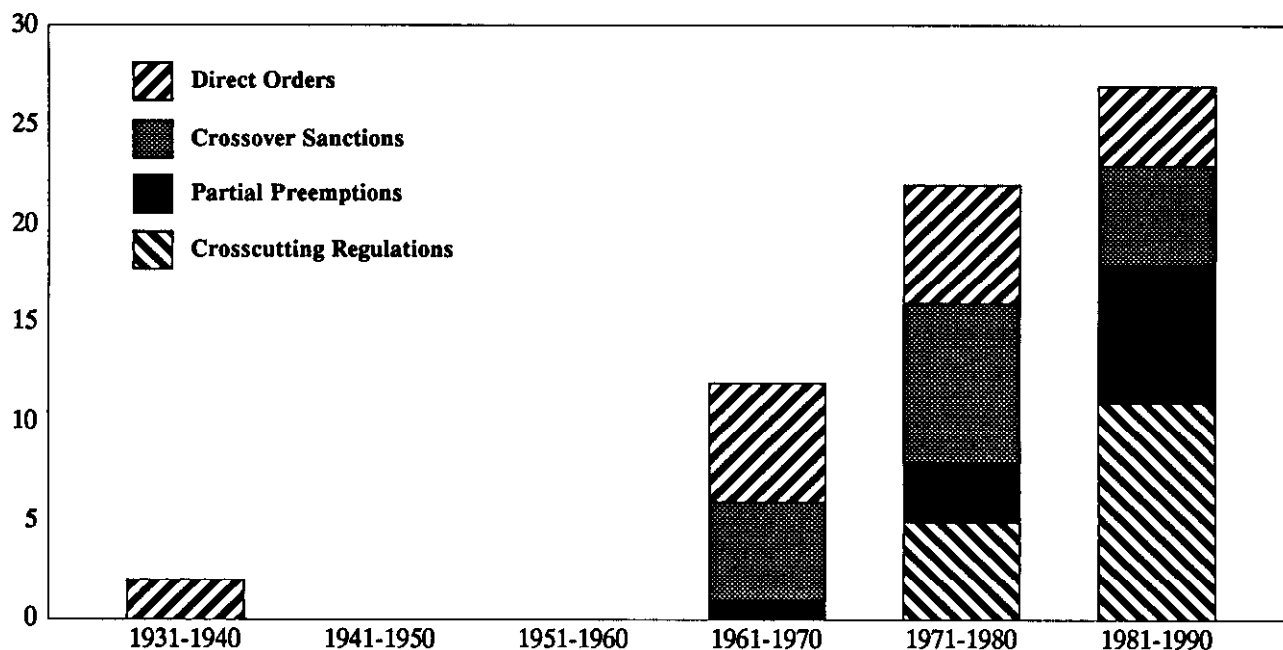
In some cases, states and localities object to these mandates chiefly because of their intrusion into traditional spheres of state authority. This was the case for legislation requiring states to allow longer and heavier trucks on their highways and forcing them to raise their minimum drinking age. In both cases, the instrument employed was the "crossover sanction," through which states are subject to reductions in highway construction aid if they do not comply with federal regulations. The 1980s saw increased reliance on both direct orders and crossover sanctions, the two most openly coercive of the four new intergovernmental regulatory techniques described in past ACIR research.⁵ Moreover, as discussed in more detail below, some of the new federal mandates did place costly financial burdens on state and local govern-

ments. For example, the *Safe Drinking Water Act Amendments of 1986* will impose estimated costs of \$2 to \$3 billion annually on public water systems, while recent handicapped education requirements may cost over \$500 million annually.

Mandate Growth in Perspective

Figure 1 compares the level of federal regulatory activity from 1981 to 1990 with earlier decades. The chart makes clear that, despite efforts to constrain the growth of intergovernmental regulation, the 1980s remained an era of regulatory expansion rather than contraction. The 27 statutes imposing significant new regulatory burdens on state or local governments actually outnumbered the 22 such laws enacted during the 1970s. This surprising record of continued intergovernmental regulatory activity for the 1980s was all the more significant given the overall decline in legislative output during the past two decades. On average, the Congress passed fewer public bills per legislative session during the 1980s compared to the 1960s and 1970s, so the influx of new mandates represented a larger proportion of a shrinking legislative agenda.

Figure 1
The Growth of Regulatory Federalism: Enactments Added per Decade, 1931-1990
 (includes new programs and major amendments)



Source: ACIR, *Regulatory Federalism*, Appendix Table 1.

It is important to note that the 1980s also witnessed the enactment of several regulatory relief measures that are not evident in this inventory of new mandates. For example, bilingual education requirements were modestly relaxed, cities were granted some relief from antitrust penalties, and a series of new block grants was established. On the other hand, the inventory of 27 new mandates does not include a number of costly conditions that were added to existing grant-in-aid programs (in order to allow comparisons with ACIR's earlier research). Particularly noteworthy here were expensive new requirements added to the Medicaid program, workfare conditions attached to AFDC in conjunction with welfare reform, and legislation increasing local government contributions for federal water projects.

The Costs of Federal Mandates

Although there are many problems associated with intergovernmental regulations—including inefficiency, intrusiveness, and excessive complexity—federally mandated expenditures represent the most visible dimension of the mandate problem for many state and local officials, especially during tough budgetary times. While it is clear that some specific regulatory requirements impose substantial costs on affected governments, information about the overall financial burdens imposed by federal mandates is incomplete. In many cases, it is extremely difficult to measure the monetary costs or the benefits of federal regulations accurately, and the costs of compliance often vary widely from one jurisdiction to another.

One source of information about the costs of federal intergovernmental regulations is available from the

Congressional Budget Office (CBO). Since 1983, CBO has attempted to estimate the intergovernmental fiscal effects of proposed federal legislation. During the 1980s, the office produced state and local cost estimates on more than 3,500 bills and amendments, including 457 estimates for bills that were enacted into law. An analysis of these data indicates that:

- New regulations adopted between 1983 and 1990 imposed cumulative estimated costs of between \$8.9 billion and \$12.7 billion on states and localities, depending on the definition of mandates that is used;
- On an annual basis, such regulations imposed estimated costs of between \$2.2 billion and \$3.6 billion in FY 1991;
- Federally mandated costs have risen rapidly since 1986, growing at a pace faster than overall federal aid; and
- Additional costly requirements—which are not included in the above estimates—have been enacted and are scheduled to take effect in the years ahead (see Table 2).

Unfortunately, the CBO data provide only an approximate and highly conservative estimate of the fiscal magnitude of federal mandates. Individually, many of the CBO cost estimates were rough and preliminary. Cumulatively, they were incomplete. No CBO estimates were prepared

Table 2
Selected Recent Federal Regulations: Estimated Costs

Title	Estimated Costs
Asbestos Hazard Emergency Response Act	\$3.145 billion over 30 years ¹
Leaking Underground Storage Tank Requirements	\$428 million capital costs; \$128 million annually for operations and maintenance ²
Wastewater Treatment	\$12.3 billion capital costs; \$518 million annually for operations and maintenance ³
Americans with Disabilities Act	Less than \$1.0 billion ⁴
Clean Air Act Amendments of 1990	\$250-300 million annually ⁴
Medicaid expansions in 1990 budget agreement	\$870 million over 5 years ⁴

¹ *Federal Register* 52 (October 1987): 41845.

² EPA, Municipal Sector Study, pp. B-40,41.

³ EPA, Municipal Sector Study, table III-2.

⁴ CBO cost estimates, various years.

for one-quarter of the 27 new intergovernmental statutes inventoried in Table 1, including some that have proved to be extremely costly.

For example, no cost estimate was prepared for the *Water Quality Act of 1987*, although the cost of pending wastewater requirements was put at \$12 billion by an EPA study. In other cases, subsequent research indicated that CBO estimates were too low. The agency's estimate for the *Asbestos Hazard Emergency Response Act* did not include the most costly burdens associated with developing local asbestos management plans and the actual removal of hazardous asbestos from local schools, even though EPA subsequently estimated the costs of complying with these provisions to be approximately \$3 billion.

Regulatory Activity by the Executive Branch

Some of the authors of CBO's cost estimating process hoped that it might restrain federal mandating by providing the Congress with more timely and complete information about the fiscal consequences of proposed regulatory initiatives. Given the growth of legislative mandates since its enactment, this result clearly has not been obtained. But, because legislative statutes are frequently general or vague, the magnitude of the regulatory obligations imposed on states and localities are typically the result of specific rules promulgated by implementing agencies, not direct congressional action. Moreover, because the executive branch rulemaking process was the focus of concerted deregulation efforts during the 1980s, a complete portrait of regulatory federalism during the past decade must also consider the implementation of preexisting mandate laws.

Detailed but unpublished information concerning changes in regulatory requirements for 18 major intergovernmental mandates was accumulated by the General Accounting Office (GAO) and made available to ACIR.⁶ For this specific set of programs, GAO analysts sought to compile every change in administrative standards and procedural requirements published in the *Federal Register* and the *Code of Federal Regulations* between 1981 and 1986, the most active years of the Reagan administration's

deregulation effort. These empirical data were supplemented with interviews and additional information about changes in funding levels, delegation of regulatory decision-making to states, and the intensity of federal oversight.

Despite a variety of regulatory reform initiatives, these data indicate that the federal government's overall regulatory burden on state and local governments from existing programs continued to increase during the 1980s. As Table 3 indicates, there was a growing federal regulatory burden on state and local governments in 11 of

Table 3
Summary of Changes in Mandated Burden on State and Local Governments
 (18 Programs, 1981-1986)

Mandate Burden Increased (11)

1. Clean Air Act
2. Endangered Species Act
3. Fair Labor Standards Act (FLSA)
4. Handicapped Education (1975)
5. Historic Preservation Act
6. Ocean Dumping
7. Occupational Safety and Health Act (OSHA)
8. Pesticides (FIFRA)
9. Rehabilitation Act of 1973 (Section 504)
10. Safe Drinking Water Act
11. Wholesome Meat Act

Mandate Burden Stable (2)

1. Hatch Act
2. Title VI Civil Rights

Mandate Burden Reduced (5)

1. Age Discrimination in Employment Act
2. Davis-Bacon Act
3. Flood Disaster Protection Act
4. National Environmental Policy Act (NEPA)
5. Uniform Relocation Act

Source: Unpublished GAO case studies.

the 18 program areas studied (61 percent of the total) as measured by changes in program standards, administrative procedures, compliance costs and federal aid, state delegation, and enforcement patterns. Increasingly prescriptive regulations produced greater programmatic burdens and compliance costs, while federal funding to help states administer these programs generally declined.

The GAO data indicate further that mandate burdens remained stable in two additional cases; that is, they were not reduced by the regulatory relief effort. Overall reductions in regulatory burden occurred for only five of the 18 statutes (28 percent of the total).

More specifically, some 140 regulatory changes were identified, adding a net 5,943 requirements in the 18 policy areas. Many of these had far-reaching effects on state and local governments. For example, during the review period:

- An estimated 7.7 million more state and local employees were brought under the coverage of the *Fair Labor Standards Act*.
- Thirty-six states were affected by new visibility standards for federal park lands issued by the Environmental Protection Agency.
- Nearly 2,500 requirements expanding existing occupational safety and health standards for states were issued by the Occupational Safety and Health Administration.
- More than 2,200 requirements were issued by seven federal agencies under Section 504 of the *Rehabilitation Act of 1973*.
- About 250 animal and plant species were added to the endangered and threatened lists under the *Endangered Species Act of 1973*, an increase of over 150 percent since 1980.

Overall, there was a considerable increase in both the stringency of program standards and in the specificity of administrative procedures for many different programs. While federal efforts to increase the delegation of authority to states and to rely on less intensive methods of oversight did help diminish mandate burdens in several cases, overall they were not sufficient to counterbalance the combined impact of stricter standards, along with reduced administrative funding.

The Executive Order on Federalism

The GAO data discussed above cover the most vigorous period of attempted deregulation during the first half of the 1980s. Nevertheless, one important additional initiative to restrain the growth of new intergovernmental mandates occurred later. In October 1987, President Reagan issued Executive Order 12612, which outlines a series of principles and procedures designed to guide executive branch decisionmaking on issues that have federalism implications. Specifically, federal agencies were instructed to:

- (1) Assess the impact of their legislative and regulatory proposals on the federal system;
- (2) Minimize the adverse or unintended effects of federal policies on states and localities; and

- (3) Restrict inappropriate preemption of state and local policymaking and administrative prerogatives.

Federal agency compliance with this Executive Order was studied to determine whether this new process has restrained or affected the development of new mandates. Thousands of entries in the *Federal Register* during a three-year period were examined for evidence that the Executive Order on Federalism had altered regulatory decisionmaking.

