AN INFORMATION REPORT

Federally Induced Costs Affecting State and Local Governments

U.S. Advisory Commission on
Intergovernmental Relations

M-193
September 1994

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Executive Summary

In this report —***Federally*** Induced ***Costs Affecting State and Local*** **Governments-ACIR develops a new concept of federally induced costs.** The purpose of this concept is to explore more completely the fiscal dimensions of federal actions affecting state and local governments without the pejorative connotations associated with the term "mandates." Also explored are the ways in which the federal government assists state and local governments, which can be thought of as an offset to induced costs. This information can assist in considering the question of balance between costs and aid.

The report (1) describes the issue, how it evolved over recent years, and current congressional action; (2) examines the intergovernmental tensions associated with federally induced costs; (3) examines the types of federal action that may increase state and local government costs; and (4) examines nine ways in which the federal government assists state and local governments in getting the resources they need to respond effectively to federal initiatives.

Federal mandates to state and local governments are a built-in feature of American federalism. For decades, the federal government's use of mandates was relatively limited. In recent years, however, the federal government's use of mandates has grown rapidly. As the number of mandates has grown, so have the costs to state and local governments. In 1993, the term "unfunded federal mandates" became the rallying cry for one of the most contentious intergovernmental issues in recent times. This commonly used term, however, has different meanings to different participants in the debate. This report seeks to help clarify the debate.

The Congress and the executive branch have begun to focus greater attention on the problems associated with federal mandates and possible strategies for relief. By 1994, 34 mandate relief bills had been introduced in the Congress and the President had signed Executive Order 12875 prohibiting federal agencies from creating unfunded mandates not required by law.

Establishing and operating a workable reimbursement process will be difficult. State experience with mandate reimbursement programs for local governments suggests that federal policymakers will need to address a series of complex issues before reimbursement programs can be effective. **One of the principal objectives of this report is to develop a viable framework for investigating such issues. Among the issues are the following:**

1) There is no universally accepted definition of a federal mandate and surprisingly little consensus on the matter.

2) Some of the most costly federal financial impacts on states and localities do not fit the standard definition of a federal mandate closely, if at all.

It is clear that many federal policy instruments can impose financial impacts on state and local governments. They may include: traditional direct mandates; various forms of grant-in-aid conditions; federal preemptions; tax policy provisions; incidental and implied federal policy impacts; and federal exposure of state and local governments to legal and financial liabilities.

From the federal government's perspective, requiring state and local governments to undertake activities, provide benefits, or enact laws can appear to be an effective and efficient way to achieve desirable federal policy objectives. Few state and local governments disagree with those objectives, but many question the implementation methods, financing, effectiveness, and implications for federalism. These concerns include, among others:

1) Excessive costs due to complex and rigidly specified implementation mechanisms, often not based on sound, peer-reviewed scientific studies;

2) Inadequate consideration of the costs imposed and the benefits to state and local jurisdictions by growing numbers of judicial decisions, statutes, and regulations;

3) Distortion of state and local government budgets and policy priorities;

4) Erosion of state and local initiative and innovation;

5) Inefficiencies due to the application of single, uniform (one size fits all) solutions to geographically diverse problems;

6) Inadequate consideration of the varying state and local financial and personnel resources;

7) Attenuated accountability to citizens, due to the separation of responsibilities for policy direction and public finance; and

8) Existence of a double standard, whereby the federal government exempts itself from compliance, or complies only partially, with the regulations it imposes on state and local governments.

Many hard-to-grasp details are crucial to finding workable solutions to the mandate relief issue. Some of the questions fall into the following categories:

1) What is a "mandate" and who is responsible for funding it?

2) How should reimbursement amounts be calculated?

3) Who should determine the amounts to be reimbursed?

4) Should the Congress take further action to help provide mandate relief in the executive rulemaking process?

The Clinton Administration has taken steps to:

1) Involve state, local, and tribal governments more deeply in the administrative rulemaking process;

2) Avoid imposing new mandates not required by law; and

3) Review regulations to ensure that they are needed and are no more burdensome than necessary.

Potential solutions to three broad problems include:

1) Informing the process. Three types of improved information have been suggested: (1) better cost estimates for proposed federal actions (including netting out related benefits), (2) cost-benefit accounting standards, and (3) an inventory of federally induced costs updated annually to track net aggregate impacts.

2) Disciplining the system. There are several ways to introduce greater discipline into the legislative and rulemaking processes to limit or reverse unfunded federal requirements: (1) process improvements, (2) criteria for federal funding, (3) caps, (4) realignment of the federal system, and (5) moratoria.

3) Funding federally induced costs. Beyond appropriation of funds for grants or loans, there likely will be interest in: (1) shared revenues; (2) payments in lieu of taxes; (3) user fees; (4) mixed public and private funds; (5) in-kind contributions; (6) tax expenditures; (7) stretched-out schedules for compliance; and (8) waivers from the strict letter of requirements for hardship cases.

Highlights

1. **Many types of actions by the federal government create costs that are being paid by state and local governments using their own funds.**

Some federal actions—such as enactment of new matching grant programs and increases in matching ratios, program scope, and other conditions of federal aid—are designed intentionally to stimulate increased state and local spending. Others increase state and local costs unintentionally. In addition to matching grants and grant conditions, the principal types of federal actions that induce state and local costs include:

- Direct orders that mandate state and local governments to perform an activity for which there is little or no federal funding;
- Federal regulations that allow state or local government enforcement if the state or local standards are equal to or higher than the federal standard;
- Prohibitions of state or local actions that could save state and local costs;
- Tax policies that make it more difficult or expensive for state and local governments to raise revenues, borrow funds, fund public-private partnerships, and privatize public functions;
- Court decisions or administrative regulations that impose an implied constitutional or statutory obligation for state and local governments to do or not to do something;
- Regulatory delays and nonenforcement; and
- Laws that expose state and local governments to liability lawsuits.

2. **The amount of federally induced costs paid by state and local governments are perceived to be substantial and growing.**

Among the largest and most rapidly growing of these costs perceived by state and local governments are those for compliance with health care and environmental regulations, the ***Americans with Disabilities Act, the Fair Labor Standards Act,*** and services to undocumented aliens. As the federal government endeavors to reduce its budget deficit, many state and local governments fear that there maybe strong temptations to reduce even further the federal financial contribution to meeting such goals.

3. **In some cases, federally induced costs are higher than necessary because of inflexible federal requirements.**

For example, rules requiring bilingual education rigidly emphasized instruction in a student's native language, despite obstacles to implementing transitional bilingual education in many jurisdictions and an absence of scientific evidence to justify reliance on a single approach.

Similarly, federal water pollution regulations require the use of "best available control technology," even when the benefits of such costly technology may vary greatly from one locality to the next. In addition, localities are required by the ***Safe Drinking Water Act*** to invest in costly testing for a variety of pollutants, including those unlikely to appear in a particular local water supply.

4. **Federally induced costs are displacing state and local priorities for the use of their own funds.**

The prime example in state budgets has been the rapid increase of Medicaid costs, which has been spurred by a combination of federally mandated program expansions and rising health care costs. Much of this increased Medicaid spending has come at the expense of higher education.

In local budgets, displaced expenditures have been reported to include personnel (such as police, fire fighters, and teachers), public works projects, and services (such as cutting library hours and closing library branches). These displacements make it difficult for state and local elected officials to deliver on their campaign pledges, thereby damaging their political accountability in the federal system.

5. Many estimates of federally induced costs are neither reliable nor particularly helpful in the process of enacting legislation or making administrative rules.

The reasons that estimates of federally induced costs are deficient include the following:

1) They are prepared quickly without the use of generally accepted methods that can be audited.

2) They do not reflect secondary effects (such as federal displacement of state and local priorities).

3) They are not recalculated to reflect changes made in the bill or the proposed rule.

4) They are made too late in the process to help identify and authorize less costly means of achieving federal objectives.

5) They are seldom considered by the Congress in relation to the benefits they create (to assist in calculating the net effect).

6) They rarely show how federally induced costs affect different types of state and local governments.

In addition, many federally induced costs are not estimated at all because they are considered to be nonquantifiable or too difficult to estimate.

Especially in the legislative process, cost estimates often are not available to the committee members and staff when they are developing proposals, considering alternatives, and crafting the final policy. The cost estimates that are made often come after the political and policy decisions have been made.

Estimates of compliance costs for meeting environmental protection requirements, now being made by local governments, show that the same requirement frequently has dramatically different cost implications for different localities. Given the differences in fiscal capacity, fiscal effort, and expenditure demands from place to place, these differences in federal cost impacts may range from easily manageable to impossible in individual local budgets. The same may be true of the states, although they generally have greater leeway in arranging their finances.

6. No reliable estimate of the total current magnitude of federally induced costs is available.

Most estimates are for single programs or regulations, made at the time they are proposed. Seldom is any attempt made to prepare current estimates for large groups of programs. The main exception is certain groups of environmental protection programs.

The time periods of existing estimates differ, so they cannot be added together to measure the cumulative effect of federally induced costs. Some are annualized; others are for an arbitrary number of years; still others project the full costs of compliance regardless of timing.

Some current estimates of federally induced costs have begun to emerge from local governments, and to be aggregated by the U.S. Conference of Mayors and the National Association of Counties. No federal agency has been given responsibility for maintaining a running total of the aggregate annual amount of federally induced costs that must be paid.

7. Precedents for reimbursing federally induced costs, at least in part, and mechanisms for doing so are well established in the federal government.

In earlier decades, the federal government generally shared the costs of its new intergovernmental initiatives with state and local governments—through grants and other means. In recent years, however, the federal government has moved away from cost-sharing. Federal reimbursements have been made in the form of:

- Payments for services and benefits provided by state and local governments;
- Payment for administrative or enforcement costs incurred by state and local governments on behalf of the federal government;
- Authorization for state and local governments to assess user fees to cover costs of a federally required program;
- Payments in lieu of state and local taxes;
- Grants, loans, loan guarantees, and tax expenditures to assist in funding joint programmatic objectives;
- Payments from federal trust funds supported by dedicated taxes that are collected for the purpose of meeting federally induced costs;
- Sharing of fines and penalties collected by the federal government; and
- "In-kind" provision of free training, data, technical assistance, and equipment.

8. There are no agreed-on criteria for deciding which intergovernmental initiatives should be reimbursed, the extent of reimbursement, and how reimbursement should be made.

Federal programs and regulations typically are developed in isolation. Whether a program includes federal funding, and how much, frequently depends on when it was enacted, how tight its appropriation bill is, and how effective its lobbyists are.

9. Potential mechanisms for relieving federally induced costs include:

1) A more effective fiscal notes process;

2) Firm criteria for determining federal responsibility for reimbursing induced costs;

3) **A** regulatory budget process that would **cap** the total annual costs imposed and their rate of growth;

4) **A** federal review commission with authority to study and recommend, for an up or down vote, a complete package of reforms designed to rebalance federal, state, and local responsibilities and resources;

5) **A** moratorium on new unfunded mandates; and

6) **A** clear roll-call vote to authorize congressional consideration of any new "unfunded mandate."

Each of these mechanisms has been introduced for consideration in the Congress, along with proposals to legislatively strengthen the agency rulemaking process along similar lines.

Preface

The issue of unfunded federal mandates is at the top of the intergovernmental agenda today. It has coalesced the national associations of state and local governments like no other issue in recent times, and it has caught the serious attention of the Congress and the Administration. For the Commission, this topic, which has been under study for many years, also has become a top **priority** this year.

According to the National Conference of State Legislatures, 34 mandate-relief bills have been introduced in the 103rd Congress. Hearings have been held in both Houses, and compromise bills are working their way through the legislative process. Outstanding leadership has come from the Senate Governmental Affairs Committee and others—including many of this Commission's members.

Nevertheless, unfunded federal mandates remain a controversial issue. State and local governments, facing taxpayer revolts, believe they need additional federal funding to implement the growing number of federal mandates. The federal government believes that it can find no new money for these purposes under the hard budget caps agreed to by the President and the Congress to reduce the deficit. Interest groups supporting individual mandates fear that progress toward improving America's civil rights, environmental, health, safety, and other vital conditions may be lost on the shoals of fiscal deficiency. Lobbying is fierce, and compromise is difficult.

The Commission authorized publication of this report to assist all the parties in this debate in their attempts to find a workable solution. There are no recommendations in this report because **of** the diverse views represented within the Commission. The Commission agreed, however, about the importance of this issue and the need to provide additional objective information.

Inevitably, the mandates issue leads to discussion of the relative constitutional roles of the federal, state, and local governments, as well as the practical means by which all of these governments can work together. For the most part, federal mandates cannot be effective apart from an effective intergovernmental partnership. Yet, the process by which federal mandates are created sets a tone of "them against us" that weakens the intergovernmental partnership. We will continue to work on mandate-related issues in the spirit of finding ways to strengthen intergovernmental cooperation and reduce intergovernmental tensions.

This report stops short of solutions. It does not speak much about sorting out federal, state, and local roles. It does not deal with the related issue of state mandates. These subjects have been treated in other ACIR reports that include policy recommendations of potential interest to the readers of this report.