This research concluded that the Executive Order 12612 process has not been fully or consistently implemented and it has failed to produce widespread changes in federal agency decisionmaking. In particular:

- Patterns of compliance with Executive Order 12612's procedures vary widely among federal agencies.
- Some agencies routinely fail to implement the Executive Order's certification and assessment procedures in even the most superficial way.
- Many agencies have failed to appoint a designated federalism official, or they have failed to inform OMB of their designee.
- In virtually all cases examined, significant regulations with important implications for state and local governments continue to be promulgated without the benefit of a comprehensive federalism assessment.

Conclusion

Despite more than a decade of serious attempts to promote deregulation, the overall burdens imposed by federal mandates on state and local governments have continued to grow, whether measured by the enactment of new regulatory statutes, the monetary costs of federal regulations, or the specific rules and regulations promulgated by federal agencies.

The causes of this continued regulatory growth are complex and varied. Many regulations address important and well documented problems from pollution to health care to civil rights. The goals associated with these programs are popular not only with the general public but with state and local officials as well. But, whereas the Congress in the past might have responded to emerging needs with a new federal aid program, the scarcity of federal funds during a decade of historic deficits has made the alternative of federal mandates look increasingly attractive to federal policymakers. This regulatory approach has been encouraged by the Supreme Court, which has adopted an extremely permissive stance toward federal mandating after brief attempts to revive the 10th amendment as a substantive check on federal policymaking.

For those who are concerned about its consequences for the overall balance of the federal system, the persistent growth of intergovernmental regulation suggests there is a need for new and more effective strategies to limit federal mandates. It also suggests that state and local governments cannot assume that regulatory reform

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The Federal Courts: Intergovernmental Umpires or Regulators

Although much of the attention of the intergovernmental community has recently been focused on the Congress and the executive branch as the regulators of state and local governments, ACIR notes in its forthcoming report, *Federal Regulation of State and Local Governments: Regulatory Federalism—A Decade Later*, that the federal judiciary continues to play a critical regulatory role.

The report traces key developments in the federal judiciary's approach to cases involving federal regulation of state and local governments. Identifying trends in decisions rendered since the 1984 publication of *Regulatory Federalism: Policy, Process, Impact and Reform*,¹ the report places particular emphasis on two areas of law. First, it examines the court's traditional caseload involving the Tenth Amendment and the Commerce Clause. And second, it analyzes the rise of public law litigation, whereby federal courts take an active role in overseeing the operation of state and local government institutions and programs.

NLC: A Ray of Hope in the 1970s

Federal courts always have played an important role in issues affecting the regulation of state and local governments, although that role has transformed dramatically during this century. As ACIR noted in *Regulatory Federalism: Policy, Process, Impact and Reform*:

Until the 'Constitutional Revolution' of 1937, questions of federal-state relationships were regarded as weighty legal issues. In prior years, the Supreme Court had played a substantial (if largely negative) role in striking down both federal and state statutes deemed improper under the constitution.²

That approach changed in the late 1930s, as the key decisions of the Court

declared the Tenth Amendment to be nothing more than a 'truism,' while the scope of national authority to regulate interstate commerce and to spend for the general welfare was vastly expanded. Thereafter, questions about the powers of Congress vis-a-vis those of the states were regarded as primarily political or policy issues, rather than grave Constitutional concerns. Consequently, the legislative branch—not the judiciary—became the new 'umpire of federalism.'³

This trend continued into the 1970s. In *National League of Cities v. Usery*,⁴ however, the Supreme Court took a different path, finding, for the first time in almost 40 years that a federal statute exceeded the proper scope of constitutional authority for the federal government under the Tenth Amendment.

The Uncertain Status of the Tenth Amendment

Garcia v. San Antonio Metropolitan Transit Authority

ACIR's hope that "the federal judiciary will revive and expand upon the principles expressed in *NLC v. Usery*" was short-lived.⁵ In 1985, the Supreme Court reversed *NLC* in *Garcia v. San Antonio Metropolitan Transit Authority*, virtually abandoning any specific constitutional defenses against national regulation of state functions.⁶

A five-member majority stated in *Garcia* that, "[I]f there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them."⁷ That "elsewhere," according to Justice Harry A. Blackmun, was not to be

discovered in specific constitutional limitations, but in the national political process. Blackmun asserted that

the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.⁸

Dissenting Justice Lewis F. Powell condemned the Court's premise that states, in the latter 20th century, could find adequate protection in the national political forum. He asserted that the Court's view was "clearly at odds with the proliferation of national legislation over the past 30 years, . . . [since] 'a variety of structural and political changes occurring in this century ha[d] combined to make Congress particularly insensitive to state and local values.'"⁹

According to A.E. Dick Howard, the Court's decision to withdraw from the federalism fray breaches

[a] basic tenet of Anglo-American constitutionalism[:] . . . no branch of government should be the ultimate judge of its own powers . . . [and that] principle is especially important in a system that, in addition to being federal, looks to checks and balances and the separation of powers to restrain arbitrary government.¹⁰

South Carolina v. Baker

In *South Carolina v. Baker* (1988),¹¹ the Court reaffirmed and broadened the scope of *Garcia*.

At issue in *Baker* was the constitutionality of Section 310(b)(1) of the *Tax Equity and Fiscal Responsibility Act of 1982*.¹² This act prohibits a federal income tax exemption on long-term bonds issued by state and local governments unless the bonds are in registered form.¹³ South Carolina, supported by the National Governors' Association (NGA), filed suit, charging that the act abrogated Tenth Amendment principles and violated the doctrine of intergovernmental tax immunity. The high court disagreed with the state, 7-1, on both counts.

Explaining its decision, the Court stated that "nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation."¹⁴

According to one observer, ". . . The Court's decision upholds congressional regulation of one of the most significant sources of state and local revenue and does so in terms that will permit even more extensive regulation in the future."¹⁵

Commanding Action through Public Law Litigation

In the cases discussed above, the justices fulfilled their traditional role by resolving disputes on points of law raised on appeal. Some of the nation's most controversial judicial decisions over the past decade, however, involve a different role for the federal courts.

Rather than simply issuing decisions restricting state and local government powers, judges deciding these cases assume a quasi-legislative, quasi-administrative role, telling the states what they must do to resolve the dispute particularly regarding the operation of state institutions and programs.

During the nearly four decades since the Supreme Court decided that the federal district courts' "proximity to local conditions" made them uniquely qualified to manage school desegregation efforts,¹⁶ the federal judiciary continually has expanded the scope of its authority. Now, legislative- and executive-like, it routinely engages in restructuring school districts, revamping prisons and jails, relocating public housing facilities, reforming mental institutions, and rearranging union composition and practice. In this new wave of public law litigation, "Relief is wide-ranging, typically requiring effort by many layers of government. Implementation frequently intimately involves judges—usually federal judges—in day-to-day operations of state government."¹⁷

Recourse to this new public law model of litigation has been facilitated, over the past several decades, by broad interpretations of constitutional and statutory causes of action. In particular, the now sweeping scope of 42 U.S.C. Section 1983 has allowed for countless public lawsuits against local government and state and local officials.

Indirect Taxation and the Extension of Court Power

*Missouri v. Jenkins*¹⁸ illustrates the expansion of federal court power that occurred during the 1980s. In that case, begun in 1977, a group of students argued that the Kansas City Metropolitan School District and the state operated a system of segregated schools.¹⁹

As a result of the civil rights violation, a district court ordered detailed remedies and set forth the financing necessary to fund implementation of its directives. Because Missouri's constitution and statutes limited the amount of tax revenue the school district could raise to meet its share of the financial obligation, the court assessed most of the costs to the state.

The school district was unable to finance its share of the expenditures without violating the state Constitution or state law. To resolve this financial dilemma, the district court ordered the school district to raise its property tax levy beyond the limits imposed by the Missouri Constitution.

On appeal, the U.S. Supreme Court reversed the district court's direct imposition of a tax increase as "not only intrud[ing] on local authority but circumvent[ing] it altogether."²⁰ The majority, however, upheld the appellate court's strategy of prohibiting the operation of state laws that prevent local jurisdictions from meeting court-imposed financial obligations. In its ruling, the Supreme Court argued that "state policy must give way when it operates to hinder vindication of federal constitutional guarantees."²¹

Justice Anthony M. Kennedy noted in his concurrence, "This assertion of judicial power in one of the most sensitive policy areas, that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies."²² As one commentator warned,

the significance of *Jenkins* also lies in its potential application to other cases involving funding for constitutional violations where the equitable

powers of the court also play a significant role, such as public housing, prisons, state apportionment schemes, and state mental health systems, among others.²³

While few would argue the grave responsibility of federal courts for determining, and the local governments for alleviating, the unconstitutional effects of segregation (or any other civil rights violations), this approach ultimately could undermine or reverse the dynamic of federalism and separation of powers—an equally grave constitutional concern.

42 U.S.C. Section 1983

Among the means for attacking state actions, including custodial conditions, probably none has been as powerful over the past 30 years as 42 U.S.C. Section 1983. A statutory derivative of the Fourteenth Amendment, Section 1983 provides a direct federal remedy for official violations of federal law.

Traditionally, Section 1983 was thought to apply only to “interests secured by the Constitution”²⁴ in general, and the Fourteenth Amendment in particular. As a result, it proved a relatively effective tool for redressing abrogations of basic civil rights and liberties. Beginning in 1980, however, the high court moved to expand the scope of the civil rights law to interests created by federal statutes.

That trend continued through 1991, when the Court, appearing to break entirely new ground, ruled in *Dennis v. Higgins* that “[s]uits for violations of the Commerce Clause may be brought . . . under Section 1983.”²⁵ Finding that the lower courts had erred in too narrowly construing the 1871 Civil Rights Act, the U.S. Supreme Court, in a 7-2 decision, asserted that “[a] broad construction of Section 1983 is compelled by statutory language which speaks of deprivations of ‘any rights, privileges, or immunities secured by the Constitution or laws.’”²⁶ Although the Court conceded that “the ‘prime focus’ of Section 1983 . . . was to ensure ‘a right of action’ to enforce the protections of the Fourteenth Amendment” and related statutes,²⁷ it nevertheless noted that its own rulings since 1980 had taken Section 1983 far beyond its original goal.

Responding specifically to the Commerce Clause claim, the Court granted “that the . . . Clause is a power-allocating provision, giving Congress pre-emptive authority over the regulation of interstate commerce.”²⁸ However,

it is also a substantive “restriction on permissible state regulation” . . . [And] individuals injured by state action that violates this aspect of the Commerce Clause may sue and obtain injunctive and declaratory relief. . . . This combined restriction on state power and entitlements to relief under the Commerce Clause amounts to a “right, privilege, or immunity” under the ordinary meaning of those terms. . . . [Hence], the Commerce Clause of its own force imposes limitations on state regulation . . . and is the source of a right of action of those injured by regulations that exceed such limitations.²⁹

The Guarantee Clause

Although the progression of cases during the 1980s seems, to some observers, to leave state and local governments with little protection against the federal government and vulnerable to a full range of new liabilities under Section 1983, Justice Sandra Day O’Connor has advanced a theory that, if adopted by the Court, could provide states and local governments with a constitutional basis of relief.

In her dissent to *Baker*, Justice O’Connor focused on Article 4, Section 4 of the Constitution, which states, “The United States shall guarantee to every state in the Union a republican form of government.” O’Connor argued that state autonomy may be “protected from substantial federal intrusions by virtue of the Guarantee Clause of the Constitution.”³⁰

Later, writing for the majority in *Gregory v. Ashcroft*, O’Connor again raised the Guarantee Clause as justification for upholding a state constitutional provision for the mandatory retirement of state judges at age 70 against the federal *Age Discrimination in Employment Act*.

O’Connor’s use of the clause to justify protection of state rights against the federal government contrasted with previous use of the provision by the courts. Before her *Baker* dissent, the guarantee clause was thought to protect individual civil rights against invasion by state governments.

Conclusion

Will Justice O’Connor’s line of thinking guide the high court during the 1990s? Or is the guarantee clause just an interesting theory, one that will have little, if any, influence in future decisions of the federal courts?

Richard Ruda, chief counsel of the State and Local Legal Center, recently remarked that “what we saw last year [1990-91 Term], particularly near the end, was a resurgence of the 10th Amendment. . . . Certainly the philosophy that informs the 10th Amendment of *Gregory* is very different than the philosophy that informed *Garcia*.”³¹

Others are not so sure that a change in federal court thinking is likely.

There is no theme more familiar to constitutional law than the clash between federal power and state autonomy. The history of that struggle reveals, by and large, a long losing battle by the states.³²

Uncertainty thus abounds. What would, however, seem clear to many intergovernmental observers is that the Court needs to achieve greater balance in its decisions involving issues of federalism. The nation’s high court is, after all, its great constitutional referee. It umpires the often competing claims of majorities and minorities; of governments and individuals; of businesses and consumers. And once, it was the so-called “umpire of federalism,” weighing the sometimes opposing claims of national and state voereignty. It is simply hoped that the Court will again add that equation to the constitutional balance.