The Commission has not taken positions on the mandate-relief bills now before the Congress. It should be noted, however, that the compromise bill taking shape in the Congress appears to address many **of** the issues identified in ACIR research as needing attention, and appears to be gathering the support of most of the intergovernmental partners. I am pleased that this progress is occurring now. It is urgently needed.

The Commission authorized the publication of this report at its meeting on June 17, 1994.

William F. Winter
Chairman

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William E. Davis III
Executive Director

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The Mandate Relief Issue Comes of Age

1

Current Interest in Mandate Relief

Federal mandates to state and local governments are a built-in feature of American federalism. The federal government has a number of responsibilities, enumerated in the Constitution, over which it has definitive authority. Other governmental responsibilities are "reserved to the states or to the people," as expressed in the Tenth Amendment to the Constitution.

For decades, the federal government's use of mandates was relatively limited. The relationship with state and local governments typically revolved around federal-aid programs that provided substantial federal funding for implementing federal requirements. In recent years, however, the federal government's use of mandates has grown rapidly. By 1993, the term "unfunded federal mandates" had become the rallying cry for one of the most contentious intergovernmental issues. This commonly used term, however, has different meanings to different participants in the debate. This report seeks to help clarify the debate.

This chapter examines the growing interest in federal mandate relief, the factors driving this trend, and the evolutionary steps that have brought the issue into the congressional arena and shaped the current debate.

Crowing Number and Impact of "Mandates"

Even defined conservatively, the number of federal intergovernmental regulations has increased dramatically since 1960 (see Figure 1).[1] Using a more inclusive definition, the National Conference of State Legislatures has identified 185 federal "mandates" that are in effect.[2]

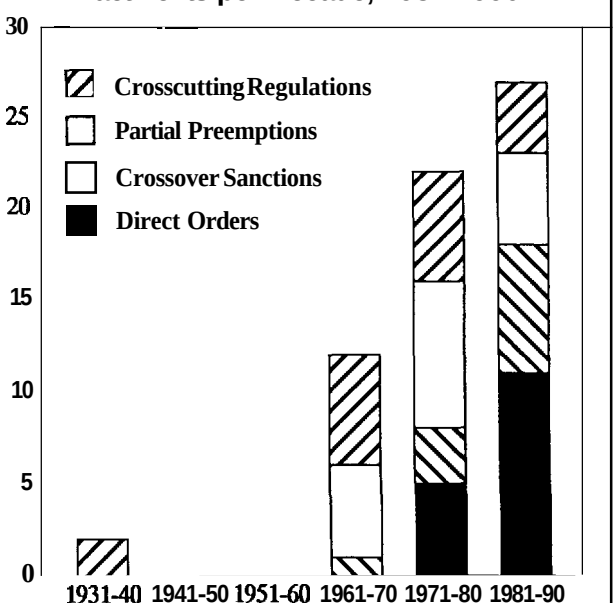
As the number of mandates has grown, so have the costs to state and local governments. Medicaid and environmental protection programs have been particularly costly. At the same time, many state and local governments have been facing taxpayer revolts and revenue-depleting reverses in their economies. As a result of these forces, many state and local government officials have made mandate relief their top intergovernmental reform priority.

The Federal Response

The Congress and the Executive Branch have begun to focus greater attention on the problems associated with federal mandates and possible strategies for relief. In one of his first intergovernmental initiatives, President Bill

Figure 1

The Growth of Regulatory Federalism: Enactments per Decade, 1931-1990



Note—Includes new programs and major amendments.

Sources: ACIR, *Federal Regulation of State and Local Governments* (1993), Table 4-1, and *Regulatory Federalism* (1984), Appendix Table 1.

Clinton issued Executive Order 12866 (September 30, 1993), which requires federal agencies to consult more actively and fully with their state and local counterparts before promulgating intergovernmental regulations and mandates. This order was followed by Executive Order 12875 (October 26, 1993), which seeks to limit unfunded mandates arising from agency rule promulgation.

Many state and local government officials would like to go further, and they have made the reimbursement of federally mandated expenditures a top priority for legislative action in the Congress. In response to their concerns, 34 mandate relief bills had been introduced in the 103rd Congress by June 1994, including 10 that would require federal reimbursement or waiver of some or all of the costs of federally mandated activities.)

Difficulties in Reimbursing Mandates

Establishing and operating a workable reimbursement process will be difficult. Studies of state mandate reimbursement programs for local governments have found that most of them provide relatively little funding relief and some are completely ineffective.[4] The states' experience suggests that federal policymakers will need to address a series of complex issues before reimbursement programs can be designed.

One of the principal objectives of this report is to develop a viable framework for investigating such issues. For example, precision is needed to determine which types of regulatory requirements and which costs will qualify for federal reimbursement. More will need *to* be learned about the federal programs that provide full or partial cost reimbursement to state and local governments, how such programs differ, and their advantages and disadvantages.

Other questions pertain to the benefits of federal mandates and the relationship between benefits and costs. Although compliance with mandates may require additional expenditures, state and local governments also may derive increased revenues, or economic, social, or environmental benefits and/or reduced costs because of the amelioration of previously costly conditions. Thus, netting out of costs and benefits is an important consideration. Determining benefits is no less difficult than determining costs, however, especially when indirect costs and benefits are included. Without such data, mandates often are enacted on the basis of presumed benefits because they appear, on their face, to be good policy.

Many obstacles to mandate reimbursement are conceptual in nature. For example, definitions of "mandates" often are unworkable or inappropriate. According to common usage, mandates encompass any federal statutory, regulatory, or judicial instruction that (1) directs state or local governments to undertake a specific action or to perform an existing function in a particular way, (2) imposes additional financial burdens on states and localities, or (3) reduces state and local revenue sources.[5]

Three problems interfere with utilizing this definition as a basis for financial reimbursement: (1) the nonfiscal dimension of mandates, (2) problems of definition, and (3) impacts beyond mandates.

The Nonfiscal Dimension. *Many of the problems associafed with mandates are not primarily fiscal in nature.* For example, objections to provisions establishing a uniform speed limit on the nation's highways, and to many other rules, have little to do with the cost of implementation. These mandates, however, raise important issues of legitimacy, accountability, and political representation, such as:

- Is there a clear and convincing need for national uniformity in this area?
- Should such decisions be made unilaterally by national policymakers — whether in the Congress, the Executive Branch, or the courts?
- If state or local governments are charged with implementing a rule, what happens if their constituents object and come to believe that the governments are unresponsive because they are unable to alter a mandated activity?
- What impact does such citizen dissatisfaction have on the concept of democratic accountability?

"Political costs" such as these would remain even if the financial costs of mandate implementation were minimal or fully reimbursed by the Congress.

From the federal government's perspective, however:

- Issues such as cross boundary costs and impacts (e.g., air emissions, wastewater flows, groundwater contamination) create a need for minimum national standards.
- National standards also can be viewed as less expensive for industry than compliance with many individual, distinct state standards.
- States compete. Absence of a minimum national standard can lead to destructive competition, especially if (1) there are no mechanisms for charging prices equal to marginal costs or for marginal pricing, or (2) marginal costs are less than average costs.
- Disconnects between accountability and decisionmaking can occur at all levels. State and local governments are more subject to pressure by large economic development entities and may be pressured into less than optimal pricing and investment decisions because of monopoly/oligopoly powers in the local marketplace.
- Every federal regulation is created for a purpose. To the extent that each regulation incorporates a

legitimate national interest (such as national security, health, or interstate commerce), there is a counterweight to state and local interests.

Problems of Definition. *There is no universally accepted definition of a federal mandate and surprisingly little consensus on the matter.* For example, in its 1984 report *Regulatory Federalism: Policy, Process, Impact, and Reform,* ACIR highlighted four forms of intergovernmental regulation that were relatively new at the time: direct order mandates, partial preemptions, crossover sanctions, and crosscutting requirements. The report did not include grant-in-aid conditions, judicial mandates, complete federal preemptions of state and local activities, or federal statutes that affect state and local revenue-raising capabilities.

Consequently, attempts to estimate the total number of federal mandates—and thus define the universe of programs that might be subject to reimbursement—vary greatly. One recent estimate of statutory mandates totalled 36, another counted 185.[6] A recent inventory of federal preemption laws, which overlaps partially with the other two studies, counted 439 explicit federal preemption statutes.[7] None of these tallies included federal judicial mandates. Moreover, all of them were based on counts of legislative statutes—some of which entail hundreds of pages of specific administrative rules and procedures affecting state and local governments.

Financial Impacts beyond Mandates. *Some of the most costly federal financial impacts on states and localities do not fit the standard definition of a federal mandate closely, if at all.* For example, the federal government spends millions of dollars annually on so-called "impact aid" grants to local school systems to help offset costs that occur as an incidental consequence of the location of a major federal installation. These substantial costs are not the result of a mandate. The conventional definition of a federal mandate is likely to prove equally inadequate when dealing with immigration or other policies that create significant incidental fiscal impacts, which are wholly or partially unreimbursed.

The Scope of Federal Financial Impacts

It is clear that many federal policy instruments can impose financial impacts on state and local governments. They may include:

- Traditional direct mandates;
- Various forms of grant-in-aid conditions;
- Federal preemptions;
- Tax policy provisions;
- Incidental and implied federal policy impacts; and
- Federal exposure of state and local governments to legal and financial liabilities.

Although these instruments vary considerably in their degree of compulsion and regulatory intent, intergovernmental dialogue about federal "mandates" is often complicated by the varying definitions used. A thorough understanding of federal influences on state and local expenditures requires a recognition of the potential effects of all of these tools, including those that do not fit the standard definition of a mandate.

The Approach of This Report

In this report, ACIR develops a new concept—*federally induced costs*—to explore more completely the fiscal dimensions of federal actions affecting state and local governments without the pejorative connotations and definitional baggage associated with the term "mandates." *Also* explored are the ways in which the federal government assists state and local governments—which can be thought of as an offset to induced costs. This information can assist in considering the question of balance between costs and aid.

Before presenting the research, it is helpful to examine the broad dimensions of the "mandate issue" as it has evolved into an important subject of intergovernmental concern. Many of the problems associated with mandates and other federally induced costs are relatively recent. They have become politically significant gradually as the scope and character of federal policy initiatives evolved from a traditional reliance on grants and other subsidies to influence state and local government behavior to a greater emphasis on unfunded regulation.

Because this is a relatively new development, which has been encouraged by changing federal judicial doctrines and increasingly constrained federal budgets, a brief review of the dimensions of the mandate issue will help place federally induced costs into a broader perspective.

Intergovernmental Tensions Associated with Federally Induced Costs

From the federal government's perspective, requiring state and local governments to undertake activities, provide benefits, or enact laws can appear to be an effective and efficient way to achieve desirable federal policy objectives. Few citizens would disagree with the federal objectives. Indeed, few state and local governments disagree with them. Equal employment opportunities for the handicapped, clean air, safe drinking water, and curbing alcohol abuse by teenagers are all worthy and widely accepted public policy goals. They produce many benefits, some of which would be impossible or unlikely to occur without federal action.

Despite agreement on the merits, however, controversies have arisen about the methods used to implement some of these policy objectives. For many mandated programs, concerns have been raised about financing, effectiveness, and implications for federalism. These concerns include, among others:

1) Excessive costs due to complex and rigidly specified implementation mechanisms, often not based on sound, peer-reviewed scientific studies;

2) Inadequate consideration of the costs imposed and the benefits to state and local jurisdictions by growing numbers of judicial decisions, statutes, and regulations;

3) Distortion of state and local government budgets and policy priorities;

4) Erosion of state and local initiative and innovation;

5) Inefficiencies due to the application of single, uniform (one size fits all) solutions to geographically diverse problems;

6) Inadequate consideration of the varying state and local financial and personnel resources;

7) Attenuated accountability to citizens, due to the separation of responsibilities for policy direction and public finance; and

8) Existence of a double standard, whereby the federal government exempts itself from compliance, or complies only partially, with the regulations it imposes on state and local governments.

These specific controversies are examined in Chapter 2, after consideration of the evolution of the overall mandate issue.

Evolution of the Mandate Issue

The growth of federal intergovernmental regulations began to attract significant attention during the late 1970s. For example, then New York City Mayor Ed Koch characterized the proliferation of federal regulations as a "mandate millstone,'' which was "threaten[ing] both the initiative and the financial health of local governments throughout the country."'

Scholarly research lent support to such concerns. One study found that local governments in several states were subject to hundreds of specific administrative requirements and conditions of aid. Although no specific figure was calculated, the costs of these requirements were believed to have "significant fiscal impacts" on the communities. Only in about one-half of the cases were the costs of these requirements fully or partially reimbursed by the federal government.[9]

In another study of a small sample of local jurisdictions, the Urban Institute estimated that the costs imposed by several major federal regulations averaged about $25 per capita, a figure equal to about 20 percent of all federal aid received by those jurisdictions.[10]

Such findings helped inspire a series of federal regulatory relief initiatives during the 1980s. Some of them, such as the ***State and Local Government Cost Estimate Act of 1981*** and Executive Order 12612 on Federalism (October 1987), were aimed specifically at intergovernmental mandates." Nevertheless, the growth of intergovernmental mandates and mandated costs continued throughout the 1980s and early 1990s, exacerbated by relative declines in federal aid, especially to local governments. As a result, the issue of federal mandates attracted more and more attention.