Notes

¹ U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Regulatory Federalism: Policy, Process, Impact and Reform* (Washington, DC, 1984), p. 249-250.

² *Ibid.*, p. 249-250.

³ Ibid.

⁴ 426 U.S. 833 (1976).

⁵ ACIR, *Regulatory Federalism*, p. 269.

⁶ See also *Intergovernmental Perspective* 11 (Spring/Summer 1985); entire issue.

⁷ 469 U.S. 528 at 547.

⁸ Ibid., at 552.

⁹ Ibid., at 565, footnote 9, citing ACIR, *Regulatory Federalism*, p. 50.

¹⁰ A.E. Dick Howard, "Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles," *University of Georgia Law Review* 19 (1985): 788. On this point, see also Bernard Schwartz, "National League of Cities Again: R.I.P. or a Ghost that Still Walks," *Fordham University Law Review* 54 (1985): 157-58.

¹¹ 485 U.S. 505 (1988).

¹² Public Law 97-248. See 26 U.S.C. Section 103(b)(3).

¹³ Unregistered or so-called bearer bonds became the focus of congressional attention because they leave "no paper trail and thus facilitate . . . tax evasion." 485 U.S. 505 at 507.

¹⁴ Ibid., at 515.

¹⁵ "The Supreme Court 1987 Term," *Harvard Law Review* 102 (1988): 227.

¹⁶ *Brown v. Board of Education*, 349 U.S. 294, at 299 (1955).

¹⁷ Barry Friedman, "Right and Remedy," *Vanderbilt Law Review* 43 (1990): 595-96,

¹⁸ 110 S. Ct. 1651 (1990).

¹⁹ *Jenkins v. Missouri*, 593 F. Supp. 1485 (WD Mo. 1984). During the year following the original complaint, the district court realigned the Kansas City school district as a defendant in the litigation. *School District of Kansas City v. Missouri*, 460 F. Supp. 421 (WD Mo. 1978).

²⁰ 110 S. Ct. 1651 at 1663.

²¹ Ibid., at 1666.

²² Ibid., at 1678-79.

²³ Douglas J. Brocker, "Taxation without Representation: The Judicial Usurpation of the Power to Tax in *Missouri v. Jenkins*," *North Carolina Law Review* 69 (1991): 766.

²⁴ According to Justice Kennedy, Representative Shellabarger, the sponsor of the civil rights statute, "spoke only of interests secured by the Constitution." *Golden State Transit Corporation v. Los Angeles*, 493 U.S. 103 (1989), Kennedy, J., dissenting at 117.

²⁵ 111 S. Ct. 865 at 867 (1990).

²⁶ Ibid., at 868.

²⁷ Ibid., at 869.

²⁸ Ibid., at 870.

²⁹ Ibid., at 870-872.

³⁰ 485 U.S.C. 505 at 534.

³¹ Cited in Lawrence J. Haas, "States Bounce Back," *National Journal* (August 10, 1991): 1980.

³² Dan T. Coenen, "Untangling the Market-Participant Exemption to the Dormant Commerce Clause," *Michigan Law Review* 88 (1989): 395-396.

Federal Mandates: The Record of Reform

(continued from page 11)

initiatives from Washington will be sufficient. If they hope to obtain real and lasting relief, they will have to build on existing mandate monitoring efforts and devote much more sustained attention to influencing the formulation of federal regulations.

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Notes

¹ John Martin, quoted in *Federal Action Monitor*, Oklahoma State Senate, September 6, 1991.

² Quoted in Julie Rovner, "Governors Ask Congress for Relief from Burdensome Medicaid Mandates," *Congressional Quarterly Weekly Report*, February 16, 1991, 417.

³ Molly Sinclair, "Reagan Helps State, Local Regulators," *Washington Post*, June 17, 1984.

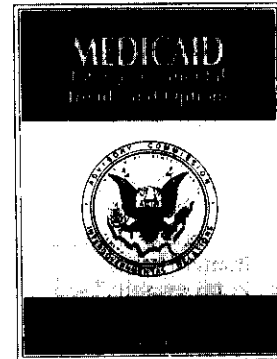
⁴ Martha A. Fabricius, "Fiscal Impact of Proposed Mandates from the 102nd Congress," National Conference of State Legislatures, October 1991, p. 1.

⁵ As documented in ACIR's original research on the report *Regulatory Federalism*, four new types of regulation proliferated in the 1960s and 1970s. Grant conditions that impose federal fiscal sanctions in one program area for failure to comply with federal requirements under another, separately authorized, program are known as *crossover sanctions*. *Direct orders* consist of direct legal requirements imposed by the federal government on states and localities that are enforced by civil or criminal penalties. *Crosscutting requirements* are those general provisions applied across the board to many or all federal grants to advance national social and economic goals. Finally, *Partial Preemptions* consist of federal laws that set minimum national standards for certain programs. In these programs, responsibilities for administration and enforcement may be delegated to states or localities provided they meet certain federal criteria.

⁶ Special thanks for making this information available to ACIR go to John Kamensky, Joel Marus, and John Vocino of the U.S. General Accounting Office.

Medicaid: Intergovernmental Trends and Options

Medicaid is increasing in cost and decreasing in effectiveness in many areas. Medicaid spending nearly tripled between 1980 and 1990 (from \$24.8 billion to \$71.3 billion), and the expenditures are projected to continue to rise sharply. The report identifies major trends in Medicaid and presents recommendations intended to restore the program's original goals and design by (1) increasing state and local roles in Medicaid policymaking; (2) increasing state and local program flexibility; (3) adopting interim modifications to Medicaid and implementing comprehensive health care reform by 1994; (4) transferring local Medicaid administration and financing to the states; (5) transferring the cost of long-term care to the federal government under Medicare; and (6) improving the targeting of federal Medicaid funds. The recommendations are intended to slow the growth of Medicaid expenditures for the states, allow the states to serve the health care needs of their populations better, and bring more accountability, balance, and certainty to Medicaid service delivery and financing.



A-119 1992 \$10

Characteristics of Federal Grant-in-Aid Programs to State and Local Governments: Grants Funded FY 1991

During the past 25 years, federal grants-in-aid to state and local governments have changed dramatically in type, number, dollar amount, and other characteristics. This is ACIR's sixth report on the system since 1975. The number of categorical grant programs grew from 422 in 1975 to 534 in 1981, dropped to 392 in 1984, and rose to an all-time high of 543 in 1991. The number of block grants grew to 14 by 1991. In general, about 75 percent of all grant aid is distributed by formulas, and over 25 years at least 70 percent of the money in the system has been distributed through categorical programs. Medicaid, the largest formula program, accounts for about 30 percent of all grant outlays.

Characteristics
of Federal Grant-in-Aid Programs
to State and Local Governments:
Grants Funded FY 1991



1991

M-182 1992 \$10

(see page 33 for order form)

Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues

Federal preemptions of state and local authority have increased significantly since the late 1960s. Of 439 significant preemption statutes enacted by the Congress since 1789, more than 53 percent (233) have been enacted only since 1969. To assess the impact of federal preemption and perceptions regarding various approaches, ACIR surveyed state elected officials, agency heads, and the 26 state ACIRs. There was a consensus that there is too much federal preemption and that the Congress delegates too much authority to federal administrators. Nevertheless, many respondents acknowledge the need for federal preemption under certain circumstances.

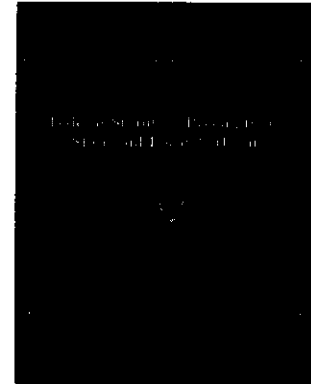
In general, state officials rated highly (1) standard partial preemption, (2) a federal statutory provision stipulating that a state law is valid unless there is a direct and positive conflict with a federal law, and (3) congressional permission for states to act where no federal standard is in effect.

With this report, the Commission reaffirms its earlier recommendation that federal preemption, while necessary in a federal system, ought to be minimized and used only as necessary to secure the effective implementation of national policy adopted pursuant to the Constitution."

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Toward a Federal Infrastructure Strategy: Issues and Options

Toward a Federal Infrastructure Strategy documents the progress of an interagency initiative to develop a federal infrastructure strategy through a partnership including the Department of the Army, the Environmental Protection Agency, the Department of Energy, other federal agencies, state and local governments, and the private sector. Emphasis was placed on planning, design, finance, construction, operation, and maintenance.

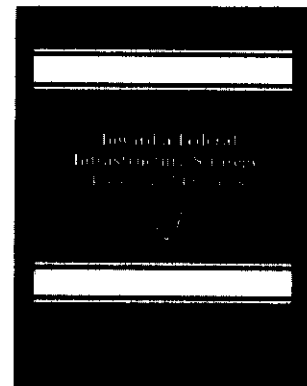
The Advisory Commission on Intergovernmental Relations convened a series of workshops for representatives from more than 25 congressional and other federal agencies and departments, and more than 70 organizations representing state and local governments, public works providers, and related research, advocacy, professional, and user groups.

Based on the consultations, a broad consensus emerged around five infrastructure issues that should be addressed by the federal government: (1) rationales for federal investment, (2) regulations, (3) technology, (4) financing, and (5) management.

A-120

1992

\$8



(see page 33 for order form)

The States and Regulatory Flexibility: Win, Lose, or Draw?

James L. Martin

At the Annual Meeting of the National Governors' Association on July 31, 1989, President George Bush announced: "I am a federalist. I was there when Ronald Reagan issued the executive order on federalism; and I want you to know that I stand by it."

Has the Federalism Executive Order (EO 12612) worked? Yes, especially when combined with the *Paperwork Reduction Act of 1980*. Has regulatory federalism decreased? No, especially in light of new mandates in Medicaid and major environmental laws. As this is written, the House of Representatives is passing the "Neighborhood Schools Improvement Act" and going to conference over the "Suter Amendment." The first experiments with deregulation of categorical education grants; the second establishes the grounds for myriad new lawsuits against the states.

With the passage of Part C of the "Neighborhood School Improvement Act," which would give 300 schools the flexibility to consolidate major categorical grants-in-aid to better coordinate services to schools, in accord with the National Education Goals adopted by the governors, the Congress has signaled that flexibility will be a key part of the education agenda. At the same time, the House has passed the "Suter Amendment," which would give eligible recipients the right to sue the state for all services and benefits outlined in state plans under the *Social Security Act*. While supporting deregulation of categorical education programs, all of the state government organizations are opposing the Suter Amendment, which if enacted could foster unlimited lawsuits resulting in massively increased federal regulation by judicial decision. But that's the week ahead. What about the last decade?

Regulatory Flexibility Successes

Regulatory flexibility has had many successes over the last decade on two fronts: congressional legislative language and sustained administrative flexibility.

The Congress and Flexibility

The Congress has heard the governors' requests for more flexibility in several broad areas through enactment of welfare reform, education, child care services, the *Clean Air Act*, the *Intermodal Surface Transportation Efficiency Act* (ISTEA), new laws for state donations and tax programs to finance Medicaid, and elementary and secondary education and the state role in interstate transportation of waste.

In each of these broad national programs, the Congress responded to the governors' requests for basic flexibility in the law so that consequent regulations for the program would be workable. WIN-Work Incentive grant waivers in 35 states led to eventual national welfare reform with state flexibility to combine welfare reform with work incentives such as continued health care coverage. President Ronald Reagan's signing of this new legislation was for welfare federalism what President Richard Nixon's trip to China was for foreign relations.

President-elect Bush had his first official meeting as President-elect with the executive committee of the National Governors' Association (NGA) two weeks after his election and followed this up with a bipartisan summit meeting to develop the highly acclaimed and supported National Education Goals, which emphasize outcomes rather than micro-management and procedural issues. The president's first meeting with all the governors began with a reaffirmation of support for the Federalism Executive Order, a crucial message that the bureaucracy needed to hear. It is one of the few "Reagan" initiatives

specifically identified for extension in the early days of the Bush Administration. There has also been a 42 percent increase in funding in the last three years for the 11 major education programs.¹

The next major piece of domestic legislation in which the Congress ensured flexibility was the child care bill. It began with detailed federal mandates for all facets of child care training and service delivery. In working with the governors, the Congress developed a 100 percent block grant with gubernatorial options from detailed state standards to private vouchers, one of the most flexible programs recently adopted. This was followed by the *Clean Air Act*. Although the act has many new nationwide standards, they were reached in accord with the governors, the White House, and others after extensive consultations. The *Clean Air Act* and the new surface transportation program are the most extensive and far-reaching environmental and transportation domestic programs enacted in the last decade. ISTEA is the largest domestic discretionary program, at about \$20 billion per year. The law gives governors and local officials new and expanded powers to coordinate all forms of transportation for the future. The ultimate impact of the vast new flexibilities in this law for state and local elected officials has yet to be appreciated.²

Finally, the Congress worked with the governors and the White House in the closing days of the 1991 session to formulate new rules for financing the largest of all intergovernmental domestic programs—the Medicaid entitlement program.³ States were ensured broad flexibility with adequate transition rules to institute new financing arrangements for the \$160 billion state-federal Medicaid program. The administration has pledged full cooperation with NGA in developing the final rules for the new financing options.