In 1986, the National Governors' Association and the Reagan administration undertook a two-year joint effort to identify and reduce federally imposed administrative burdens.[12] In 1990, the National Conference of State Legislatures began publishing the ***Mandate Monitor*** (now the ***Mandate Watch List)*** to track proposed federal legislation that would impose new regulatory costs and requirements on state governments.

Growing numbers of states and communities have launched independent efforts to inventory and assess the costs associated with federal mandates. Some notable examples include studies conducted by the cities of Anchorage, Columbus (Ohio), and Chicago, and the states of Tennessee, Ohio, and Virginia (see Appendix A).[13]

By 1993, each major public interest group representing state and local elected officials had made unfunded mandates a top priority issue. In order to generate greater public awareness, the groups joined together to sponsor a "National Unfunded Mandates Day" on October 27, 1993.

ACIR Examines the Issue

ACIR's concern for the intergovernmental implications of mandates and federally induced costs began almost 20 years ago. In its 1977 report ***Categorical Grants: Their Role and Design***,[14] the Commission focused early attention on crosscutting grant requirements (termed "generally applicable national policy requirements"), maintenance-of-effort requirements, and other forms of grant conditions. The following year, the Commission examined financial issues arising from state mandates affecting local governments in ***State Mandating*** of ***Local Expenditures***.[15] ACIR's 1984 report ***Regulatory Federalism: Policy, Process, Impact and Reform*** traced the growth in federal mandates during the 1960s and 1970s and classified them into four mandate types.[16]

Subsequent reports traced the growth of federal mandates and preemptions during the 1980s and began the difficult task of identifying the financial costs of intergov-

ernmental regulations.[17] The Commission added to knowledge about this field with reports on individual programs and requirements, including *Disability Rights Mandates, Medicaid: Intergovernmental Trends and Options, Intergovernmental Decisionmaking for Environmental Protection and Public Works, Mandates: Cases in State-Local Relations,* and *High Performance Public Works: A New Federal Infrastructure Investment Strategy for America.*[18]

Through these and other efforts, ACIR has developed a growing body of recommendations (see Appendix B), which include:

- Elimination of crossover sanctions as an enforcement tool in federal statutes (1984);[19]
- Full federal reimbursement for all additional direct costs imposed by new legislative mandates (1984);[20]
- Establishment of a "preemption notes" process (1) within the Congress to analyze the impacts of proposed preemption legislation prior to enactment, and (2) within the Executive Branch as part of the rulemaking process (1992);[21]
- Reexamination by the Supreme Court of the constitutionality of federal mandating (1993);[22]
- A two-year moratorium on unfunded or underfunded legislative, executive, and judicial mandates (1993);[23] and
- Enactment of a Mandate Relief Act that would require (1) regular inventory and cost estimation of all existing and proposed federal mandates, (2) analysis of the incidence of costs and the ability to pay of those parties on whom the costs fall or would fall, and (3) equitable federal sharing of the mandated costs or an affordable prioritization and scheduling of compliance by the nonfederal parties (1994).[24]

Congress Considers Federally Induced Costs

In 1993, the question of what to do about federally induced costs began to be considered seriously by the Congress. Thirty-four bills to provide "mandate relief" were introduced in the 103rd Congress, hearings were held in both Houses, and legislative action began.

It is clear that federally induced costs come from many sources and can be reimbursed in many ways. Thus, the question of what to do about federally induced costs has no simple answer. The proposed mandate-relief bills illustrate the diversity of approaches that could be taken.

Overview of Mandate-Relief Bills

The 34 mandate relief bills pending in the 103rd Congress are shown in Table 1-1 and are categorized below:

1) The largest number of bills (12) would revise the fiscal notes process; some would extend the process to the Executive Branch.
2) Seven bills would require that future federal mandates be funded in order to be enforceable. Three additional bills would seek a constitutional amendment to impose this requirement.
3) Two proposed Senate resolutions would require two-thirds votes for (a) a Senate committee to report a bill with an unfunded mandate and (b) the full Senate to pass a bill with an unfunded mandate. A proposed House resolution would express the sense of the House that unfunded mandates should not be passed.
4) Three bills would reimburse mandates.
5) Two bills would require an explicit statement of "intent to preempt" in any federal statute that would displace state and local authority in order for the preemption to provide a valid basis for federal agency rulemaking and court adjudication.
6) Other one-of-a-kind bills would (a) establish a federal mandates budget process, @) cap federally imposed regulatory costs, (c) establish a pilot program to study innovative regulatory approaches, (d) require federal agencies to consider the views of state and local governments under the *Regulatory Flexibility Act,* and (e) establish a Commission on Unfunded Federal Mandates to study federal-state responsibilities and develop plans for rationalizing mandates by recommending termination, suspension, consolidation, or simplification.

Questions Raised

In the process of holding hearings on a number of these bills, it became apparent that many hard-to-grasp details are crucial to finding workable solutions to the mandate relief issue. Questions raised by the hearings fall into the following categories:

What is a "Mandate" and Who is Responsible for Funding It?

Traditionally, the matching share in the federal grant programs was used to drive most federal initiatives. This has become less true as the federal government has moved away from grants toward unfunded regulatory initiatives (full funding of authorized grants has become increasingly rare).

Thus, the search for legal principles has increased. For example, should the costs of complying with requirements to protect civil rights, voting rights, and the rights of Americans with disabilities be federally reimbursed, or should they be considered a basic constitutional responsibility of state and local governments? If state or local governments have the choice of whether or not to participate in a federal program, does that remove the federal government's obligation to reimburse expenses?

Table 1-1

Mandate Relief Bills of the 103rd Congress

Total Relief Bills: 34

Type of Relief	Author	Bill	Date Introduced	Co-sponsors	Chamber	Committee Referral	Phone	Comments
Fiscal Note:								
12	Nickles	S 81	1/21/93	17	Senate	Governmental Affairs	(202) 224-5754	for regs. and legis. if enacted; same as HR 1086
	Hatch	S 490	3/3/93	0	Senate	Judiciary	( ) 224-5251	fy to regulations
	Moseley-Braun	S 563	3/11/93	9	Senate	Gov'tal Affairs, Budget	( ) 224-2854	fy to legislations
	Dorgan	S 1592	10/27/93	7	Senate	Gov'tal Affairs, Budget	( ) 224-2551	cost estimate for legis. and regs; with penalty if bill has no estimate
	Glenn	S 1604	10/29/93	5	Senate	Governmental Affairs	( ) 224-3353	estimates for governments
	Ewing	HR 830	2/5/93	251	House	Judiciary	( ) 225-2371	pertains only to regulations
	Clinger	HR 886	2/16/93	60	House	Gov't Operations, Rules	( ) 225-2738	for regs. legis.: no penalty;also, sorting of responsibilitie
	Shays	HR 1006	2/18/93	22	House	Rules	) 225-5541	for legislation only: contains penalty if bill does not have estimate
	Baker (LA)	HR 1088	2/24/93	16	House	Gov't Operations, Rules	) 225-3901	for egs. and legis.; contains penalty if bill has no ti same as S 81
	Moran	HR 1295	3/11/93	243	House	Gov't Operations. Rules	(202) 225-4376	cost estimate for legis and regs; with penalty if bill has no estimate
	DeLay	HR 3446	11/4/93	4	House	GovY Operations	(202) 5951	like S I and HR 08
	cox	HR 4006	3/10/94	0	House	Gov't Operations, Rules	(202) 2255611	for regs. and legis; no penalty
Reimbursement:								
3	Stump	HR 410	1/5/93	21	House	Gov't Operations, Judiaary, Rules	(202) 225-4576	
	Barca	HR 4127	3/24/94	5	House	GovY Operations		
	Sasser	S 1606	11/1/93	1	Senate	Governmental Affairs	(202) 224-3344	reimburse for 20% of mandates: includes mandate moratonum
Funding Else Requirements Waived:								
7	Condit	HR 140	1/5/93	219	House	Gov't Operations	(202) 225-6131	
	Snowe	HR 369	1/5/93	21	House	Gov't Operations	(202) 225-6306	
	Hefley	HR 894	2/16/93	29	House	Rules	(202) 225-4422	also includes fiscal note; mth penalty provisions; no minimum impact
	Herger	HR 3429	11/3/93	2	House	Gov't Operations	(202) 225-2665	
	Dreier	H Con Res 51	2/24/93	24	House	Gov't Operations	(202) 225-2305	
	Kempthorne	S 993	5/20/93	53	Senate	Governmental Affairs	(202) 224-6142	
	Coverdell	S 1188	6/30/93	6	Senate	Governmental Affairs	(202) 224-8049	
Pre-emption Clarification:								
2	Levin	S 480	3/2/93	1	Senate	Governmental Affairs	(202) 224-6221	clarify application of federal pre-emption of state & local laws
	Thomas	HR 2327	5/27/93	15	House	Gov't Operations	(202) 225-2311	clarify application of federal pre-emption of state 8 local laws
Constitutional Amendment Prohibiting Unfunded Mandates:								
3	Franks (NJ)	HJRes 254	8/6/93	13	House	Judiciary	(202) 225-5361	constitutional amendment prohibiting unfunded mandates
	Gillmor	HJRes 282	10/26/93	5	House	Judiciary	(202) 225-6405	constitutional amendment prohibiting unfunded mandates
	Brown	SJRes 148	10/27/93	11	Senate	Judiciary	(202) 224-3270	constitutional amendment prohibiting unfunded mandates
Other:								
7	Condit	HRes277	10/15/93	26	House	GovY Operations	(202) 225-6131	expresses sense of the House regarding unfunded mandates
	Smith (TX)	HR 3421	11/1/93	79	House	Gov Ops , Rules Judiciary	(202) 2254236	institutes a federal mandates budget process
	Torkildsen	HR 3504	11/10/93	12	House	Gov't Operations, Rules	(202) 225-8020	mutli-faceted approach; reports, reimbursement, cost-estimates w/penalty
	Hatch	S 13	1/21/93	5	Senate	Governmental Affairs	(202) 224-5251	caps regulatory costs
	Gregg	S648	3/24/93	20	Senate	Governmental Affairs	(202) 224-3324	mutli-faceted approach: reports, reimbursement, cost-estimates w/penalty
	Gregg	S Res 157	10/27/93	5	Senate	Rules 8 Administration	(202) 224-3324	requires 2/3 vote for Senate cmte. approval of mandate bill
	Gregg	S Res 158	10127193	5	Senate	Rules & Administration	(202) 224-3324	requires 2/3 vote for Senate approval of mandate bill or amndmt.

Source: National Conference of State Legislatures

Legally, these questions have been considered to be largely settled by the **U.S.** Supreme Court—federal reimbursement generally *is* not required. Nevertheless, two recent federal cases reopen the possibility that federal mandates that "commandeer" state legislatures or executive officers into the service of a federal program may be impermissible if they are not paid for. The **U.S.** Supreme Court established this principle in New York v. United States, **112** S.Ct. **2408 (1992),** in a hazardous solid waste liability case. The **U.S.** District Court applied the same reasoning in striking down the federal checks on handgun buyers required by the Brady Act in Printz v. United States (May **16, 1994).**

Politically, these questions are even more hotly debated. The federal deficit leaves little room for using federal money to calm this debate. The option of abandoning enforcement of federal requirements when the federal government does not pay for them is politically as difficult as finding new money to fund them.

Would more sharply defined boundaries between federal, state, and local responsibilities help clarify mandate relief issues? How could these boundaries be defined? Should the Congress be better informed about state and local roles and responsibilities before it imposes new roles and costs on them? In particular, should the Congress be better informed about the effects of state mandates affecting local governments?

How Should Reimbursement Amounts be Calculated?

For example, if the federal, state, and local governments all share in the benefits of the federally required program, should they share proportionally in meeting the costs, or should the federal government pay all the costs because it initiated the requirement? Should a new reimbursement program cover past compliance costs as a matter of fairness to state and local governments that took early action? If the federal government changes a program in a way that increases state and local costs, should it reimburse the added costs even though it may not have covered the original program? Should a federal provision that allows costs to be passed on to those who cause a problem or benefit from compliance be considered reimbursement? If an independent federal commission or a federal court imposes extra costs on state and local governments, should the Congress be responsible for estimating those costs and finding reimbursement funds?

Who Should Determine the Amounts to be Reimbursed?

Should the Congressional Budget Office (CBO) be responsible for estimating the costs of requirements imposed by federal courts and administrative agencies? Is there a need to estimate the total costs imposed on state and local governments by federal requirements? Should these costs be compared with the amounts of federal aid? Should all forms of federal aid **be** counted? Should the benefits of federal requirements to state and local governments and to the national economy also be estimated? Should those benefits be considered reimbursements? Should the costs and benefits affecting states and localities be differentiated by government? How should these various estimates be related to each other?