Regulatory flexibility has proceeded on many major areas of domestic programs through the regular congressional process. All of the previously mentioned efforts were bipartisan and worked out via continuing dialogue with the Congress and the administration, and were signed into law by the President.

While we can be pleased with our progress, much more needs to be done. Examples include new waiver authority for statewide health care reform, expanded statewide flexibility to manage scores of categorical education and environmental programs, such as wetlands protection, and full funding of environmental programs such as the state revolving loan funds under the *Clean Water Act* and the *Safe Drinking Water Act*.

The Administration and Flexibility

The second major area of regulatory flexibility comes from the administration. The last decade has seen a substantial degree of “reasonableness” when it comes to new regulations imposed on state and local government, except when mandated by statute. For example, the administration cannot waive ERISA or the *Americans with Disabilities Act*, in order to enable states to develop more effective statewide reforms. It cannot waive the law for 77 different categorical education programs for elementary, secondary, and vocational education. But implementation of all laws can be made more flexible, and thus workable and successful through departmental rules and regulations. The most effective tool for state and local officials in

fighting duplicative and excessive paperwork requirements is the *Paperwork Reduction Act*, which was developed and is strongly supported by Representatives Jack Brooks and Frank Horton as former chairman and ranking Republican on the House Government Operations Committee. This act gives OMB the authority to request a review of agency regulations, especially when state and local governments complain of excessive agency regulation and/or field memoranda.

The *Paperwork Reduction Act*, in combination with Federalism Executive Order 12612, was used over the last decade to stop the re-regulation of the block grants initiated in 1981. By definition, a block grant gives flexibility to the recipient in its use of federal funds. Views on block grants directly correlate to whose “block” you are on. The Congress likes the Maternal and Child Health Block Grant and others like the Community Development Block Grant. Inspectors general and agency micro-managers don’t like block grants because they don’t use the same national rules and uniform reporting procedures; each state uses the same management procedures for the block grants that it uses for its own funds (over \$500 billion in 1991). Inspectors general have tried to impose OMB Circular A-87 “Uniform Cost Allocation Rules” on each of the block grants. This would have created massive re-regulations and loss of flexibility for each block grant. Successful challenges under the Federalism Executive Order and the *Paperwork Reduction Act* were launched with OMB to stop re-regulation of the Small Cities Block Grant, the *Job Training Partnership Act*, the Education Block Grant, and the Alcohol, Drug, and Mental Health Block Grant, as well as the unnecessary complication of A-87 itself.

In addition, OMB created the *Cash Management Improvement Act*, whereby states will be paid interest on state funds used to prepay the federal share of programs such as highways. Work with OMB on the new donation and tax regulations for Medicaid continues at this time, with all signs pointing to a successful resolution of differences. The administration continues to issue broad new waivers for state welfare reforms in Oregon, Wisconsin, New Jersey, and Maryland, with more in prospect.⁴ The Maryland waiver is statewide, with many new areas of joint action for welfare reform. Regulatory coordination and flexibility is needed in environmental controls. EPA recently testified that it has as many as 800 different regulations that affect state and local governments. Columbus, Ohio, has documented specific costs due to EPA rules at \$1.6 billion over the next eight years.⁵ Laws and regulations must be better grounded in risk and cost-benefit analysis.

Funding Levels and Flexibility

Regulatory flexibility is also directly affected by funding levels (see charts). Adequate funding encourages innovation and makes necessary federal controls somewhat easier to live with. While federal assistance for domestic discretionary programs saw very slow growth during most of the 1980s, funding has increased twice as fast as inflation during the first three years of the 1990s. Moreover, the 11 major state-federal safety net programs increased 7.1 percent per year from 1981-1990 and 20 percent a year in the 1990s, with Medicaid funding the leader. These increases are sweet and sour because states have had to match federal funds in many of these programs, such as Medicaid, at a national average of 43 percent.

Grant-in-Aid Programs: Selected Discretionary and Entitlements
Comparisons 1981 to 1990 and 1990 to 1993
(federal fiscal years; dollars in millions)

SELECTED DISCRETIONARY	FY 1981	FY 1990	FY 1992	FY 1993 PRES. BUDGET	CHANGES					
					1981 to 1990			1990 to 93 Pres.		
					Percent			Percent		
					\$	Total	Avg. Annual	\$	Total	Avg. Annual
DEPARTMENT OF AGRICULTURE										
EMERGENCY FOOD ASS'T (TEFAP) ADMIN	\$0	\$50	\$45	\$45	\$50	NA	NA	-\$5	-9.7%	-3.3%
WOMEN, INFANTS & CHILDREN (WIC) 9/	924	2,126	2,600	2,840	1,202	130.1%	9.7%	714	33.6%	10.1%
RURAL WATER & WASTE DISPOSAL GRTS.	200	208	350	300	8	3.8%	0.4%	92	44.4%	13.0%
DEPARTMENT OF COMMERCE										
ECONOMIC DEVELOPMENT ASSISTANCE	365	192	227	0	-174	-47.5%	-6.9%	-192	-100.0%	-100.0%
DEPARTMENT OF EDUCATION										
COMPENSATORY EDUCATION 1/	2,959	5,222	6,707	6,828	2,263	76.5%	6.5%	1,606	30.8%	9.4%
IMPACT AID: MAINT. AND OPERATIONS	632	717	744	522	86	13.6%	1.4%	-195	-27.2%	-10.1%
* EDUCATION BLOCK GRANT	512	456	450	450	-56	-11.0%	-1.3%	-6	-1.3%	-0.4%
DRUG FREE SCHOOLS & COMMUNITIES	0	438	508	508	438	NA	NA	70	16.0%	5.1%
EDUCATION EXCELLENCE 2/	0	0	100	768	0	NA	NA	768	NA	NA
SPECIAL EDUCATION:										
BASIC STATE GRANTS	875	1,543	1,976	2,073	668	76.4%	6.5%	530	34.4%	10.4%
PRESCHOOL, INFANT, & TODDLERS GRTS.	25	331	495	501	306	NA	33.2%	170	51.4%	14.8%
CHAPTER 1 STATE INSTITUTIONS 1/	153	146	143	129	-7	-4.3%	-0.5%	-17	-11.6%	-4.0%
SCIENCE & MATH EDUCATION	0	127	240	248	127	NA	NA	121	95.5%	25.0%
VOCATIONAL & ADULT EDUCATION	782	1,130	1,437	1,454	348	44.5%	4.2%	324	28.7%	8.8%
DEPT. OF HEALTH & HUMAN SERVICES										
ADMINISTRATION ON AGING--GRANTS	623	704	782	783	81	13.0%	1.4%	79	11.2%	3.6%
* ALC./DRUG ABUSE/MENT. HEALTH GRANT	540	1,193	1,360	1,360	653	120.9%	9.2%	167	14.0%	4.5%
CHILD WELFARE SERVICES 3/	173	253	274	274	80	46.3%	4.3%	21	8.5%	2.7%
* COMMUNITY SERVICES BLOCK GRANT	485	323	360	0	-162	-33.4%	-4.4%	-323	-100.0%	-100.0%
FAMILY PLANNING	162	139	150	155	-23	-14.2%	-1.7%	16	11.5%	3.7%
IMMUNIZATION GRANTS	30	162	259	289	132	439.9%	20.6%	127	78.4%	21.3%
HEAD START	814	1,552	2,202	2,802	738	90.6%	7.4%	1,250	80.5%	21.8%
CHILD CARE & DEV. BLOCK GRANTS	0	0	825	850	0	NA	NA	850	NA	NA
LOW INCOME HOME ENERGY ASSIST. 4/	1,752	1,443	1,500	1,065	-309	-17.6%	-2.1%	-378	-26.2%	-9.6%
* MATERNAL & CHILD HEALTH BLOCK GRANT	454	554	650	674	100	21.9%	2.2%	120	21.7%	6.8%
COMMUNITY HEALTH CENTERS 8/ 9/	327	457	601	767	130	39.8%	3.8%	310	67.8%	18.8%
* PREVENTIVE HEALTH BLOCK GRANT	93	84	135	135	-9	-9.3%	-1.1%	51	60.5%	17.1%
REFUGEE ASSISTANCE	608	390	411	227	-218	-35.9%	-4.8%	-163	-41.8%	-16.5%
STATE LEGALIZATION ASSISTANCE GRANTS	0	303	0	300	303	NA	NA	-3	-1.0%	-0.3%
HUD AND INDEPENDENT AGENCIES										
COMMUNITY DEVELOPMENT BLOCK GRANTS	3,695	2,915	3,400	2,900	-780	-21.1%	-2.6%	-15	-0.5%	-0.2%
EPA WASTEWATER CONSTRUCTION GRANTS	1,605	1,948	2,400	2,500	343	21.4%	2.2%	552	28.3%	8.7%
HOPE GRANTS	0	0	361	1,010	0	NA	NA	1,010	NA	NA
HOME INVESTMENT PARTNERSHIP PROGRAM	0	0	1,500	700	0	NA	NA	700	NA	NA
OPERATION OF LOW-INCOME HOUSING	1,071	1,865	2,450	2,282	794	74.2%	6.4%	417	22.4%	7.0%
DEPARTMENT OF THE INTERIOR										
ABANDONED MINE REC. FUND	1	144	135	130	143	NA	73.6%	-14	-9.7%	-3.4%
DEPARTMENT OF JUSTICE										
DRUG CONTROL & SYS. IMPROV. GRTS.	0	445	473	463	445	NA	NA	18	4.1%	1.4%
JUVENILE JUSTICE & DELINQ. PREV.	71	73	72	0	1	1.5%	0.2%	-73	-100.0%	-100.0%
DEPARTMENT OF LABOR										
DISLOCATED WORKERS	0	464	577	577	464	NA	NA	113	24.5%	7.6%
EMPLOYMENT SERVICE STATE ADMIN.	781	779	822	822	-2	-0.3%	0.0%	43	5.5%	1.8%
* EMPLOYMENT & TRAINING GRANTS 5/	6,445	2,445	2,456	2,417	-4,000	-62.1%	-10.2%	-28	-1.1%	-0.4%
UNEMPLOYMENT COMP STATE ADMIN 6/	1,316	1,801	2,564	2,316	485	36.9%	3.5%	515	28.6%	8.7%
DEPARTMENT OF TRANSPORTATION										
AIRPORT OBLIGATION CEILING	570	1,425	1,900	1,900	855	150.0%	10.7%	475	33.3%	10.1%
HIGHWAY OBLIGATION CEILING 7/	8,750	12,210	15,686	18,898	3,460	39.5%	3.8%	6,688	54.8%	15.7%
HIGHWAY EXEMPT FROM CEILING 7/	100	1,418	1,300	300	1,318	NA	34.3%	-1,118	-78.8%	-40.4%
MASS TRANSIT:										
FORMULA GRANTS	1,558	1,625	1,520	1,604	67	4.3%	0.5%	-22	-1.3%	-0.4%
INTERSTATE TRANSFER GRANTS	865	160	160	82	-705	-81.5%	-17.1%	-78	-48.6%	-19.9%
URBAN DISCRETIONARY GRANTS	1,970	1,137	1,900	1,000	-833	-42.3%	-5.9%	-137	-12.0%	-4.2%
ELIMINATED PROGRAMS										
GENERAL REVENUE SHARING	4,570	0	0	0	-4,570	-100.0%	-100.0%	0	NA	NA
URBAN DEV. ACTION GRANTS (UDAG)	675	0	0	0	-675	-100.0%	-100.0%	0	NA	NA
SUBTOTAL: DISCRETIONARY	\$47,528	\$51,091	\$65,207	\$66,248	\$3,564	7.5%	0.8%	\$15,156	29.7%	9.0%

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MANDATORY/ENTITLEMENT	FY 1981	FY 1990	FY 1992	FY 1993 PRES. BUDGET	CHANGES					
					1981 to 1990			1990 to 93 Pres.		
					Percent			Percent		
					\$	Total	Avg. Annual	\$	Total	Avg. Annual
CHILD NUTRITION	\$3,464	\$4,887	\$6,068	\$6,488	\$1,424	41.1%	3.9%	\$1,600	32.7%	9.9%
TEFAP, COMMODITY PURCHASES	0	120	120	120	120	NA	NA	0	0.4%	0.1%
SOCIAL SERVICES BLOCK GRANT 10/	2,399	2,762	2,800	2,800	363	15.1%	1.6%	38	1.4%	0.5%
FAMILY SUPPORT WELFARE PAYMENTS	7,712	11,659	14,496	14,652	3,946	51.2%	4.7%	2,994	25.7%	7.9%
* AFDC JOBS 10/	351	531	1,000	1,000	180	51.1%	4.7%	470	88.5%	23.5%
CHILD SUPPORT ENFORCEMENT	0	533	705	790	533	NA	NA	257	48.2%	14.0%
FOOD STAMPS	11,303	16,906	23,652	23,757	5,603	49.6%	4.6%	6,850	40.5%	12.0%
CHILD WELFARE SERVICES ENTITLEMENT 3/	0	0	0	1,298	0	NA	NA	1,298	NA	NA
FOSTER CARE AND ADOPTION ASSISTANCE 3/										
BASE AMOUNT	328	1,375	2,496	1,702	1,047	319.4%	17.3%	327	23.8%	7.4%
PRIOR YEAR CLAIMS	0	0	118	0	0	NA	NA	0	NA	NA
MEDICAID 11/	17,440	41,125	72,503	84,401	23,685	135.8%	10.0%	43,276	105.2%	27.1%
VOCATIONAL REHAB. STATE GRANTS	854	1,528	1,788	1,840	674	78.9%	6.7%	312	20.4%	6.4%
SUBTOTAL MANDATORY/ENTITLEMENT	\$43,851	\$81,426	\$125,746	\$138,847	\$37,574	85.7%	7.1%	\$57,422	70.5%	19.5%

TOTAL: SELECTED GRANTS-IN-AID	\$91,379	\$132,517	\$190,952	\$205,095	\$41,138	45.0%	4.2%	\$72,578	54.8%	15.7%
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* Program did not exist in current form in 1981. 1981 estimates reflect funding for preceding programs (e.g., WIN preceded AFDC JOBS).
NA - the percentage change is not computed because of zero funding in one of the comparison years, or the percentage change exceeds 1,000 percent.

FOOTNOTES

- 1/ Funding for Chapter 1 state institutions is now included under Special Education.
- 2/ Of the amount proposed for 1993 in the Budget, \$500 million would be available to finance state programs providing educational choice through certificates of up to \$1,000.
- 3/ The President's Budget proposes to transfer \$1.3 billion from foster care and adoption assistance to a new child welfare services capped entitlement program.
- 4/ Of the \$1,065 million proposed in the President's Budget for 1993, \$798.5 million would not be available until the last day of federal fiscal year 1993.
- 5/ The President's Budget proposes a reformulation of the Summer Youth Employment and JTPA block grant programs.
- 6/ The 1992 funding level includes \$227.4 million plus \$88.2 million available under the new AWIU contingency provision.
- 7/ The President's Budget proposes to include 1993 Minimum Allocation funding (\$1.1 billion) under the highway obligation limitation. The 1992 funding level reflects action to reduce the \$16.8 billion enacted 1992 limitation by \$1.1 billion.
- 8/ Includes funding for Healthy Start of \$64 million in 1992 and \$143 million in 1993.
- 9/ Unlike all other discretionary programs in this section, WIC and CHC spending is currently exempt from sequestration.
- 10/ Unlike all other mandatory programs in this section, spending for this program is currently subject to sequestration.
- 11/ 1993 President's Budget estimates of the federal share of medicaid costs.

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Funds for transportation and education also have increased substantially, along with new regulatory flexibility. Although most block grant funding levels are frozen, so are new detailed regulations, thanks to the *Paperwork Reduction Act* and the Federalism Executive Order. The most troublesome areas are in intergovernmental programs for the environment, where new laws continue to be enacted while funding is less than 1980 levels. Regulatory flexibility is always welcome and is far more effective with reasonable and sustained funding levels. As the charts show, many domestic programs are receiving increased funding. The exception is for some direct local programs. The last decade has seen a definitive shift away from places to people, as seen in the shift of funds from discretionary to safety net programs, especially education and health.

Changes for the 1990s

The early 1990s are a welcome positive change in intergovernmental relations in the Congress and in the administration for both flexibility and funding. If this continues, especially with a new focus on urban areas, all parties should be much happier in this decade.

Regulatory flexibility is successful and will always be a vital part of federalism. This is a fruitful focus for intergovernmental cooperation. Mandates and preemptions are a growing gray area of intergovernmental relations. Few want to do away with mandates

for clean air, clean water, safety, or health care for pregnant women and children, but we can all work toward laws and regulations that make these mutual goals efficient as well as affordable and effective.

Congressional leaders have trusted state and local officials with more flexibility on the front end with clear legislative language, and the administration continues to be a friend of the family for state and government officials in reviewing federal regulations for paperwork reduction, federalism, and flexibility. After 29 years in this battle, I, for one, am still hopeful that the system is working in many of its most vital parts. We are winning!

James L. Martin is director of State-Federal Relations, National Governors' Association.

Notes

¹ See also John Kincaid, "Is Education too Intergovernmental?" *Intergovernmental Perspective* 18 (Winter 1992): 28-34.

² See also Bruce D. McDowell, "Reinventing Surface Transportation: New Intergovernmental Challenges," *Intergovernmental Perspective* 18 (Winter 1992): 6-8, 18.

³ See also U.S. Advisory Commission on Intergovernmental Relations, *Medicaid: Intergovernmental Trends and Options* (Washington, DC: ACIR, 1992).

⁴ See also "Welfare Reform," *Intergovernmental Perspective* 17 (Spring 1991): entire issue.

⁵ See Richard C. Hicks, "Environmental Legislation and the Costs of Compliance," *Government Finance Review* 8 (April 1992): 7-10.

Finance Data Diskettes

1990 State-Local Government Finance Data. The diskettes developed by ACIR provide access to Census finance data in a format not previously available, and are designed for easy use.

State-by-state data for 113 revenue and 200 expenditure classifications, population, and personal income are included for state and local governments combined, state government only, or all local governments aggregated at the state level.

Format:	Lotus 1-2-3 or Symphony (can be used with other DOS compatible spreadsheets)	
Price:	\$115	FY90 (5.25" diskette)
	\$125	FY90 (3.5" HD diskette)
	\$345	Eight-year set
	\$ 75	FY89
	\$ 60	FY88
	\$ 25 each	FY8387

A demonstration disk for the State-Local Finance Data is available for \$5.

State Government Tax Revenue Data, FY1980-90. This diskette makes the state tax portion of the state-local government finance series available six months earlier than the full series. Eleven years of tax revenue data (1980-90) are included on a single diskette. The revenue fields are basically the same as for the state-local series. The state government tax diskette does not contain any information on local governments, nor does it contain any expenditure data.

Price: \$85 FY 1980-90 inclusive

(see page 33 for order form)

Regulating State and Local Governments through the Internal Revenue Code

Catherine L. Spain

One would think that since state and local governments are not taxpayers they must be immune from regulation through the federal Internal Revenue Code. In fact, however, many state and local government public finance activities are regulated through this overly complex and rapidly changing body of law, resulting in new mandated costs and the loss of state and local government flexibility and discretion in performing their duties.

This trend is another manifestation of federal activism in the intergovernmental arena. The federal government seeks to achieve national policy goals and other objectives by mandating certain activities and shifting the expense to other governments. While individual researchers and organizations such as the Advisory Commission on Intergovernmental Relations have aptly documented the numerous mandates in such areas as environmental protection, civil rights, water quality, and fair labor standards, scant attention has been paid to the invasion by the federal government into state and local affairs through the tax policy process.

Federal Tax Code Mandates

There are numerous examples of federal tax law changes and implementing regulations that have been made in recent years that affect state and local debt management, cash management, and pension and benefits administration. The purposes of these policy changes are varied, and in some instances may be overlapping. It is possible, however, to identify four major objectives of such changes. They are to:

- Achieve a national policy goal such as limiting the amount of pension benefits going to persons on a tax-advantaged basis;
- Raise additional federal revenues in order to offset the cost of other proposed changes to meet the budget law requirement for revenue neutrality;
- Restrict practices the federal government deems "abusive" or does not want to encourage; and
- Improve the administration of the tax system by making sure that individuals and corporations pay their fair share of taxes.

While these objectives are useful and even laudable, they nevertheless can represent billions of dollars in additional federally mandated expenditures for state and local governments. In addition, they may even preempt and conflict with well established state and local legal restrictions, policies, and practices, causing even more problems for those who must comply. Four examples of such provisions follow.

Section 415. Section 415 of the Internal Revenue Code places a dollar limit as well as a percentage-of-pay cap on the amount of an employer-provided pension that an individual can receive annually that has been accumulated on a tax-deferred basis. This provision was originally adopted to curb a perceived abuse—the practice of highly compensated individuals building up large tax-sheltered and tax-deferred balances in their retirement plans.

Although there was never any indication that the practice was taking place in the public sector, state and local employees were subject to the limits. This requirement imposed a new administrative burden on governments, which would now be required to monitor benefit limits for their employees, and exposed them to rather severe penalties if they failed to comply. For example, if a single plan participant earned a pension benefit that exceeded the applicable limits, the plan could lose its tax-exempt status. This meant that the plan's investment earnings would be taxed and each plan participant's vested

interest in such assets would be added to the participant's income and taxed on a current basis.

Mandatory Pension Benefit Distributions. The *Tax Reform Act of 1986* contained a provision that required mandatory distributions of pension benefits to employees at age 70^{1/2}. The intent of the Congress in inserting this provision was to preclude highly compensated employees from using a pension plan as an estate planning device. In other words, the Congress did not want taxpayers to avoid or reduce their income taxes on their pension by delaying their pension distributions.

This requirement, which was eventually repealed, was costly to state and local governments from both administrative and programmatic perspectives. The mandatory distribution rule was passed almost simultaneously with amendments to the *Age Discrimination in Employment Act*, which prohibited an employer from establishing a mandatory retirement age and using age as a criterion for stopping retirement plan benefit accruals. This meant that it would be possible for an employee to receive a salary indefinitely, collect a pension, and at the same time accrue additional future retirement benefits from the same employer.

This scenario posed several challenges for state and local governments. The federal law:

- Conflicted with state and local prohibitions against double-dipping, the practice of receiving both a pension and a salary;
- Imposed higher pension costs on these governments because pension plans would have increased liabilities due to the lengthened payment periods for certain employees;
- Subjected state and local pension plans to harsh tax penalties if the law was violated, and
- Complicated the process for calculating an individual's pension by permitting the accrual of future retirement benefits at the same time benefits were being paid out.

Tax-Exempt Bond Restrictions. Additional examples of federal government actions imposing enormous regulatory burdens are the numerous tax code restrictions related to the issuance of tax-exempt bonds. Perhaps the most onerous restriction is the arbitrage rebate requirement. The federal interest in this area has been to prohibit abusive practices and to reduce the amount of outstanding tax-exempt debt.

The rebate requirement forces issuers to pay to the federal government any excess arbitrage. Excess arbitrage is the portion of interest income earned from the reinvestment of tax-exempt bond proceeds that is attributable to the difference between the tax-exempt borrowing rate and the taxable reinvestment rate. The purpose of the rebate is to remove any incentive to issue bonds for projects that may never come to fruition, to issue bonds earlier than needed, and to leave bonds outstanding longer than they otherwise would.

While only a small number of issuers ever engaged in arbitrage-motivated transactions, the application of the rebate to all governmental issuers in 1986 resulted in:

- Imposition of administrative burdens, such as the need for new computer programs, new accounting methods, and modified and less efficient investment strategies;
- Loss of investment income, which could no longer be used to reduce the amount of tax-exempt debt that had to be sold to finance a capital project; and
- Employment of numerous consultants to assist governments in complying with the rebate.

Not uncommon were situations in which issuers paid substantial sums to assemble data, hire consultants, and perform calculations only to determine that no rebate was owed. This diversion of scarce government resources into unproductive uses has made the rebate one of the most detested federal tax mandates.

State and Local Government Tax Reporting Requirement. This year, a provision that would have imposed tremendous financial burdens on state and local governments was considered in the Congress. Originally proposed as a revenue raiser to offset the costs of exempting certain private-activity tax-exempt bonds from state volume caps, the provision sought to improve tax administration by ensuring that taxpayers do not take a tax deduction for payments that do not qualify for the state and local property and income tax deduction. Specifically, state and local governments would be required to issue an information report to the individuals who paid the taxes or received a refund, as well as to the Internal Revenue Service. Substantial new computer programming, staffing, and postage costs would be involved if this new mandate is adopted.

These are just a few examples of federally mandated costs that have been imposed through the Internal Revenue Code. Several other changes that have been adopted or proposed are:

- Mandatory social security coverage for certain state and local government employees;
- Mandatory medicare coverage for state and local government employees;
- Section 89 nondiscrimination tests for state and local government welfare plans; and
- Changes in the administration of federal gasoline and diesel excise taxes that require certain governments to pay the taxes even though they do not apply to these governments and seek a refund from the federal government.

Finding Relief from Mandates

As with any mandate, an obvious remedy is to try to obtain a reimbursement to defray the costs of compliance from the level of government imposing the mandate. While this approach has met with some success at the state level, the federal budget deficit has strained federal resources available for such programs. One approach is the

limited credit state and local governments are permitted to take against their rebate payment to defray compliance costs.