Should the Congress Take Further Action to Reform the Executive Rulemaking Process to Help Provide Mandate Relief?

The Clinton Administration has taken steps to:

1) Involve state, local, and tribal governments more deeply in the administrative rulemaking process;

2) Avoid imposing new mandates not required by law; and

3) Review regulations to ensure that they are needed and are no more burdensome than necessary.

At the same time, some of the mandate relief bills introduced in the Congress would add fiscal notes and other requirements to the rulemaking process. Should such legislation be passed, and what should it include? In particular, should legislation provide an explicit basis for the Clinton administration reforms, and is there a need to amend the Federal Advisory Committee Act to make it easier for state, local, and tribal government officials to interact with federal agencies in the rulemaking process? Should a threshold be applied when determining which executive agency actions should include a cost estimate? Should executive branch cost estimates be exempt from judicial review?

Potential Elements of the "Mandate-Relief" Solution

Solutions are needed to three broad problems: **(1)** informing the process, (2) disciplining the system, and **(3)** funding federally induced costs.

Informing the Process

Estimates of the total annual cost impact of federal actions on state and local government budgets range from **2** or **3** percent to 20 percent or more. There is no good fix on these figures, either nationwide or for individual state and local governments, yet they are at the heart of the issue. If the impact is negligible, it is not worth a lot of political attention and energy. If it is a fifth or more of a state or local government budget, it is a serious challenge to federalism.

Estimates of costs to state and local governments from proposed federal actions also are inadequate. They:

1) Are prepared quickly, without generally accepted methodologies or data bases representing major cost determinants and how the costs are imposed among the various types of government;

2) Seldom take into account offsetting benefits and cost-recovery mechanisms to introduce the concept of net costs;

3) Often are made too late to be used in developing the legislative or regulatory proposal;

4) Seldom are recalculated for competing alternatives and modifications made to proposals before adoption; and

5) Frequently are not based on detailed assumptions about implementation alternatives.

Three potential means of better informing the process have been suggested: (1) better cost estimates for proposed federal actions, (2) cost accounting standards to facilitate the collection of reliable information, and (3) an inventory of federally induced costs updated annually to track their total impact over time.

Better Cost Estimates. It has been suggested that the congressional fiscal notes process be improved and extended to agency rulemaking. Estimates could be made earlier, while legislative and regulatory proposals are being formed and while the most cost-effective and least burdensome alternatives are being sought. More time might be taken in making the estimates, and improved methodologies might be developed. Reactions to federal requirements by state and local governments, as well as the diverse effects of the requirements also might be explored.

Costs to the private sector could be estimated to make the analysis more complete and realistic, and the related public and private benefits could be estimated and compared to costs to net out the effective impact. However, lest the amount of work involved in preparing these more ambitious analyses overwhelm the process, the government's analytical resources might have to be either increased or more narrowly applied to relatively few major proposals each year.

A research study may be needed to improve the methodologies for estimating costs and benefits. It has been suggested that these methods be able to accommodate proposals that incorporate risk assessments, prioritization of compliance schedules, and waivers allowing innovation and flexibility in compliance.

Intergovernmental networks could be established, as in Florida and Virginia, to facilitate and improve the estimates. Using the expertise and specialized data bases of administering agencies also might improve the quality. As the methodologies improve, they could be shared between the executive and legislative branches of the federal government, and between the federal, state, and local governments.

A cooperative process might (1) reduce the workload on any single agency, (2) broaden the number of programs for which estimates could be prepared, (3) improve the quality of estimates, and (4) improve intergovernmental confidence in the estimates.

To assist in the congressional reauthorization process, for example, one suggestion is that the committee having jurisdiction ask the administering agency to supply, one year before the end of the current authorization period, an analysis of the federally induced costs, how and by whom they have been funded, and alternatives for improving program affordability and intergovernmental equity. This analysis could be prepared in consultation with state and local governments to help make it as realistic as possible.

Cost Accounting Standards. One way of improving estimates of future costs is to build up historical data for similar and related activities. Such data also would provide an actual-cost baseline for calculating the current total of federally induced costs and for identifying the marginal costs added by new mandates. Cooperatively developed accounting standards would assure confidence in the figures, no matter who prepares them. Caution should be exercised in moving toward cost accounting, however, because it is likely to be costly.

Inventory and Tracking System. If the total impact of federally induced costs on state and local governments is the nub of the problem, then some agency needs to be charged with compiling the costs and reimbursements associated with the federal actions. On the legislative side, CBO is the logical choice. In the Executive Branch, OMB's Office of Information and Regulatory Affairs (OIRA) would be a logical choice. The key questions are whether the costs are increasing or decreasing, and by how much. Such a system would take time to establish and could be costly. Interagency cooperation might make it feasible.

Disciplining the System

Information alone may not be enough to limit federal imposition of added costs on state and local governments. The congressional fiscal notes process has been in place for over a decade without noticeably slowing new costs. The Federalism Executive Order, which calls for federalism assessments, also has had little effect since it was signed in 1987.

The enhanced intergovernmental consultation provisions in the Clinton administration's new executive orders on agency rulemaking (12866 and 12875) show promise, but they are still essentially informational, and they cannot ignore or contradict congressional intent. Thus, they alone may not be able to reduce new federally imposed costs significantly.

Even the constitutional and judicial limits on federal intrusion into the affairs of state and local governments have lost their effectiveness in the eyes of the U.S. Supreme Court. Thus, any additional disciplining of the mandate process probably must come from the Congress.

A number of the pending mandate relief bills seek to go beyond past attempts to discipline the process. Reflecting the frustration of state and local officials who see their political accountability and budget authority being eroded, these bills seek real limits on the creation of new mandated costs. To be effective in reducing the growing potential for federal-state-local conflict engendered by the rise in unreimbursed costs, these limits would hold federal policymakers responsible for their actions.

There are several ways to introduce greater discipline into the legislative and rulemaking processes to limit or reverse unfunded federal requirements: (1) process improvements, (2) criteria for federal funding, **(3)** caps, **(4)** realignment of the federal system, and *(5)* moratoria.

Process Improvements. The fiscal notes process could be tightened by raising the standards for preparing federalism assessments, requiring that cost estimates be available for consideration before the markup of a bill, and providing a point-of-order procedure to ensure consideration of adequate information in developing the proposal before it can be brought forward for adoption.

Criteria **for** Federal Funding. Both constitutional and practical criteria might be considered. For example, constitutional criteria might provide that civil rights protections (perhaps with certain exceptions) might not be reimbursable, while clearly enumerated federal powers such as foreign affairs (including immigration-related costs) might be fully reimbursable. Implied powers under the Constitution might be candidates for shared funding on some consultative or negotiated basis.

"Practical" criteria might include:

1) Avoiding excessive financial and technical burdens on individual state and local governments that occur because of their size or particular circumstances;

2) Demonstrating affordability and workability for the affected governments;

3) Full federal funding of clear national goals that have strict deadlines and inflexible uniform standards of compliance;

4) Full federal funding of required administrative costs in federal-aid programs to provide incentive for the federal government to keep these requirements simple and efficient; and

5) Making all costs of meeting grant conditions (including crossover sanctions) reimbursable as part of project costs.

These examples illustrate the complex nature of designing and establishing criteria for federal funding. Nevertheless, such criteria would be essential if the concept of "unfunded mandates" were to be used in a practical way.

Caps. A cap on the rate of growth or total amount of federally induced costs could offer a solution to the problem because it is difficult for most state and local governments to adjust quickly to budgetary shocks. This introduces the idea of a regulatory budget.

Federally induced costs are real dollar costs that show up in state and local budgets. Thus, it could be argued that the federal government has a responsibility to limit these costs because it creates them.

Exceptions to caps could be provided through (1) a declaration of national emergency and (2) a separate (perhaps supermajority) vote in the Congress.

Realignment **of** the Federal System. Reallocating functions and revenue sources among the federal, state, and local governments often has been proposed as a means of "sorting out" and rebalancing the federal system. If this were done carefully, it **is** argued, each government would have the resources it needs to meet its own responsibilities. A mandate review commission, with adequate time and resources, might reevaluate federal requirements and recommend terminations, consolidations, and other modifications of mandates to create a more perfect balance.

Moratoria. In the view of many state and local officials, the solution for unfunded federal requirements is to call a halt—"no new money, no new mandates." **A** moratorium could be statutory or constitutional. It could be complete or could have some exceptions that are either enumerated or enacted on an ad hoc basis by separate (perhaps supermajority) votes.

If the moratorium option were adopted, the concept of "unfunded" would have to be carefully defined and applied. In the case of reauthorizations of requirements, would only "additional" costs or the whole reauthorization be counted as new? In the latter case, most existing requirements eventually would have to be federally funded.

Funding Federally Induced Costs

It is not enough to know how much a new federal requirement will cost. It also should be demonstrated how the costs can be met. Reimbursement of the estimated costs through direct funding in the federal budget is the simplest way to make this demonstration. The federal deficit limits the use of this method, however. **Thus,** the search for financial partners, "creative financing" techniques, and affordability analyses is increasingly attractive.

Many solutions to these three problems have been proposed. Finding the money to fund new federal requirements will not be easy in today's budget climate. Given this situation, it appears likely that creative approaches to reimbursement will be considered. Beyond appropriation of funds for grants or loans, there likely will be interest in:

1) shared revenues;

2) payments in lieu of taxes;

3) user fees;

4) mixed public and private funds;

5) in-kind contributions;

6) tax expenditures;

7) stretched-out schedules for compliance (based on risk assessments, good peer-reviewed science, and local government priorities for using available funds most cost effectively to ensure the greatest possible improvements in the health, safety, and rights of their citizens); and

8) waivers from the strict letter of requirements for hardship cases.

How to "score" these reimbursements could become a key question.

Direct reimbursements for each new federal requirement, on an individual basis, could be cumbersome. Indirect reimbursement, such as a new general revenue sharing program recalibrated each year to be about the same amount as the total of all "unreimbursed mandates" for that year, would be simpler to administer, but it might not always make a perfect match with those governments that pay the costs and it would have to be based on a good estimate of total federally induced costs. The indirect route to reimbursement has been adopted in Connecticut.[25]

Conclusion

The issues outlined above are difficult, and objective research alone is not likely to resolve them. Additional intergovernmental dialogue also is needed. This report suggests a framework for that dialogue.

Notes

[1] See, for example, Susan A. MacManus, " 'Mad' about Mandates: The Issue of Who Should Pay for What Resurfaces," *Publius: The Journal of Federalism* 21 (Summer 1991): 59-76.

[2] National Conference of State Legislatures (NCSL), *Mandate Catalogue* (Washington, DC, December 1993).

[3] Several bills attracted considerable support. Early in 1994, a bill introduced by Rep. James P. Moran to improve the congressional process for estimating mandate costs (H.R. 1295) had 243 cosponsors. Among the bills that would waive compliance with unfunded federal mandate requirements, H.R. 140, introduced by Rep. Gary A. Condit, had 219 cosponsors in the House of Representatives and S. 993, sponsored by Sen. Dirk Kempthome, had 53 cosponsors in the Senate.

[4] For analyses of state mandate reimbursement programs, see U.S. Congress, Senate, Subcommittee on Intergovernmental Relations, 1985 *Hearings;* U.S. General Accounting Office (GAO), *Legislative Mandates: State Experiences Offer Insights for Federal Action* (Washington, DC, 1988); and U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Mandates: Cases in State-Local Relations* (Washington, DC, 1990).

[5] There is no universally accepted definition of a federal mandate. The definition used above is consistent with the concept as it is commonly understood in political debate, but it is broader than the definition used in several previous ACIR reports.

[6] See ACIR, *Regulatory Federalism,* Appendix 1; and NCSL, *Mandate Catalogue.*

[7] ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* (Washington, DC, 1992), p. 9

[8] Edward I. Koch, "The Mandate Millstone," *The Public Interest* 61 (Fall 1980): 42.

[9] Catherine H. Lovell et al., *Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts* (Riverside: University of California, Graduate School of Administration, 1979), p. 162.

[10] Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," in U.S. Congress, Joint Economic Committee, *Government Regulation: Achieving Social and Economic Balance,* Vol. 5 of *Special Study on Economic Change* (Washington, DC, 1980), p. 327.

[11] These initiatives are described and evaluated in ACIR, *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s* (Washington, DC, 1993); and *Regulatory Federalism;* and Marshall T. Goodman and Margaret T. Wrightson, *Managing Regulatory Reform* (New York: Praeger, 1987).

[12] White House Office of Intergovernmental Affairs and Office of Management and Budget, *Regulatory Refonii: The Administration's Implementation Status Report on the National Governors' Association Regulatoty Refonn Initiatives, Phase II* (Washington, D C OMB, August 1988, p. ii).

[13] See Municipality of Anchorage, *Paying for Federal Environmental Mandates: A Looming Crisis for Cities and Counties* (Anchorage, 1992); City of Chicago and Roosevelt University, *Putting Federalism to Work for America: Tackling the Problems of Unfunded Mandates and Burdensome Regulations,* (Chicago, 1992); Environmental Law Review Committee (Columbus, Ohio), *Environmental Legislation: The Increasing Costs of Regulatory Compliance to the City of Columbus* (Columbus: Health Department, 1992); Tennessee Department of Finance and Administration, "The Impact of Federal Mandates" (Nashville, April 1992); and Virginia General Assembly, Joint Legislative Audit and Review Commission, *Catalog of State and Federal Mandates on Local Governments* (Richmond, 1992).

[14] ACIR, *Categorical Grants: Their Role and Design* (Washington, DC, 1997).

[15] ACIR, *State Mandating of Local Expenditures* (Washington, DC, 1978).

[16] ACIR, *Regulatory Federalism.*

[17] ACIR, *Federal Regulation of State and Local Governments* and *Federal Statutory Preemption of State and Local Authority.*

[18] ACIR, *Mandates: Cases in State-Local Relations* (1990), *Intergovernmental Decisionmaking for Environment and Public Works* (1992), *Medicaid: Intergovernmental Trends and Options* (1992), and *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Banier Removal* (1989).

[19] ACIR, *Regulatory Federalism*

[20] Ibid.

[21] ACIR, *Federal Statutory Preemption of State and Local Authority.*

[22] ACIR, *Federal Regulation of State and Local Governments.*

[23] Ibid.

[24] ACIR, *High Performance Public Works: A New Infrastructure Investment Strategy for America* (Washington, DC, 1993).

[25] Geary Maher, "Connecticut's Consideration and Rejection of a Mandate Reimbursement Program," in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates: What Are the Alternatives?* (Washington, DC: Urban Institute Press, 1990). See also a reprint of this article and descriptions of the approaches in six other states in ACIR, *Mandates: Cases in State-Local Relations.*

Intergovernmental Tensions Associated with Federally Induced Costs

2

Federally induced costs have given rise to eight specific intergovernmental concerns, which are described in this chapter:

1) State and local governments perceive these costs to be high and growing.
2) The combined costs of multiple federal actions are poorly considered.
3) State and local priorities are distorted.
4) State and local initiative is eroded.
5) Some of the costs are unnecessary.
6) State and local resource limitations are not considered.
7) State and local political accountability is distorted.
8) A double standard sometimes is applied to compliance.

Costs Imposed

Expenditures required by federal laws, regulations, or court orders can be large. For example:

- The **U.S.** Department of Transportation estimated that the total costs of complying with its 1986 handicapped nondiscrimination rules for mass transit systems would total over *$5* billion in 1992 dollars, spread out over 30 years.[1]
- The **U.S.** Department of Labor estimated in 1987 that the application of the *Fair Labor Standards Act* to state and local employees would cost those governments almost $1.5 billion over ten years.[2]
- The Environmental Protection Agency estimated that the costs of removing asbestos from public schools, as mandated by the *1986 Asbestos Hazard Emergency Response Act,* would total more than $2.5 billion over a 30-year compliance period.[3]

These three examples present prospective cost estimates developed by federal agencies prior to promulgating rules and regulations. Such estimates are by nature preliminary and sometimes highly inaccurate.

The **U.S.** Conference of Mayors (USCM) and the National Association of Counties (NACo) sought to highlight the costs of several specific federal mandates in 1993 by reporting compliance costs based on a sample survey (see Table 2-1). The USCM survey produced responses from 314 cities for the costs of ten federal mandates. Based on this survey, the estimated cost for all cities in 1993 was *$6.5* billion. NACo received survey responses from 128 counties for 12 mandates. Based on this survey, the estimated cost for all counties in 1993 was **$4.8** billion.

The level of confidence that can be placed in these cost estimates in unknown, and there has been no agreement on the various measures that might be used to put these figures into proper financial perspective. **A** staff report prepared for the Senate Committee on Environment and Public Works was highly critical of the methodology used in the **USCM** and NACo studies.[4]

ACIR Analysis of the Estimates

A preliminary ACIR analysis of mandate cost estimates also raised several questions about the scope, methodology, and interpretation of the results.[5] The estimates were prepared by USCM; NACo; EPA; Tennessee, Ohio, and Virginia; Columbus and a group of nine other Ohio cities; Lewiston, Maine; and Anchorage, Alaska (see Appendix A).

In general, ACIR found that, although several state and local governments have sought to provide good, com-

Table 2-1

City and County Estimates of Total Annual Costs to Comply with Certain Unfunded Federal Mandates, Fiscal Year 1993

(in millions)

Program	Cities	Counties
Clean Water Act/Wetlands	$3,613	$1,186
Solid Waste Disposal/RCRA	882	646
Safe Drinking Water Act	562	164
Clean Air Act	404	302
Americans with Disabilities Act	356	294
Fair Labor Standards Act	212	262
Underground Storage Tanks	138	176
Endangered Species Act	37	120
Asbestos Removal (AHERA)	129	NA
Lead-Based Paint Removal	118	NA
Immigration Act	NA	1,536
Bond Arbitrage Restrictions	NA	78
Superfund Amendments	NA	43
Davis-Bacon Act	NA	11
Total	6,451	4,818

NA = Not asked

Source: U.S. Conference of Mayors/Price Waterhouse, *Impact of Unfunded Federal Mandates on US Cities: A 314 City Survey* (Washington, DC: USCM, 1993), Table 1; National Association of Counties/Price Waterhouse, *NACo Unfunded Mandates Survey* (Washington, DC: NACo, 1993), Table 1.

prehensive information about federal mandate costs and their budget effects, there are still gaps and unresolved issues. Some studies have concentrated only, or primarily, on environmental mandates, or on a sample of mandates.

All the estimates reviewed by ACIR were based on a limited number of federal actions that impose costs on state and local governments. In addition, the city and county estimates do not include many other local governments that are subject to mandate costs, including townships, school districts, and other special districts. Consequently, the USCM and NACo studies are neither comprehensive nor inclusive for all states or local governments. They do, however, provide some national perspective to mandate costs.

According to the USCM study, "cities reported that unfunded mandate costs consume an average of 11.7 percent of their locally raised revenues." The NACo study arrived at a comparable figure of 12.3 percent, but added that "individual counties reported much higher percentages." No details were provided about how these percentages were estimated.

The U.S. Bureau of the Census reports that 1991 general revenue from own sources totaled $118.1 billion for cities and $87.4 billion for counties. Based on these revenues, the costs of the federal mandates examined by USCM and NACo represented *5.5* percent of the revenues collected by the cities and counties in 1991. These percentages are less than half those in the city and county studies. The higher percentages reported by USCM and NACo may have resulted from greater effects of mandates on the larger governments that were sampled or from using a smaller revenue base, such as only general fund revenues, in the percentage calculations.

The EPA study—which estimated in 1990 that the costs of complying with all of its mandates in 1995 would be $3.9 billion for states and $27.9 billion for local governments—took a different approach. EPA related municipal mandate costs to households, and estimated "that in the coming years, the average household will be charged an additional $100 annually for locally provided environmental services." It is not clear whether this estimate is based only on city expenditures, or on cumulative state and local expenditures. County and state mandate costs are not expressed as costs per household in the study.

Issues in Evaluating Mandates' Fiscal Effects

Any attempt to evaluate the fiscal effects of mandates must contend with a variety of difficult issues. Perhaps the most troublesome will be how comprehensive such studies should be and how to allocate costs. The studies ACIR evaluated raised questions about methodology and how to interpret results. For example:

Should the definition of mandates be limited to outright unfunded directives, or should it include requirements associated with federal grants and the effects of federal tax actions? There currently is a great range in the definitions. Federal mandates and state policies also have become intertwined in many instances, making it difficult to determine which government is responsible for the costs, especially the cost incurred by local governments.

Medicaid illustrates one key definition problem, namely, how to treat matching grant programs. Some officials consider Medicaid a federal aid program that helps states meet their responsibilities; hence, they do not see it as a mandate. Others view the whole program as a federal mandate, while still others believe only nondiscretionary costs added since 1987 are mandates.

The Tennessee study (see Appendix A) raises a tax issue that illustrates another type of definition problem. Should food stamps, which are provided at full federal cost (except for administration) to aid needy state residents, be considered a mandate because of loss of sales tax revenues on food purchased with them?

When both state and federal laws or regulations require similar action, which government should be responsible for the unfunded local mandate? Solid waste disposal has been a

persistent local problem in recent years, and has been subject to increasing state regulation. But hazards created by improper handling of solid wastes also have been a federal concern that has resulted in federal laws and regulations. This ambiguity illustrates the difficulty in determining which government should be responsible for mandate costs.

Should costs that local governments pass through to users in the form of *fees and charges be differentiated from costs payable from general taxes?* For example, water users pay for a direct benefit in terms of improved water quality. At the same time, however, individual users have little or no voice in the level of quality desired for use. The amount paid by the user is based on the amount of water used and on the extent of water treatment needed to comply with federal or state mandates. In contrast, mandate costs payable from general taxes may provide no direct benefit to the taxpayer, and the amount of taxes paid usually is not related to benefits received.

Should mandate costs that are incorporated into budget bases or rate schedules be differentiated from future costs that will add to spending or rates? Calculating those costs creates a practical problem of determining what percentage of existing costs is attributable to past mandate requirements, including how far back to go in determining such requirements.

Should the effects of mandates be shown as a percentage of budgets, own-source revenues, costs per household, or on some other basis to make them more meaningful? In many cases, there is an important difference in effect between existing costs and future costs. Frequently, it is only new or additional costs that cause most governments to have budget problems. For example, a city that has upgraded its sewage treatment to required federal standards and has included the costs in its current sewer rates will have a problem only when new or increased requirements are imposed. Mandates that require annual operational or service expenditures, however, may become more burdensome during periods of fiscal stress for a state or local government.

Other issues include (1) how to show future but unscheduled and unfinanced mandate costs to illustrate effects on annual budgets, and (2) how to treat these and other issues in mandate relief legislation.

Combined Impacts are Poorly Assessed

As suggested in Table 2-1, individual federal mandates should not be looked at in isolation. The combined effects of multiple requirements outweigh the costs of any single regulation.

Yet, information about such additive costs is fragmentary at best and frequently unavailable, prompting the type of independent cost estimation surveys summarized above. Few cost data are available from the federal government for regulations imposed prior to 1981, when neither the Congress nor the Executive Branch routinely attempted to estimate the costs or benefits or the net financial effects of proposed rules or statutes. Although such procedures are now in place in the Congress, the resulting cost estimates are often incomplete, hastily prepared, and seldom updated. Not all legislative and regulatory mandates are included, and there is no procedure to provide information about the costs of judicial mandates.[6]

Such information gaps undermine policymaking and performance in all units of government. Federal policy objectives may be unexpectedly undermined if policymakers are unaware of existing regulations and requirements that are competing for state and local attention and resources. For their part, state and local government officials cannot establish effective priorities if they are frequently blindsided by costly new federal requirements.

The cumulative costs of multiple federal mandates may be substantial. Based on the data reported by cities and counties in Table 2-1, local government associations have estimated that the sample of unfunded federal mandates selected for review were equal, on average, to about 12 percent of local tax revenues in 1993.' Available data from federal government sources suggest comparable cumulative costs.

Many of the most expensive federal requirements involve minimum environmental standards that must be met by states and their political subdivisions. Table 2-2 contains EPA estimates of the total annualized state and local costs of complying with federal environmental directives in 1986 dollars. State costs were estimated to be $3.0 billion in 1987, increasing to a projected $4.5 billion in 2000. Spending by local governments was estimated to increase from $19.2 billion in 1987 to $32.6 billion in 2000.

Table 2-2
Annualized State and local Costs to Comply with Environmental Mandates, 1972-2000
(millions of 1986 dollars)

Funding Source	1972	1980	1987	1995	2000
State Government	1,542	2,230	3,025	3,911	4,476
Local Government	7,673	12,857	19,162	27,913	32,577

Source: U.S. Environmental Protection Agency, *Environmental Investments: The Cost of a Clean Environment* (Washington, DC, 1990), selected data from pp. 8-49 through 8-51. These estimates use a mid-range discount rate of 7 percent and include funding to meet EPA's air, water, land, chemicals, and multimedia regulations.