Another traditional approach for dealing with the mandate problem is to begin to develop cost estimates of the burdens imposed on the affected parties. State and local governments are at a decided disadvantage in obtaining information about the cost of tax mandates because the federal law providing for the preparation of cost estimates on legislation by the Congressional Budget Office specifically exempts tax legislation. Among the changes that are needed to improve the process and limit the proliferation of tax mandates on state and local governments is to require the Congressional Budget Office to prepare cost estimates for tax bills and to provide those estimates in a timely fashion. Without this information, it is impossible to compare the burden imposed by the tax change with the expected federal benefit.

In line with this recommendation is the need for greater attention to and enforcement of requirements that are in place. Often, federal agencies fail to fulfill their legal obligations to ensure that the regulations to implement tax law changes are not overly burdensome. For example, federal agencies do not prepare regulatory flexibility analyses as required by the *Regulatory Flexibility Act of 1980* for rules affecting governments with populations of 50,000 or less. Federal agencies also have failed to prepare a regulatory impact analysis of certain proposed regulations as required by Executive Order 12291 because they were determined not to have an annual effect on the economy of \$100 million or more. There also have been instances when the estimated paperwork burden required by the *Paperwork Reduction Act* is totally unrealistic.

Several recommended relief options are process related. Seldom is there an opportunity to testify on the impact of a specific legislative provision because proposals are developed by staff behind the scenes and may not be made public until a committee mark up is scheduled for a bill. Another problem is the lack of specific legislative language. Tax bills are routinely marked up by the Ways and Means Committee in concept only and specific legislative language is not drafted until bills are reported from committee. A more open legislative process would provide for greater opportunities to discuss the impact of onerous provisions. A more open revenue estimating process also would help by shifting the debate about the merits of many of these proposals from revenue considerations to policy considerations.

With increased awareness of the impact of tax code mandates on state and local governments, brought about by such efforts as the Commission on Public Finance established by Representative Beryl F. Anthony, have come substantial efforts to modify and simplify federal tax law provisions and Internal Revenue Service (IRS) regulations. The Congress has attempted to include tax simplification provisions in the pension and bond areas in recent tax legislation. IRS has committed to substantially rewrite the 1989 arbitrage regulations that were severely criticized by municipal market participants. The Treasury Department and IRS also are engaging in more consultation with state and local governments both formally and

informally. Another effort is a proposal developed by the Government Finance Officers Association (GFOA) to provide regulatory relief for issuers of tax-exempt bonds for mandated infrastructure facilities.

Mandated Infrastructure Facility Bonds

GFOA's Mandated Infrastructure Facility (MIF) bond proposal responds to two of the most critical problems facing state and local governments—obtaining the financing needed to build and rehabilitate the nation's public infrastructure and the increasing number and scope of federal laws that mandate public infrastructure, but provide little or no federal funding. GFOA proposes to provide relief from this class of mandates by reducing the tax code mandates that make tax-exempt financing more costly and complicated.

The GFOA plan makes it easier and less costly to finance such facilities by creating a new category of bonds called "mandated infrastructure facility" bonds and granting relief from tax code restrictions such as:

- Limits on the amount of private involvement or participation in a facility financed with tax-exempt bonds;
- The arbitrage rebate requirement; and
- Taxation of such bonds under the alternative minimum tax.

The proposal defines a mandated facility as any facility or portion of a facility that is built, acquired, renovated, or rehabilitated because of a requirement in a federal statute or regulation. The association intends to refine this definition as more data are collected and input from other organizations and individuals is obtained.

The GFOA MIF bond proposal is hardly the solution to the tax mandates problem. It is a targeted and reasonable effort to help state and local governments meet their capital needs by reducing tax regulatory burdens. To obtain further relief from existing tax mandates and the proliferation of this regulatory device, there must be a greater understanding by local, state, and federal officials of how the tax policy process restricts state and local government activities and the extent to which it imposes financial burdens.

Catherine L. Spain is director of the Federal Liaison Center, Government Finance Officers Association.

Changing Public Attitudes on Governments and Taxes: 1992

ACIR's 21st annual public opinion poll found less confidence in all governments, more positive attitudes about public works, the federal government giving the least for taxpayers' money, and the federal income tax and local property tax in a dead heat as least fair.

\$-21 1992 \$10

(see page 33 for order form)

Local Boundary Commissions: Status and Roles in Forming, Adjusting, and Dissolving Local Government Boundaries

To determine the status of the boundary review commissions (BRC) that operate in 12 states, ACIR interviewed staff members and conducted a survey of state associations of municipalities, townships, and counties. Eight states established BRCs between 1959 and 1969 (Alaska, California, Michigan, Minnesota, Nevada, New Mexico, Oregon, and Washington). The other BRCs are in Iowa (1972), Utah (1979), Virginia (1980), and St. Louis County, Missouri (1989). The commissions exercise decisionmaking or advisory authority over the establishment, consolidation, annexation, and dissolution of units of local government, within the framework of state constitutional and legislative provisions. For the most part, the commissions are small and have limited funding. Annexation and mediation of interjurisdictional boundary conflicts top the BRC agendas. Some commissions have developed new techniques for resolving disputes and negotiating agreements for service delivery and tax sharing. Despite 30 years of experience with BRCs, no comprehensive evaluation of their work or effectiveness could be found.

M-183 1992 \$8



Metropolitan Organization: The Allegheny Case

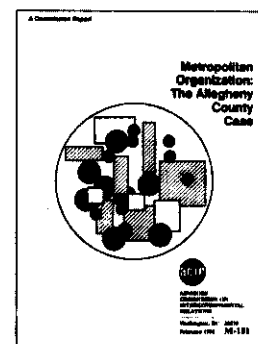
This information report continues ACIR's effort to learn how complex metropolitan areas function.

Allegheny County, the central county of the Pittsburgh metropolitan area, is by conventional measures the premier fragmented county among those nationwide with populations of more than one million—and by traditional accounts should exhibit all the “pathologies” of jurisdictional fragmentation.

But it doesn't.

Allegheny County has a complex organization for delivering police and fire protection, street services, and education—the services that are the focus of this report. The study also describes patterns of growth, political economy and geography, intergovernmental cooperation, and the functional dimensions of metropolitan organization.

M-181 1992 \$10



(see page 33 for order form)

Environmental Regulations: Lightning the Load

F. Henry Habicht II

There is an old adage that "a whale is only harpooned when it spouts." Indeed, as the deputy administrator of a federal regulatory agency that for 22 years has acted under the mandates of Congress to place a large share of burden on state and local governments, I sometimes feel I might be putting myself and my agency at a bit of a risk in addressing the issue of federal regulation of state and local governments. However, EPA and state and local governments have accomplished much through cooperation in recent years. EPA has learned from the last two decades of experience. There has been a fundamental restructuring of EPA's relationship with the public, with our partners, and with those we regulate so that to the greatest possible extent we can focus first on the top environmental priorities and spend every environmental dollar productively. Our recognition that state and local governments are critical partners and customers has been key to this success.

This is a time of changing roles for federal, state, and local governments in environmental protection. On the one hand, the nature of environmental problems has changed. There are larger universes of smaller pollution sources, and the pollution is coming in smaller and smaller amounts, harder and harder to detect. Furthermore, the problems are increasingly location-specific and geographically focused. At the same time that the types of problems have changed, a whole series of questions has arisen about what techniques we should use to address them. Since science is advancing all the time, we have a greater ability to detect environmental problems and greater knowledge about the causes and effects. However, because of the complicated nature of our problems, we have learned that the more we know, the more we do not know. For example, we may find a contaminant in the water or soil, but it isn't immediately clear whether it is a meaningful environmental risk.

Even if there were no issue of the burden of regulations on states and localities, there would still be a great need for the federal, state, and local governments to work together to solve environmental problems. A federal agency like EPA would be severely handicapped without the insight that state and local governments bring in understanding local concerns and how to make the fullest use of local ingenuity.

The Regulatory Burden

In the eyes of many states and local governments, though, the growth in the burden of regulations mandated by the Congress and implemented by EPA and other agencies has emerged as the fundamental environmental issue. Statutory and regulatory requirements are overloading many state and local governments. There are 800 subsections of EPA regulations that apply to small communities, 400 of which actively regulate local activities, such as setting limits on contaminants in drinking water. The individual effects of many of these regulations are minor, but the cumulative burden can be enormous. If no one EPA employee can know all of these rules, how can a small community environmental manager be expected to know all of them?

Local cost escalation is dramatic. It is projected that by 2000 local governments will have to spend an extra \$12.8 billion per year, or 65 percent more than they did in 1988, just to maintain current levels of environmental protection. The smallest communities will be hit the hardest. At a time when federal help will almost certainly decline, the annual costs per household of environmental protection will double, from 2.5 percent of household income in 1987 to 5.6 percent in 2000. It is important to remember that almost 90 percent of the government units with which EPA works serve communities of fewer than 10,000 people, and these communities contain 70 percent of the nation's landfills, 80 percent of the drinking water systems, and 90 percent of the wastewater facilities.

To complicate matters further, financial resources in the localities for both management and capital investment are shrinking. Between now and 2000, local governments will need to raise 32 percent more money to keep up with the present regulatory load, at a time when U.S. GNP is estimated to grow by only 2.4 percent per year. In 1991, 35

states reported operating shortfalls or accumulated deficits, and one in four city governments faced deficits of more than 5 percent, or twice as many as in 1990.

As a matter of economic reality, the nation—including EPA—cannot do everything at once to improve the environment. EPA's Science Advisory Board has made that point strongly in recent years. We know that our requirements must be based on solid science and an analysis of risk. We cannot jump feet first into every environmental "crisis of the day." The Congress, the American public, and EPA need to work together to make sure that our environmental policy is not just a series of frenetic attempts to extinguish ill-perceived fires.

Rethinking EPA Policy

Fortunately, the full realization of the extent of the state and local capacity problem has come at a time when EPA is rethinking its approach to environmental protection, both in terms of how it manages itself and how it structures its policies for the country. EPA has developed a large-scale agencywide "strategic plan," a coordinated blueprint for action, made up of initiatives that cut across the formerly sacrosanct structural boundaries of its programs in air, land, and water. EPA's fundamental allegiance to science and risk informs all environmental policies, but there is much more to our new approach, such as the encouragement of pollution prevention, a greater reliance on economic incentives, and geographic targeting on an ecosystem basis. One of EPA's ten basic strategic planning objectives is building state and local capacity. States and localities will benefit directly from our new emphasis on creative and realistic environmental protection.

Redefining EPA-State Relationships

EPA and the states have made much progress in redefining their relationship on the issue of environmental capacity. One important step was the establishment of an EPA/State and Local Capacity Task Force in the fall of 1991. The task force has the principal mission of determining what EPA could do to increase the ability of states and local governments to better manage environmental programs. There are four working subcommittees: state/EPA relationships, alternative financing strategies, state technical capability, and streamlining the grant processes.

These committees are guided by the ethic of total quality management and the lessons EPA has learned in its recent good experiences in negotiated rulemaking. EPA's technique is collaboration, bringing in all the affected parties to listen to what they have to say, with the goal of developing an end result that is flexible and does not prescribe specific processes. The task force considers all relevant questions concerning state capacity, including how state and federal planning and budgeting can be coordinated, and what the most useful financial and technical tools are for states and localities. A report is to be completed soon, but the task force will continue with its work beyond that time.

Another clear instance of EPA and the states working together is the recent development by the

National Governors' Association of a policy for relieving the unnecessary burdens created by the implementation of the *Safe Drinking Water Act* (SDWA). Regulatory stress is apparent in the areas of municipal solid waste, Superfund, and the *Clean Air Act*, and it is now strongly evident in the implementation of SDWA. EPA estimates that states have only half the resources necessary to implement the act. It was clear that the huge challenges posed by that act necessitated a new kind of partnership between the federal government and the states and localities.

This is a state and local problem. The states are concerned from the standpoint of management, supervision, and oversight. Communities are concerned from the standpoint of operation of, and capital investment in, the delivery system. Resource problems have become particularly acute in the midst of the current economic climate.

EPA began to address the situation by requesting an 18 percent increase in funds for state drinking water programs in the current budget. We also issued guidance for much greater state flexibility in implementing the regulations. Still more needs to be done, though, to address the needs of the local governments and drinking water users who must pay the \$2 billion per year that EPA has identified in capital, operations, and monitoring costs.

Steps toward Flexibility

In situations like this, innovative thinking and creative planning are required to define real steps that will bring real relief. To that end, EPA Administrator William Reilly established a Governors' Forum on Environmental Management in the spring of 1992, chaired by Governor Michael Castle of Delaware, which examined the drinking water issue and developed eight recommendations for actions by state and local governments, the federal government, and the Congress. The eight recommendations were amended and approved by the governors at the annual meeting of the National Governors' Association in August.