Although environmental regulations impose some of the greatest costs on state and local governments, they are not the only source of mandated expenditures. Other costly regulations involve health care, access for the physically disabled, and employee pay and working conditions. Table 2-3 includes a partial list of such mandates for which cost

Table 2-3

Official Cost Estimates from Selected Fiscal Notes and Regulatory Analyses

(millions)

Year	Title	Estimated Cost 1991	Estimated Cost Multi-Year Period[1]
1983	**Social Security Amendments of 1983**[2]	$838	$5,334
1983	*National Oil and Hazardous Substances Pollution Contingency Plans*[3]	6	651
1984	Hazardous and Solid Waste Amendments of 1984		
	Training and Management	0	33
[1988]	*Underground Storage Tanks*	100	2,250
1985	**Medicare Coverage for New State and Local Employees (COBRA)**	306	1,382
1986	**Pipeline Safety Authorization**	57	213
1986	**Water and Reclamation Projects**	9	23
1986	*DOT Handicapped Nondiscrimination Rules*	178	5,357
1986	School Asbestos Removal		
	Removal and Cleanup	153	2,508
1986	**Water Resources Development Act**	548	1,458
1986	**Employment for the Disabled Act**	7	19
1986	*Safe Drinking Water Amendments (SDWA)*		
	Filtration	269	3,295
1986	**Education of the Handicapped Amendments**	600	1,175
1986	**Veterans Benefits and Health**	2	10
1987	*Hazardous Substances List Planning and Notification*	11	133
1987	*Fair Labor Standards Act Amendments*	85	1,447
1988	**Lead Contamination Control Act**	6	14
1988	**Medicare Catastrophic Coverage Act**	190	780
1988	**Family Support Act**	160	136
1988	**Ocean Dumping Ban Act**	33	165
1988	*Community Right-to-Know Act*	29	317
1989	**Medicare Catastrophic Repeal**	460	1,115
1990	*Hazardous Substances*	130	173
	Total	$4,174	

[1] Periods vary from 5 to 30 years. CBO estimates are generally made only for 5 years. Some agency estimates are for total lifetime costs, over 20 or 30 years. Total lifetime costs are used when available.

[2] Cost estimates for federal statutes highlighted in bold type were obtained from CBO estimates prepared for legislative consideration.

[3] Cost estimates for federal requirements highlighted in italics were obtained from regulatory impact analyses prepared by federal agencies during the rulemaking process.

estimates were available from the Congressional Budget Office or other federal agencies. For fiscal 1991, the estimated costs of these selected requirements totaled almost $4.2 billion.

For local governments in particular, the financial burdens of mandates have also grown because of reductions in federal financial assistance. By one estimate, federal aid as a share of local revenues declined 73 percent for counties and 57 percent for cities between 1980 and 1986,[8] and continued to decline at an average annual rate of 8.3 percent for cities and 10.3 percent for counties between 1985 and 1991.[9]

There also have been recent changes in federal tax law that make state and local revenue raising more difficult. Volume caps and other limitations were placed on certain state and local government bonds in 1982, 1984, 1986, and 1990. The federal income tax deduction for state and local sales taxes was eliminated in 1986, and deductions for state and local income taxes were restricted for high-income individuals in 1990.

Distortion of State and local Priorities

Another problem arises from the impact of federally induced costs on state and local budget priorities. When state and local officials are required to change laws or appropriate funds to comply with federal rules, they are unable to allocate budgets in accordance with locally determined needs. In some cases, federal mandates may dramatically skew the priorities of state and local jurisdic-

tions. As one governor recently explained his problem with federal Medicaid requirements: "One of my major frustrations is I need more money for education and infrastructure. It's all gobbled up by skyrocketing health care."[10]

The cumulative effect of multiple federal mandates creates a particularly difficult problem for 49 state governments, which, unlike the federal government, must meet constitutional or statutory balanced budget requirements." With rare exceptions, additional spending requirements are financed by reductions in other areas or by tax increases.

Erosion of Initiative

Uniform national standards and procedures often are favored as a way to guarantee a minimum level of effort in meeting certain federal goals. Imposing one level of services or method of implementation, however, erodes the ability of state and local governments to experiment and test varying programs under different circumstances.

Bilingual Education. One example of rigid federal directives is in the bilingual education program. The rules governing this program, intended to enhance learning by students who speak limited English, favor partial instruction in a student's native language. Alternative approaches—such as language immersion and "English as a Second Language"—are strictly limited, despite serious obstacles to implementing transitional bilingual education in many jurisdictions and an absence of scientific evidence to justify such an approach. As one comprehensive evaluation study concluded:

> The case for the effectiveness of transitional bilingual education is so weak that exclusive reliance on this instructional method is clearly not justified. Too little is known about the problems of educating language minorities to prescribe a specific remedy at the federal level. . . . Each school district should decide what type of special program is most appropriate for its own unique setting.[12]

Medicaid. Similarly, the federal-state Medicaid program, which is intended to provide basic health care to the indigent, is beset by serious problems that are widely acknowledged by federal, state, and local officials. Medicaid costs have been growing exponentially, while millions of low-income individuals lack health insurance coverage. Yet, innovative state proposals to restructure health care—including those that promise to provide broader coverage at potentially lower costs—frequently have been blocked by federal rules and a reluctance to provide waivers for experimental programs. Relying on waivers, moreover, can subject state experimentation to the vagaries of presidential-congressional relations and interest-group politics.

Unnecessary Costs

Federal directives also may produce waste and inefficiency in government. Sophisticated solutions or complicated administrative procedures that assume the availability of highly skilled personnel or advanced technology may force unduly expensive requirements on jurisdictions when a simpler solution may be as effective or more cost effective.

Testing for Pollution. For example, federal water pollution regulations require the use of "best available control technology" (BACT). Jurisdictions may be required to adopt a more costly treatment method even when it will have a marginal effect on pollution levels. At the same time, rigid technology-based standards lack incentives for experimentation with innovative pollution abatement procedures that may prove more effective.[13]

Drinking Water. Similarly, the *Safe Drinking Water Act* requires that localities invest in testing for a variety of pollutants, including those unlikely to appear in the local water supply. For example, some cities in the continental U.S. have criticized requirements to test their drinking water for an agricultural pesticide currently used only on pineapples in Hawaii. EPA argues, however, that past use of this long-lasting chemical may pose future dangers in other parts of the nation and that waivers are available where justified.

Inattention to State and Local Resource Limitations

Just as the problems confronting communities throughout the United States often vary widely, so do their resources. Severe problems of poverty, aging infrastructure, and eroding tax bases confront many large cities, for example.

Many Small Communities. Less well recognized are the unique problems that confront many smaller, mostly rural communities. Although a majority of Americans lives in metropolitan areas, two-thirds of the nation's general local governments serve fewer than 2,500 people.[14] Such small governments typically operate on minimal budgets (see Table 2-4) with few full-time employees and even fewer specialists. Thus, many lack an adequate governmental infrastructure for managing the fiscal, administrative, and technical requirements of federal mandates.

Communicating with 85,000 Governments. Given that the Census Bureau counts nearly 85,000 local governments in the United States, there may be no way to determine accurately the costs and benefits of federal mandates on particular communities. No federal agency is equipped to communicate regularly and individually with these local governments to help them resolve compliance problems. Even if an agency wishes to establish a partnership for more effective and efficient mandate management, the number of local governments is too large to allow assistance to any significant number of communities directly.

EPA has estimated that the greatest fiscal impacts of environmental mandates will likely fall on many of the

Table 2-4

Average Annual Revenues of Small General Local Governments, 1986-1987

Population	Average Revenue	Number of Governments
Less than 250	$49,55	7,032
250-499	119,207	5,269
500-999	219,490	6,252
1000-1999	477,844	5,975
2000-2999	971,223	2,873
3000-3999	1,535,796	1,673
4000-4999	2,402,382	1,187

Source: U.S. Department of Commerce, Bureau of the Census, unpublished data.

very smallest and the very largest local governments (see Table 2-5). Although not all of these governments have responsibility for every **EPA** program, they are the jurisdictions which, on average, can least afford them. Nevertheless, geographic impacts and variations in fiscal capacity generally are not accounted for when new regulations are promulgated by federal officials.

Distortion of Accountability

In order to evaluate government performance accurately and hold elected officials accountable for their actions, citizens must be able to identify the policymakers responsible for designing, adopting, financing, and implementing government services. Intergovernmental mandating interferes with this chain of democratic accountability by breaking key linkages between policy adoption and implementation. Officials responsible for setting policy objectives are freed from the responsibility for financing their decisions. This can distort public choices about government services and taxes and create confusion and intergovernmental conflict.

For example, recently enacted federal mandates are expected to require many local governments to more than double user fees and taxes for environmental services.[15] Faced with such increases, many local taxpayers have begun to object to local officials, who have little choice but to obey the regulations. Rather than starting a productive public dialogue about the benefits and **costs** of alternative politics, such mandates are prompting some local governments to engage in blame avoidance by itemizing federal and state mandated costs on their utility bills and encouraging citizens to direct their complaints to the responsible parties.

Double Standard

Adding to state and local officials' concerns about federally induced costs is the fact that the federal government or the Congress sometimes exempts itself from compliance with the mandates. Even if they are not exempt, compliance with mandated standards across federal agencies may be uneven and problematic.[16]

Exemptions also may be extended to federally sponsored enterprises, such as Amtrak. For example, California, Florida, Idaho, Nevada, and Oregon sued to stop the passenger rail corporation from flushing train toilets directly onto the tracks. Amtrak escaped liability in 1990 when the Congress amended an unrelated bill to grant Amtrak immunity from suit, retroactive to February 5, 1976, and to permit Amtrak to continue flushing toilets onto tracks for six more years.[17]

Table **2-5**

Potential Increase in Annual User Charges from Environmental Regulations

(dollars per household)

Size	Types of Regulations: Waste Water	Drinking Water	Solid Waste	Miscellaneous*	Total
0-2,500	$45	$40	$26	$59	$170
2,501-10,000	20	15	23	**32**	90
10,001-50,000	20	5	32	23	80
50,001-250,000	20	10	28	12	70
Over 250,000	60	15	51	**34**	160

[1] Includes school asbestos removal and underground storage tank requirements.

Source: Jasbinder Singh, Raffael Stein, Sanjay Chandra, and Brett Snyder, *Municipal Sector Study: Impact of Environmental Regulations on Municipalities*, prepared for the Sector Study Steering Committee, **U.S.** Environmental Protection **Agency,** Washington, DC, 1988, p.v.

Local officials also express concerns about cases in which the federal government exempts itself and the states, but not local governments, from the reach of federal statutes and regulations. Alan Beals, former executive director of the National League of Cities, has referred to the tendency of **EPA** to view local governments as "the regulated community":

> In developing regulations for underground storage tanks, **EPA** exempted the federal government and States from requirements to obtain virtually unavailable insurance. Municipalities, on the other hand, none of whom are permitted to deficit spend, some of whom have budgets bigger than some of the small States, are not.[18]

Conclusion

These intergovernmental concerns have developed over many years. They raise serious issues that deserve answers.

Notes

[1] See Marcella Ridlen Ray and Timothy Conlan, 'At What Price? The Costs of Federal Mandates in the 1980s," paper presented at the 54th Annual Conference of the American Society for Public Administration, San Francisco, July 18, 1993, p. 6. The Department of Transportation's cost estimate was $4.04 billion in 1983 dollars, which has been converted here to 1992 dollars.

[2] Ibid. The Department of Labor estimate was $1.13 billion in 1984 dollars, which has been converted to 1992 dollars. See also, for example, John Kincaid, "From Cooperation to Coercion in American Federalism: Housing, Fragmentation and Preemption, 1780-1992," *The Journal of Law and Politics* 9 (Winter 1993): 333-431.

[3] Ibid., pp. 6, 15. EPA cost estimates have been updated to 1992 dollars, and costs applied to nonpublic schools have been omitted.

[4] 'Analysis of the Unfunded Mandate Surveys Conducted by the U.S. Conference of Mayors and the National Association of Counties," June 14, 1994.

[5] U.S. Advisory Commission on Intergovernmental Relations (ACIR), "Estimating the Financial Effects of Federal Mandates on State and Local Govcrnnients" (draft discussion paper), **Docket** Book, Commission meeting, April 14, 1994.

[6] For a more detailed analysis of the procedures, performance, and limitations of the congressional fiscal notes process and Executive Orders 12291 and 12612, see ACIR, *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s* (Washington, DC, 1993). E.O. 12291 was superseded by E.O. 12866, "Regulatory Planning and Review," on October 4, 1993. E.O. 12612 was superseded by E.O. 12875, "Enhancing the Intergovernmental Partnership," on October 26, 1993. However, many of the basic procedures and limitations of the early executive orders remain in effect.

[7] U.S. Conference of Mayors/Price Waterhouse, *Impact of Unfunded Federal Mandates on U.S. Cities: A 314 City Survey* (Washington, DC, 1993) p. 2; and National Association of Counties/Price Waterhouse, *NACo Unfunded Mandates Survey* (Washington, DC, 1993), p. 2.

[8] Lillian Rymarowicz and Dennis Zimmerman, *Federal Budget and Tar Policy and the State-Local Sector: Retrenchment in the 1980s* (Washington, DC, Library of Congress, Congressional Research Service, 1988) cited in U.S. General Accounting Office (GAO), *Federal-State-Local Relations: Trends of the Past Decade arid Emerging Issues* (Washington, DC, 1990), p. 18

[9] GAO, *State and Local Finances: Some Jurisdictions Confronted by Short- and Long-Term Problems* (Washington, DC, 1993), p. 69.

[10] Gov. Evan Bayh, quoted in Ceci Connolly, "If Governors are Harbingers, Clinton Faces Tough **Road,"** *Congressional Quarterly Weekly Report*, August 31, 1993, p. 2261.

"Vermont is the sole exception.

[12] Andriana deKanter and Keith Baker, "Bilingual Education May Not Be Best Way to Educate Limited-English Children, Report Says," *Education Times*, October 5, 1981, p. 2.

[13] See Robert Stavins and Thomas Grumbly, "The Greening of the Market: Making the Polluter Pay," in Will Marshall and Martin Schram, *Mandate for Change* (New York, Bcrkley Books, 1993), pp. 197-216.

[14] **U.S.** Department of Commerce, Bureau of the Census, *Government Organization, 1987 Census of Governments,* Vol 1, No. 1 (Washington, DC, 1988).

[15] Jasbinder Singh, Raffael Stein, Sanjay Chandra, and Brett Snyder, *Municipal Sector Study: Impacts of Environmental Regulations on Municipalities*, prepared for the Sector Study Steering Committee, **U.S.** Environmental Protection Agency (Washington, DC, September 1988), p. v.

[16] See, for example, ACIR, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Washington, DC, 1989).

[17] National and Community Service Act of 1990, 104 Stat. 3127, 42 U.S.C. 12401 note.

[18] Alan Beals, "Meeting the Environmental Challenges," in *Paying for Progress: Perspectives on Financing Environmental Protection* (Washington, DC: U.S. Environmental Protection Agency, 1990), p. 20.

3 Federally Induced Costs

Practices that Impose Federally Induced Costs

The federal government imposes financial costs on state and local governments in at least nine ways. Most familiar is the concept of direct mandates—statutory, regulatory, or judicial orders requiring state and local governments to offer a benefit, establish a program, or enact laws or regulations. Other actions and inactions by the federal government also can increase state and local expenditures.

Federally induced costs can be generated by:

1) Statutory direct order mandates;
2) Grant-in-aid matching requirements;
3) Grant-in-aid conditions on spending and administration;
4) Total statutory preemption;
5) Partial statutory preemption;
6) Federal income tax provisions;
7) Mandates, preemptions, and grant conditions implied by federal courts and administrative agencies;
8) Regulatory delays and nonenforcement; and
9) Federal exposure of state and local governments to liability lawsuits.

Some of these techniques require affirmative state and local obligations or activities. Other federal laws or regulations may induce costs by prohibiting or restricting a cost-effective state or local practice and requiring a more expensive alternative. Other federal rules or statutes reduce the capacity of state and local governments to raise revenues. Finally, costs may be imposed as an indirect or ancillary consequence of an independent federal policy that implies a role for state or local governments, as when federal immigration policies create a larger local school population that must be served.

A matrix of the principal policy instruments and their financial impacts is presented in Table 3-1. Some, such as direct mandates, can have both direct and indirect financial effects on state and local governments. Others, such as tax policy provisions, have more focused effects. Each of these techniques and types of financial impact is discussed below.

Statutory Direct Order Mandates

Direct order mandates imposed by federal statute direct a constitutionally subordinate jurisdiction to take certain actions. Such orders may be supported by civil penalties, fines, or criminal sanctions for noncompliance.

Direct order mandates can take both positive and negative forms. They may order a single jurisdiction or an entire class of governments to establish a new program or alter an existing one to improve the level of services or to raise minimum standards. Alternatively, a direct order may prohibit, halt, or restrict a specific governmental practice or program.

The Congress has used direct order mandates to require specific and sometimes costly actions by state and local governments. For example:

1) The ***Fair Labor Standards Act*** **(FLSA)** requires that local governments meet minimum national standards for pay and overtime conditions for their employees.[1]

2) The ***Asbestos Hazard Emergency Response Act of 1986*** requires local school systems to inspect for and remove hazardous asbestos materials from school buildings.

3) The ***Voting Accessibility for the Elderly and Handicapped Act of 1984*** requires that all state and local polling places used in federal elections be made accessible to the physically disabled.

Table 3-1

Instruments and Types of Federally Induced Costs

	More Direct Fiscal Effect								*Less Direct Fiscal Effect*
	Direct Order		Condition of Aid			Preemption			
	Statutory Mandate	Judicial Mandate	Cross Cut	Crossover Sanction	Action	Partial	Full	Tax Policy	Policy Action
Impose Direct Costs	X	X	**X**	X	X	X			
Restrict Revenues							X	X	X
Prohibit Cost-Effective Alternative	**X**	X	**X**	**X**	X	X	X		
Ancillary Impact									X

In other instances, the Congress, like the courts, has issued negative directives that impose incidental or indirect costs. For example, as a result of the federal ban on dumping sewage sludge in the oceans, contained in the *Ocean Dumping Ban Act of 1988*,[2] some municipalities had to adopt more expensive disposal methods.[3]

Other statutes have combined prohibitions with affirmative mandates. For example, amendments to the *Social Security Act of 1935*,[4] adopted in 1983, prohibited state and local governments from terminating participation? Subsequent amendments increased contribution rates several times for all employers, including the public sector.[6] These changes cost state and local governments an estimated $470 million in 1984, $750 million in 1988, and $810 million in 1989.[7]

Expenses associated with Social Security also grew because the amendments required state and local governments to deposit the tax withholdings twice instead of once a month. Deposits were accelerated further by the *Omnibus Budget Reconciliation Act of 1986.8* Overall, between 1983 and 1990, state and local governments paid an additional $7.5 billion in OASDI and health insurance taxes as a result of these changes?

In large part, the costs associated with these Social Security requirements were incurred because state and local governments lost their special status under the act. Once these governments were required to provide coverage like most other employers, they had no recourse from the increases.

In other cases, federal mandates have imposed higher standards on the public sector than on the private sector. For example, small businesses with fewer than 15 employees are exempt from the employment requirements of the *Americans with Disabilities Act*.[10] Local governments must comply with the act regardless of size or number of employees."

Statutory Grant-in-Aid Conditions

Public dialogue about federal mandates is often complicated by the tendency to equate federal grant-in-aid conditions with direct order mandates. Even though the two types of requirements can be equally expensive, they are quite different conceptually and constitutionally.

Program-Specific Grant Conditions. Theoretically, conditions of aid are distinguishable from direct order mandates because a state or a local government can refuse to apply for or accept the federal grant. Although this legalistic approach seemed plausible when federal aid constituted a small and highly compartmentalized part of state and local revenues, it overlooks current realities. Many grant conditions have become far more integral to state and local activities—and far less subject to voluntary forbearance—than originally suggested by the contractual model.

In addition, in what state and local officials liken to a governmental version of "bait and switch," new requirements may be added after a program is in effect, service populations may be expanded or redefined, and existing local practices may be restricted or prohibited. Even if such changes are expensive, politically and administratively a recipient government may find it difficult to withdraw from the program because:

- It has already incurred substantial start-up costs.
- It may have abolished its own program in favor of the federal initiative.
- The public may have come to rely on the benefits provided by the grant program.
- The jurisdiction may depend heavily on the federal money.

A clear example is Medicaid, which provides health care to eligible individuals who fall below certain income levels or are medically needy. With its inception in 1965, all states except Arizona elected to join the program, which is funded jointly by the federal and state governments.[12] Initial state expenditures of $680 million in FY 1966[13] grew to $27.325 billion in FY 1989.[14] Now the sole source of health care for millions **of** low-income Americans, Medicaid has become an indispensable government service, and even Arizona participates.[15]

Such mandated service expansions are particularly troublesome to states. The National Association of State Budget Officers (NASBO) estimates that Medicaid expansions since 1988 cost states an additional $2 billion in FY 1991. Through fiscal year 1995, the estimated cumulative costs total $17.4 billion.[16]

Seeking a degree of cost control, the National Governors' Association (NGA) urged the Congress either to fund Medicaid expansions or permit states to adopt program expansions at their option." To assure federal policymakers that coercive federal action was not necessary and that states would not forget the health care needs of the poor, NGA emphasized that in 1986 it had recommended a federal law "allowing States to expand Medicaid programs to cover all pregnant women and children up to age 18 with family incomes below the federally established poverty level." Most states adopted the option.[18]

The Congress ignored NGA's recommendation for federal funding of voluntary compliance with such expansions. In 1990, the Congress expanded benefits further for children, low-income elderly individuals, and mentally retarded persons. Federal laws also required Medicaid coverage for children under age 19 over a five-year period.[19] Prior to that time, the coverage applied only to children under age 7. These changes are estimated to cost states an additional $33 billion over the five-year period.[20]

Once a program of this nature is begun, the pressures for expansion and increased expenditures do not come solely from the Congress. The U.S. Supreme Court ruled in 1990 that the Virginia Hospital Association had the right to sue the state for failing to adopt Medicaid reimbursement rates that were deemed adequate and reasonable.*' Virginia was supported in opposition to this suit by amicus curiae briefs filed by 37 other states.

Matching Requirements. Many federal aid programs are established explicitly to draw state and local governments into activities in which they did not previously operate, getting them to spend some of their own funds and ensuring that they do not decrease the amount of own-source funds by substituting federal money. Program expansion is the federal goal. Matching requirements, maintenance-of-effort provisions, and "non-supplant" clauses are used to achieve this goal.

Crossover Sanctions. Crossover sanctions are conditions not directly related to the purpose of the grants. Over the last two decades, the Congress has used this mechanism to require state and local governments to take actions that the federal government lacked the constitutional authority to order directly.

Crossover sanctions have been used most commonly in conjunction with federal transportation spending. One of the first came during the Arab oil embargo of the early 1970s. In an effort to conserve gasoline, the Congress persuaded the states to lower their maximum speed limits to 55 miles per hour by threatening to withhold up to 10 percent of their federal aid highway funds if they did not comply.[22] The states reluctantly agreed. Other laws have required the withholding of 5 or 10 percent (occasionally more) of highway funds unless states enact certain statutes. These requirements have increased the minimum legal age for purchasing alcoholic beverages, imposed new licensing procedures for commercial truck drivers, required helmets for motorcyclists, and produced many other actions.

Noncompliance with these requirements could have a severe impact on state budgets. For example, Wisconsin's Department of Transportation recently estimated that the state could lose all of its federal aid highway funds if one or more of the applicable penalties were assessed (see Table 3-2).

State and local officials object to crossover sanctions because:

1) They involve several, often basic, programs simultaneously and are difficult to avoid.

2) The monitoring, enforcement, and compliance expenses increase costs of operation.

3) They can be used to invade the most basic areas of state and local responsibility

For example, in 1990, the Congress ordered that 25 percent of FY 1991 funds that might be obligated for federal aid highway and highway safety construction programs be withheld from any state that has a public authority responsible for public transportation in an urbanized area with a 1980 population of 3 million or more but did not have, by October 1. 1990. state laws that authorize:

Table 3-2
Crossover Sanctions in Federal Highway Programs

Subject	Possible Sanctions as a Percentage of Federal Highway Funds
Highway maintenance	up to 100.0%
Interstate maintenance	6.2
Maintenance of user fee effort	33.3
Truck size and weight enforcement	6.2
Access to Interstates for 80,000 lbs. trucks	100.0
Mandatory urban planning	5.0
55 m.p.h. speed limit	100.0
55 m.p.h. speed compliance	3.5
Vehicle inspection/maintenance	4.0
Outdoor advertising	6.2
Junkyard control	6.2
Nondiscrimination	100.0
Minimum drinking age (21 years)	6.2

Source: Wisconsin Department of Transportation.

1) A general source of tax revenue to take effect on or before January 1,1992, dedicated to paying the nonfederal share of projects for mass transportation eligible for assistance under the *Urban Mass Transportation Act of 1964;* or

2) The establishment of regional or local sources of tax revenue dedicated to paying such nonfederal share or for paying operating expenses of mass transit service so as to satisfy financial capacity standards as may be required by the Secreta'ryof Transportation.[23]

The sanction was to be continued for calendar year 1992 if enabling statutes had not been enacted before October 1,1991. A waiver could be obtained if the governor submitted to the Secretary of Transportation by October 1, 1991, a written certification stating that:

(1) He or she is opposed to the enactment of a law described in subsections (a)(1) and (2), and that funding as described in subsections (a)(1) and (2) would not improve public transportation safety; and

(2) The legislature (including both houses where applicable) has adopted a resolution, by a simple majority, expressing its opposition to a law described in subsections (a)(1) and (2).[24]

Despite the disruptive potential of crossover sanctions, constitutional challenges have been rejected by the courts. In 1984, for example, President Ronald Reagan signed into law legislation depriving states of federal aid highway funds if they failed to raise the minimum alcoholic beverage purchase age to 21.[25] South Dakota sued to overturn this limitation, maintaining that the 21st Amendment to the Constitution granted power to regulate alcohol consumption solely to the states. The statute was upheld by the U.S. Supreme Court as a legitimate use of the conditional spending power in *South Dakota* v. *Dole*.[26]

The Congress has shown some signs of sensitivity in recent years to the objections leveled at crossover sanctions. Some recent crossover sanctions have had an "opt out" provision for states to use under certain conditions.