The recommendations of the governors' drinking water policy are clearly comprehensive and forward looking. They embrace the risk-based approach that EPA has taken in the last several years, and they encourage the expansion of pollution prevention practices while encouraging the need for state and local flexibility and discretion. While there may be the need for further discussion on some specific issues, such as the use of a regulatory freeze to limit the numbers of covered contaminants at certain levels, the governors' policy will surely serve as a basis for discussion among the states and the Congress for considering the merits of sensible, risk-based approaches to relieve the regulatory burden on states and localities to the greatest possible extent while assuring safe drinking water for all Americans.

As the SDWA issue continues to unfold, the tone set by EPA, the Governors' Forum, and the National Governors' Association ensures that this will be the open, consultative, and cooperative process that it needs to be.

EPA and Local Governments

As the case of the *Safe Drinking Water Act* demonstrates, the specter of enormous environmental costs poses a real threat to local governments facing numerous priority needs and citizen demands for services. The statistics offered earlier paint the picture of small communities struggling to tread water. EPA has taken steps in the last several months to apply its new ethic of strategic planning to the problems of localities.

Most recently, EPA responded to President Bush's call for a regulatory moratorium and 90-day review by designating small communities as entities especially affected by the burden of agency regulations. The moratorium was extended for another 120 days at the end of April. During the first 90-day period, EPA identified many actions that would be taken to address the regulatory burden on small communities, including initiatives for market incentives for municipal solid waste, privatization of wastewater facilities, and point/nonpoint source trading.

Flexibility Guidelines. In April, EPA revised the agency's Regulatory Flexibility Guidelines to make small communities a primary focus. Under these new guidelines, a regulatory flexibility analysis must be performed any time small communities are affected by any rule EPA writes from now on. The key is to provide communities with flexible alternatives so that they can meet their statutory obligations with limited financial and technical resources.

Small Communities Coordinator. EPA continues to benefit from the existence of its Small Communities Coordinator, a position it established more than two years ago. The mission of the coordinator's office is to enhance EPA's focus on small communities in every phase of agency work, especially rulemaking, asking and re-asking "what are we asking small communities to do—and why?" Among many other things, the coordinator's office has developed a national data base to bring real data to the analysis of local government issues, compiled the list of 800 regulations to allow local governments (and EPA) to see their cumulative impacts, served as EPA's contact with Columbus, Ohio, as that city undertook its study of local capacity, and started a project to notify small communities of regulatory comment periods otherwise available only in the *Federal Register*.

Local Government "Cluster." EPA has also formed a Small Community and Local Government Cluster, a cross-agency, multimedia management group designed to coordinate agency policy and brainstorm new approaches for reducing burdensome processes and requirements. The cluster's goal is to develop a consultative process that gives EPA more realistic expectations of what state and local governments can do, and helps us tailor our requirements to the states and local situations. This consultative approach was apparent in two recent meetings in Washington, where a wide variety of local government capacity issues were discussed. One of the most interesting topics of discussion was the groundbreaking environmental capacity study by the city of Columbus.

Financial Advisory Board. We are paying close attention to the work of the Environmental Financial Advisory Board, which EPA chartered to explore ways of improving the financing of environmental mandates. The board reported in May that several financial mechanisms exist to close what it calls the "environmental financing gap," including reclassifying bonds, using economic incentives for pollution prevention, increasing the use of bond banks, using fee systems to raise revenues for environmental investments, and encouraging private investment in publicly owned treatment works and other facilities.

Local Capacity Committee. EPA has also placed a high priority on forming a Local Capacity and Small Community Committee under the *Federal Advisory Committee Act*. Local government officials will make up the group, and they will serve as EPA's conscience and sounding board as policies are developed, forming a counterpoint to the several internal processes set up in recent years.

EPA's ratification of a risk-based approach to environmental protection has led it to reach out to states and cities interested in adopting this ethic. The city of Columbus employs this approach, believing it to be necessary in a world of scarce resources. EPA has developed comparative risk projects to help states and localities make the same tough choices about environmental investments similar to the ones outlined in the Columbus study. Four state projects have been completed (Colorado, Louisiana, Vermont, and Washington), and more than 15 additional states have expressed interest in conducting these projects. In cities, work is near completion in Seattle and will begin shortly in Jackson, Mississippi. Two other cities have expressed interest in using science and consensus-building to set priorities through the comparative risk process.

A New Dialogue

It is a reasonable statement that EPA's recognition of the prime importance of the state and local roles in environmental management has been long in coming. What is important is that we now know that there are many reasons why we should not prescribe all elements of environmental protection, inflexibly, from Washington. Congress' statutory mandates and EPA's regulatory requirements should be crafted in the open, with the input of all parties that will be affected. EPA believes that this way of doing business applies not just to regulations but to every issue in which it can have an impact—from grants and other forms of funding to the use of such tools as total quality management, risk analysis, and pollution prevention. EPA has spent much of the last three years restructuring itself in order to make this open dialogue with its partners in state and local governments a standard practice. Now that the dialogue has begun, there is very little that cannot be accomplished.

F. Henry Habicht II is deputy administrator, U.S. Environmental Protection Agency

Perspectives on Regulatory Federalism

In conjunction with its study of federal regulation of state and local governments, the U.S. Advisory Commission on Intergovernmental Relations invited several individuals to participate in a roundtable discussion at the Commission meeting on March 20, 1992. Speakers focused on the development and implementation of Executive Order 12612 on federalism, the congressional fiscal notes process, and the general thrust of federal regulatory efforts during the 1980s. In their remarks, they highlighted the strengths and shortcomings of these tools, which were intended to reduce the regulatory burdens imposed on state and local governments. The panel members also explored the practical considerations that result in regulation of state and local governments. Finally, they commented on various policy recommendations under consideration by the Commission, such as making federalism assessments mandatory, expanding the scope of the fiscal notes process to cover bills at earlier stages of the legislative process, and other procedural reforms. Following are edited excerpts from the remarks of the panel members.

The Federalism Working Group was established under the Domestic Policy Council in August 1985. Later that year, the group began work to address the general problems that officials really didn't know what federalism was and that federalism principles were not considered often enough. The working group developed a ten-point statement of federalism principles, which was issued by President Ronald Reagan in 1986. This was followed by a report on the *Status of Federalism in America*, which traced political and constitutional developments of the last 50 years and recommended reforms in the institutional processes of the Congress and the Executive Branch to ensure that federalism is given greater attention.

Specifically, the Federalism Working Group recommended development of a Federalism Executive Order. In January 1987, President Reagan approved the concept of an Executive Order and instructed the group to develop it. The order was issued on October 26, 1987.

The Executive Order had substantive and procedural components. Substantively, it restated verbatim the basic principles that were contained in the 1986 Statement of Principles prepared by the Working Group, but it also had several sections of concrete policymaking guidance and criteria for administration officials to follow.

The procedural component was intended to reform the institutional processes. Principally, reforms were that (1) each agency would have a federalism official overseeing enforcement of the order, (2) federalism assessments would be prepared in appropriate cases, and (3) the Office of Management and Budget would enforce the order as part of its regulatory and legislative review functions.

The order sought to define federalism. We did it in terms of identifying policies that have federalism implications: regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various governments.

The policy criteria sections sought to help define the questions that should be considered in policymaking and thereby help define the debate.

One of the provisions was that federal action limiting the policymaking discretion of the states should be taken only when constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope.

Now, what is a problem of national scope?

We could not really define that, but we pointed to a major distinction that we wanted policymakers to consider, that is, *the distinction between problems of national scope, which may justify federal action, and problems that are merely common to the states, which will not justify federal action because individual states acting individually or together can effectively deal with them.*

We had a variety of provisions on preemption and criteria that officials could consider before proposing legislation. There was a conscious decision not to make

federalism assessments mandatory because of concern that such a requirement would trivialize federalism. It would create bureaucratic resentments and force bureaucrats to go underground, seeking other ways to do things, or just come up with boilerplate language.

So, the federalism assessments were made discretionary. There was a belief that the agencies should principally be the ones to enforce the order. It was made clear, however, that OMB, in its institutional processes, the regulatory review process, and the legislative review process would have the authority to raise questions about whether assessments should be prepared. There also was a strong desire in the agencies and in the Executive Branch not to impose a brand-new system.

In 1988, in a first-year assessment, we concluded that the agencies had made good progress on setting up procedures to implement the order. The major agencies involved in regulation, and legislation set up comprehensive guidelines.

We also concluded that the order was having a good, practical, informal effect on policymaking. Bureaucrats knew about it. Officials knew about it. They were talking about it. They were doing a good number of informal federalism assessments to help determine whether a formal assessment was necessary, to help flesh out the issues. There were surprisingly few formal federalism assessments.

The systems seem to be in place and, as with many systems, it is the people who are important. And, if people are pushing it, things can work.

Remarks of
JAMES BLUM

Deputy Director, Congressional Budget Office

The Commission's new report on regulatory federalism provides a balanced discussion of the fiscal note process and the difficulties in estimating the costs imposed on state and local governments by federal legislation.

Preparation of state and local cost estimates is not the primary mission of the Congressional Budget Office (CBO). Our primary focus is the federal budget, not state and local government budgets. We're only rarely asked by the Congress for information concerning state and local governments or local economies. However, we take very seriously the responsibility to prepare estimates.

A few years ago, the General Accounting Office (GAO) reviewed CBO state and local cost estimates and procedures and concluded that they have increased federal legislators' awareness of the burden that legislation containing mandates imposes on state and local governments.

GAO also reviewed the ways in which the states prepare similar cost estimates or fiscal notes and concluded that the methodologies and the processes are comparable. GAO found, however that the CBO state and local cost estimates have not had a significant impact on the course of federal legislation except when there was a strong legislative concern about imposing costs through mandates.

CBO's experience leads us to conclude that providing cost information is not sufficient to deter the enactment of new federal mandates. I do not believe that insufficient information is a problem.

When requested, CBO will prepare estimates at any stage of the legislative process. The fact is that, for most legislative proposals, congressional committees show very little interest in state and local costs.

The solution, in my opinion, is to encourage more vigilant monitoring of proposed legislation that would regulate state and local governments. If state and local government representatives become more actively involved in the legislative process, one consequence, presumably, would be greater interest in the cost of federal mandates, and more demands would be placed on us for cost information.

In short, if the Commission finds a need for more cost information on federal mandates, I believe that the focus should be on how to increase congressional demand for that information. If the demand increases, the supply will increase as well. But the converse is not true. Supply will not lead to increased demand, as our experience has demonstrated.

Finally, I would offer the following comments on the procedural reforms under consideration by the Commission.

Amending the fiscal note legislation to require more cost estimates to be prepared, based on our experience, would not have the desired effect and would not be cost effective.

Transferring the responsibility of preparing state and local cost estimates would sacrifice the expertise that has been developed at CBO, would complicate the process for legislation that involves both federal, state, and local government costs, and would not reduce the inherent difficulty of preparing these cost estimates prior to the promulgation of specific rules and regulations.

A biennial report on new mandate costs imposed by each Congress could be useful. This report could be prepared either by ACIR or by CBO.

An effort to prepare thorough estimates of the costs imposed on state and local governments by all current federal regulations, either by a new mandates review commission or by an existing organization (such as ACIR or GAO), potentially could be useful to our cost estimating process for new mandates. However, this would be a formidable undertaking.

Remarks of
WILLIAM A. NISKANEN
Chairman, Cato Institute

Former Member, Council of Economic Advisers

I commend the Commission for its continuing efforts to protect and restore the role of the states in our federal system. The new Commission report on federal regulation of state and local governments could make an important contribution to that continuing effort.

Some strengthening of the reporting requirements and review process on proposed federal regulations that affect state and local governments may be valuable. My judgment, however, is that it would be unrealistic to expect very much from such measures.

Members of Congress have about as much information as they can absorb on most issues. Very few major policy mistakes, I believe, are due to lack of information.

Over the past several decades, there has been a proliferation of required impact statements on the effects of proposed policy changes on the economy, the budget, the environment, energy use, civil rights, the disabled, and state and local governments. These impact statements often produce a flurry of initial activity, but just as often are later ignored unless specifically requested by the review authorities in the Executive Branch or the Congress.

The Commission, I suggest, is wrong to recommend that state and local governments be exempt from federal laws and regulations of general application. If state and local governments do not like specific provisions of a law of general application, they should petition the Congress to amend that act, not to seek an exemption from its provisions.

The new statement of ACIR policy options now proposes to repeal all so-called crossover sanctions on federal grants to state and local governments. The Congress has the clear authority to make grants conditional on any laws or regulations of general application. And, such conditional requirements are often an effective means to increase compliance with these general laws.

Again, if state and local governments believe that some secondary conditions are wrong, they should join other parties to petition the Congress to change such general laws, not to seek a repeal of such conditions on federal grants.

In my judgment, the most important and, clearly, the most controversial proposal is for a constitutional amendment that would empower states to force the supermajority vote in the Congress on any federal law. The long-term viability of our constitution, I believe, will be dependent on some way to test whether a federal law is supported by a broad consensus short of the restrictive Article V conditions for calling a Constitutional Convention.

State governments are the appropriate institutions to force such a test.

Remarks of
JEFF HILL

*Chief, Commerce and Lands Branch
Office of Information, Regulatory Affairs
Office of Management and Budget*

I would like to comment on the part of the Commission's report regarding the Federalism Executive Order, specifically, the federalism assessments. It is not clear to me, given what I know of the regulatory review process, how a

federalism assessment in and of itself adds anything because the vast majority of regulations do not have significant enough effects on states to warrant such a comprehensive analysis. Except to indicate that there is the flexibility in the agency to leave discretion to the states, it doesn't answer the question of whether that should happen.

Our office has roughly 30 analysts working on regulations. In my branch, one person reviews all regulations from the Department of Transportation. Another two people are responsible for the departments of Agriculture and Interior combined. That means that they each review, on average, approximately 200 regulatory transactions and 300 information collections per year. The result is that you go from the abstract to the specific very quickly. You're talking about resources.

The Executive Order provides essential hooks for influencing policy debates. The analysts in our office are aware of the Federalism Executive Order's provision, and where appropriate seek to ensure that burdens on states are kept to a minimum. OMB's guidance to agencies on information policy, Circular A-130, includes an entire section on minimizing state and local burdens. In those situations in which state and local government organizations come in with specific and timely facts and concerns about block grant programs or other matters, we can and have incorporated these concerns as part of our formal regulatory review function. For example, we have worked closely with the National Governors' Association and other state representatives to have agencies reduce burden in several programs in which federal funds are administered by states. We welcome such input.

If a coordinated resource is focused on specific rulemaking activities, it would certainly be helpful because we cannot engage in an issue until we get down to the specifics.

In effect, every agency regulatory official has a checklist of items to worry about. The Federalism Order is another item on that checklist.

**Executive Order 12612, Federalism
Federalism Principles**

Section 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to

govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

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Finance and Taxation

FEDERAL FUNDS TO STATE AGENCIES, FY 1990-1992. *Annual Report to the Illinois General Assembly*. Illinois Commission on Intergovernmental Cooperation, 707 Stratton Building, Springfield, IL 62706, May 1992. 283 pp.

The commission records and tracks applications for and awards of federal grants state agencies, and conducts an annual survey to identify receipt of federal funds. *Federal Funds to State Agencies* is designed to provide legislators and staff with a comprehensive reference. The report lists federal funds awards by fiscal year and includes descriptive program information. Illinois state agencies now participate in approximately 300 programs. Grant awards for these programs have continued to increase during the past few years. The estimated amount for fiscal year 1992 was \$6.2 billion, up from \$4.8 billion in 1991. A significant amount of the increase was for Medicaid. Other major increases were for highway construction, Chapter 1 education programs, student loans, and family support programs. Significant reductions included the state JOBS program and EPA capitalization grants for wastewater treatment plants.

GOVERNORS, LEGISLATURES, AND BUDGETS: *Diversity across the American States*. Edited by Edward J. Clynych and Thomas P. Lauth. (Contributions in Political Science No. 265). Greenwood Press, 88 Post Road West, Box 5007, Westport, CT 06881, 1991. 200 pp. \$45.

The editors use state case studies to show how gubernatorial and legislative influence vary across the country. The states range from very rural to heavily urban and show a wide diversity in their centers of power, their experience with fiscal stress, and their history of budget reforms. The states studied are California, Connecticut, Florida, Georgia, Kentucky, Idaho, Illinois, Minneso-

ta, Mississippi, Ohio, South Carolina, Texas, and Utah. The case studies are organized around a common framework of political structure and fiscal condition and the factors that shape executive-legislative budget interactions.

INTERGOVERNMENTAL FUNDING WITHIN NEW JERSEY. State Commission on County and Municipal Government, 142 West State Street, CN 062, Trenton, NJ 08625, May 1992. 265 pp.

This study presents an overview of federal and state funding in FY 1990 for programs for which more than \$1 million was provided to New Jersey counties, municipalities, public authorities, and school districts. The report emphasizes the importance of intergovernmental flows in local financial decisionmaking, the different roles of the federal and state governments and their relative contributions, and necessary background on financial matters to foster decisionmaking and sounder budget reporting processes. For FY 1990, the state provided \$5.7 billion to the local governments, and the federal government provided \$1.5 billion. Of the state funds, 60 percent went to school districts for public education, and one-third of the federal money went to counties for human services.

Local Government

IMPROVING MANAGEMENT AND SERVICES IN CITIES AND TOWNS: *Implementing Goals and Standards*. Coalition to Improve Management in State and Local Government, School of Public and Environmental Affairs, Indiana University, Bloomington, IN 47405, 1992. 45 pp. \$15.

This guide is intended for small cities, towns, and townships that have an appointed manager or a strong mayor. The guide explains how the chief executive official sets goals, prepares work programs, uses performance measurements, and ties

these into a program budget format. The recommendations draw on the experience of many practitioners, and the principal elements were field tested in Allegheny County, Pennsylvania. The first part of the guide focuses on goal setting, the second part discusses the use of performance standards, and the third section lists sources of information.

LEGISLATOR'S GUIDE TO LOCAL GOVERNMENTS IN ILLINOIS: *Special Districts*. Illinois Commission on Intergovernmental Cooperation, 707 Stratton Building, Springfield, IL 62706, August 1992. 114 pp.

This guide covers special districts, "the most numerous and perhaps least understood of all local governments" in Illinois. The report contains information on the establishment, dissolution, governance, powers, and financing of the districts, and a preliminary listing of districts by county. Illinois has the distinction of having more local governments than any other state, more than 6,500 independent entities. The Bureau of the Census lists 2,783 special districts in the state (state tabulations are somewhat lower and use different bases). Among the types of services the districts provide are airports, cemeteries, conservation, fire protection, hospitals, libraries, mass transit, assessment, parks, public health, roads, and water services. This guide is the commission's first step in developing a series of reports on local governments in Illinois.

SERVICE CONTRACTING: *A Local Government Guide*. International City/County Management Association, 777 North Capitol Street, NE, Suite 500, Washington, DC 20002-4201, 1992. 251 pp. \$45.

Local governments contract out a wide range of essential and often complex services. ICMA's latest "Green Book" shows governments

how to organize a service contracting program, prepare a scope of work, evaluate bids and proposals, negotiate, monitor performance, and handle protests. There are detailed descriptions of types of bidding procedures; step-by-step instructions on how to prepare a comprehensive, enforceable contract; suggestions for developing a default contingency plan and for making a smooth return to public service delivery, and a glossary of terms.

Mandates

STATE AND FEDERAL MANDATES AS PRESENTED TO THE ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS FROM OKLAHOMA STATE AGENCIES, COUNTIES, AND CITIES AND TOWNS. Oklahoma Advisory Committee on Intergovernmental Relations, 307 State Capitol Building, Oklahoma City, OK 73105, March 1992. 42 pp.

In 1991, the state ACIR surveyed state agencies and counties concerning the 10 most costly and/or burdensome state and federal mandates affecting them, the approximate cost of the mandates, and recommendations for lowering the cost. Cities and towns were asked to rate lists of federal and state mandates as reasonable or unreasonable, and to indicate whether or not they were adequately funded. The report is not intended to be inclusive of all state or federal mandates.

State Government

IMPLEMENTING STATE GOVERNMENT EXPORT PROGRAMS. By Michael Frazier. Praeger Publishers/Greenwood, 88 Post Road West, Box 5007, Westport, CT 06881, 1992. 232 pp. \$45.

This empirical study of the effectiveness of state export agencies offers in-depth state case studies of Arkansas, Indiana, Michigan, and Virginia. Following discussion of a theoretical framework, Frazier identifies additional factors to be considered in program evaluations—geographical location, state politics, economic interdependence, and programs administered by the U.S. International Trade Administration and the USDA Foreign Agriculture Service. The author points out that the role of state politics has been the

determining factor, both positive and negative, in the export agencies' performance. Effective state export-trade programs, he says, depend ultimately on reducing perceived barriers to exporting as well as the level of public awareness of international trade.

STATE GOVERNMENT: *CQ's Guide to Current Issues and Activities 1992-93*. Edited by Thad L. Beyle. Congressional Quarterly Books, 80 Northfield Avenue, Building 424, Edison, NJ 08837, 1992. 262 pp. \$19.95

In this revised edition of *CQ's State Government*, Beyle examines the increased visibility and influence of the states and how they are responding to the challenges of the shifting balance of federalism. During the 1980s, the states gradually assumed greater responsibilities, and the trend continues as states pick up a larger share of the tab for education, public works projects, health care, welfare, and environmental protection. In 1991-92, reduced state tax revenues across the nation created policy dilemmas as officials decided what programs to cut and by how much at the same time having to raise taxes to maintain basic services. The book covers state politics, institutions, and issues, and the media in the states.

ACIR News

(continued from page 4)

Mr. Weir provided examples of transportation problems which have to be solved with or without ISTEIA; Ms. McKenna described the evolution of her organization from the Golden Triangle Task Force to the Congestion Management Agency and explained how ISTEIA helped improve the relationship between the agency and the Metropolitan Transportation Commission; and Mr. Dahms discussed how the provisions of ISTEIA can be a catalyst for improvement.

ACIR Staff Changes

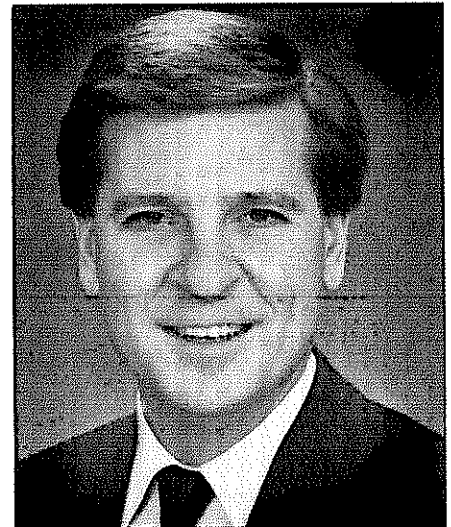
Henry A. Coleman, ACIR's director of Government Finance Research has accepted a faculty position as associate professor of public policy and directorship of the Center for Government Services at Rutgers University.

D. William Graham, a senior analyst, has taken a position with the Department of Education.

Commission Appointments

President George Bush has appointed Bruce M. Todd, Mayor of Austin, Texas, to a two-year term.

Mr. Todd has served as mayor since 1991. He was a Travis County Commissioner from 1987-1990 and has also served in a number of national, state and city organizations.



Bruce Todd

Federalism and Rights

ACIR is cosponsoring a conference on federalism and rights to be held in Philadelphia, Pennsylvania, on November 14-16, 1992. The conference, organized by the Center for the Study of Federalism at Temple University, will feature discussions of rights issues in federalism, past and present, in the United States as well as in Canada, the European Community, Russia, and South Africa. The conference registration fee is \$120. Contact Joseph Marbach at the Center for further information (215) 787-1483 or Fax (215) 787-7784.

Commission Member Dies

U.S. Rep. Ted S. Weiss died of cardiac arrest September 14, 1992, in New York City. He was an advocate for social programs and human rights. He had served as a member of the Commission since 1983. Reflecting the commitment to his office, Rep. Weiss won the Democratic primary in his district September 15, 1992.

**Members of the
U.S. Advisory Commission on Intergovernmental Relations**
(October 1992)

Private Citizens

Daniel J. Elazar, Philadelphia, Pennsylvania
Robert B. Hawkins, Jr., *Chairman*, San Francisco,
California
Mary Ellen Joyce, Arlington, Virginia

Members of the U.S. Senate

Daniel K. Akaka, Hawaii
Dave Durenberger, Minnesota
Charles S. Robb, Virginia

Members of the U.S. House of Representatives

Donald M. Payne, New Jersey
Craig Thomas, Wyoming
Vacancy

Officers of the Executive Branch, U.S. Government

Lamar Alexander, Secretary of Education
Andrew H. Card, Jr., Secretary of Transportation
Bobbie Kilberg, Deputy Assistant to the President
and Director of Intergovernmental Affairs

Governors

John Ashcroft, Missouri
George A. Sinner, North Dakota
Stan Stephens, Montana
Vacancy

Mayors

Victor H. Ashe, Knoxville, Tennessee
Robert M. Isaac, Colorado Springs, Colorado
Bruce M. Todd, Austin, Texas
Vacancy

Members of State Legislatures

David E. Nething, North Dakota Senate
Samuel B. Nunez, Jr., President, Louisiana Senate
Ted L. Strickland, Colorado Senate

Elected County Officials

Ann Klinger, Merced County, California
Board of Supervisors
D. Michael Stewart, Salt Lake County, Utah,
County Commission
Barbara Sheen Todd, Pinellas County, Florida,
County Commission

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