In addition to the waiver provision described above, the Congress recently added a waiver when it required that 5 percent of federal highway funds be withheld if a state, effective October 1, 1993, failed to suspend for six months the driver's license of any person convicted of a drug offense. The withholding will increase to 10 percent on October 1, 1995.[27] That sanction will not be invoked, however, if a governor submits to the Secretary of Transportation written certification of opposition to the enactment or enforcement of a mandatory suspension law and that the state legislature has adopted a resolution expressing its opposition to such a law.

Crosscutting Requirements

Crosscutting requirements apply to all or many different federal aid programs simultaneously. Many of these requirements, in fact, apply to any recipient of funds from any federal assistance program.

One of the earliest examples of a crosscutting requirement was the 1940 ***Hatch Act,*** which prohibits public employees in federally assisted programs from engaging in various political activities.[28] Other examples include Title VI nondiscrimination standards and requirements of the ***National Environmental Policy Act*** for consideration of environmental protection issues during review of certain federally funded projects.[29]

Some crosscutting requirements are controversial because of their specific provisions or their application. For example, the *Davis-Bacon Act*[30] requires federal aid recipients to pay the prevailing wage scale for work on construction projects funded with federal dollars. Many small and rural governments, in particular, complain that this often can add considerably to the cost of construction projects when the "prevailing wages" are based on union scales in the higher cost metropolitan areas. Similarly, the *Endangered Species Act of 1973* has sometimes halted federally assisted projects in order to protect plants and animals.

Other problems stem from the sheer numbers and proliferating use of this policy tool. By one official count, there were 59 crosscutting requirements in effect as of 1980.[31] Since that time, additional requirements have been enacted to ensure that federal aid recipients (1) maintain a drug-free workplace, (2) prohibit discrimination against the disabled, and (3) follow new cash management procedures for federal aid funds.

Because they apply to all or most federal grant programs, the proliferation of such requirements has undermined efforts to deregulate the federal aid system and provide greater discretion to state and local governments in the use of federal funds.[32] Even federal block grants and other "few strings" forms of federal aid must comply with many crosscutting requirements.

Statutory Preemption

Federal preemption may impose costs by substituting federal jurisdiction for state and local authority.[33] Federal preemption statutes may be total or partial. In a traditional case of total preemption, the federal government asserts full regulatory authority over some function or activity, thereby excluding state or local participation. Partial preemption typically is a joint enterprise, whereby the federal government exerts its constitutional authority to preempt a field and establish minimum national standards, but allows regulatory administration to be delegated to the states if they adopt standards at least as strict as the federal rules.

Total Preemption. Preemption, such as the prohibition on state regulation of bankruptcies, often involves no direct

cost to state and local governments, although they may object to what they regard as federal intrusion on other grounds. In some cases, however, a preemption that bars state or local government exercise of a specific power can have financial consequences because it may:

- Erect barriers to new revenue sources or reduce collections from existing sources;
- Impose direct costs; or
- Generate indirect expenses.

From a fiscal standpoint, restraints of greatest concern are those that block or reduce state or local government authority for raising revenue. The *Airport Development Acceleration Act of 1973,* for example, prohibited state and local governments from levying a tax or any other charge "on persons traveling in air commerce'' or a gross receipts tax on airline revenues.[34] That ban stood until 1990, when the Congress repealed it and authorized a tax on travelers, not exceeding $3.00 per boarding or $12.00 per round trip, depending on the number of boardings.[35]

Traditional sources of state and local government revenue, such as the property tax, are targets of federal bans as well. The *Railroad Revitalization and Regulatory Reform Act of 1976* prohibits state or local governments from levying a discriminatory property tax on railroad property.[36] Court challenges to such barriers have been rejected. The California Board of Equalization, for example, maintained that an additional property tax levied on railroad cars was an attempt to correct an earlier miscalculation of taxes. This argument was rejected by the U.S. Court of Appeals for the Ninth Circuit.[37]

A federal preemption restraint also may contribute to a loss of revenue for a state or local government. Federal law, for example, stipulates that tolls on the Verrazzano Narrows Bridge connecting Brooklyn and Staten Island, New York, may be collected only as vehicles leave the bridge on Staten Island.[38] This has resulted in the Triborough Bridge and Tunnel Authority losing approximately $2 million annually in toll revenues. It also increased congestion in the Holland Tunnel under the Hudson River as motorists returned to Staten Island through New Jersey to avoid payment of the toll.[39]

Federally imposed constraints on state and local government authority may sometimes lead directly to additional expenditures. As noted earlier, the federal ban on dumping sewage sludge in the oceans, contained in the *Ocean Dumping Ban Act of 1988,*[40] means that some municipalities must utilize other, sometimes more expensive, means of disposing of the sludge. This prohibition was premised on federal preemption of the authority to regulate ocean waters and the portion of the continental shelf that falls within the territorial limits of the United States.

Federally imposed constraints on state and local government authority also may have indirect or unintended effects on expenditures. States are forbidden by federal law (based on the Interstate Commerce Clause of the Constitution) from conditioning the issuance of a franchise to operate buses between two major cities on agreement by a carrier to provide service to small communities.[41] To ensure bus service to these communities, many states now provide direct subsidies to these carriers.

Partial Preemption. As noted earlier, partial preemption programs are those in which the federal government has exerted its legal authority to preempt a field of regulation and to establish minimum regulatory standards. States are allowed to administer the standards, subject to federal approval, and often to develop stricter ones if they so desire. Many of the most important environmental programs take this approach, including the *Clean Air Act,* the *Clean Water Act,* and the *Safe Drinking Water Act,* as do the *Occupational Safety and Health Act* and the federal meat and poultry inspection programs.

Such programs can involve substantial costs for compliance and administration. Some of these costs can be viewed as voluntary, but others are not. For example, if a state government wishes to establish a regulatory program in a particular area, it must be consistent with federal standards. Requirements in existing state or local laws or ordinances must be upgraded if they fall below federal standards. Standards above those set by federal law usually are allowed to stand.

Legally, the state decision to administer a partial preemption program is voluntary. States that do not have a program in a particular area or do not wish to assume the costs of administration and enforcement can opt out and allow the federal government to enforce the standards. Thus, programs such as OSHA and the *Surface Mining Control and Reclamation Act of 1977* have a pattern of mixed administration throughout the country.

This voluntary approach is less evident in other partial preemption programs. All states are responsible for devising implementation plans to enforce standards under the *Clean Air Act.* The U.S. Environmental Protection Agency does not have the staff or the resources to implement the program directly, and it has effectively resisted occasional state efforts to withdraw from program implementation.

If a state fails to develop an acceptable plan, EPA is empowered to do so. To "encourage" the state to enforce this federally devised plan, the law allows the federal government to withhold federal highway funding. The threat of this crossover sanction has prevented states from withdrawing from the program, but the result has been likened to "legal conscription," in which the federal government has been able to "draft" state and local government resources "into national service."[42]

Many partial preemption programs have another regulatory dimension that can impose costs on states, and especially on local governments. For example:

1) Local sewage treatment plants must meet federal standards under the *Clean Water Act.*

2) Local water systems must meet federal standards under the *Safe Drinking Water Act*.

3) State and local governments must meet safety standards under the *Occupational Safety and Health Act*, as well as underground storage tank requirements under the *Hazardous and Solid Waste Amendments of 1974*.

Such mandates, which are administered through partial preemption programs, often impose multi-billion dollar costs on affected governments.

Statutory Tax Policies

As illustrated by the discussion of preemption, some federal policy actions affect state and local finances by limiting their ability to raise revenues and promote local economic development.[43] Such impacts have become increasingly important features of federal income tax law, particularly during the 1980s when certain restrictions on state and local bond activity were written into federal revenue statutes.

The *Tar Equity and Fiscal Responsibility Act of 1982* was one of the first statutes to contain this sort of limitation.[44] The act requires states and local governments to issue only registered bonds instead of traditional bearer bonds. If a jurisdiction fails to do so, the interest on the bonds will be subject to the federal income tax. The constitutionality of the bond registration provision was upheld by the U.S. Supreme Court in 1988.[45]

In addition, the 1982 act removed the federal tax exemption from any industrial revenue bond (IRB) that financed "private activity" projects, such as small businesses, and all small issue IRBs were to be eliminated by 1986. (They were eliminated in 1992, but were reinstated retroactively in 1993.)

Additional tax limitations followed the 1982 act. In the *Deficit Reduction Act of 1984*, the Congress placed a cap on the issuance of industrial development bonds. Two years later, the *Tar Reform Act of 1986* imposed tighter limitations on such private-activity bonds and restrictions that affected traditional public-purpose borrowing. For example, state and local government issuers of long-term bonds must rebate any arbitrage profit to the U.S. Treasury or lose the income tax exemption.[46] In addition, some tax exempt interest was made subject to a new alternative minimum tax. Some of these changes have made it more difficult to privatize public functions and to establish public-private partnerships.

Intergovernmental tax competition represents another form of fiscal impact. When the federal government competes with state and local governments for an identical source of tax revenue (such as the income and gasoline taxes), the financial consequences can be substantial. This is true even though, unlike restrictions on the tax treatment of certain state and local bonds, there may be no intention to restrict state or local revenue sources.

Implied Mandates, Preemptions, and Grant Conditions

Frequently, policy decisions by federal courts and executive branch agencies cause state and local government expenditure increases. These increases may be as significant as those imposed by statutes enacted by the Congress.

Historically, the federal courts relied on negative remedies to influence state and local government behavior. For example, they placed restrictions on police interrogation practices, prohibited religious activities in public schools, and overturned local ordinances. Although still commonplace, such prohibitions have been supplemented in recent years by judicial orders that impose affirmative duties on state and local governments. For example, courts have ordered governments to:

1) Meet higher minimum standards in the housing and treatment of prisoners;

2) Improve conditions in state mental health facilities,

3) Integrate local school systems; and

4) Improve public housing conditions.

Although such affirmative responsibilities often address important needs, they can be costly—often much more costly than traditional negative remedies.

To illustrate further the impact of implied federal regulations, consider the costs of illegal immigration, overcrowding in public institutions, and administrative rulemaking.

Immigration. Because the federal government has exclusive constitutional authority to control immigration and determine the process of naturalization,[47] the U.S. Supreme Court has declared that state and local governments have no authority to close their borders to legal or illegal immigrants or to refuse public services to them. In fact, court orders give priority for certain services to illegal immigrants.

Thus, federal decisions to admit large numbers of refugees, the failure to prevent illegal immigration, and the lack (or inadequacy) of federal aid for serving and assimilating immigrants, all impose major costs on "gateway" state and local governments where immigrants concentrate. In fiscal year 1989, for example, approximately 107,000 refugees were admitted to the United States. Many of them did not speak or understand English; some lacked job skills; some had health needs they could not pay for; and some had to be incarcerated. Thus, the costs of providing services to immigrants can be substantial.[48]

The autumn 1989 annual survey of refugees from Southeast Asia who had been in the United States less than five years revealed that only 37 percent of those aged 16 and older were in the labor force compared to a 63 percent rate for the United States population as a whole.[49] Lack of English proficiency was the major reason for failure to participate in the labor force. Refugees who spoke

no English had a labor force participation rate of 7 percent and an unemployment rate of 29 percent. In comparison, refugees who spoke English well had a labor force participation rate of 55 percent and an unemployment rate of only 3 percent.[50]

Mayor Pam Slater of Encinitas, California, sent to the federal government a bill for $225,356.20 for services provided by the city to illegal immigrants. Explaining her frustration over the financial burdens of providing for these additional residents, she characterized the federal government's view of this problem:

> They've said, "O.K., we're not going to enforce the border and we are not going to take charge of immigration, but it's up to your local hospitals, your local schools, your local social services agencies to provide for the needs of these indigent people.""

Similarly, Virginia A. Collins, of the Los Angeles County Chief Administrator's Office, testified in 1990 before a U.S. House of Representatives subcommittee that the county's budget problems are, in part, due to federal immigration policies over which they have no control. She added that more than 850,000 undocumented aliens applied for legal status under provisions of the ***Immigration Reform and Control Act*** of ***1986;*** approximately one-quarter of them settled in the county and more than 70,000 went on welfare.[52]

Demands placed on local education services can be particularly costly. Operating costs and state assistance to educate foreign-born students in the Dade County, Florida, public schools are shown in Table 3-3. Federal and state assistance and unreimbursed costs are included in Table 3-4. During the academic year 1989-90, for example, unreimbursed operating expenses totaled $3,233,642. Inclusion of the capital costs would increase the total amount significantly.

Table 3-3

Operating Costs and State Assistance for Foreign-Born K-12 Students Dade County Public Schools 1987-88 to 1989-90

School Year	Number of Students	Operating costs	State Assistance
1987-88	13,047	$45,246,996	$37,601,454
1988-89	18,391	69,083,482	57,894,868
1989-90	14,699	60,207,104	50,020,697

Source: Letter from Stanley R. Corces, Executive Director, Division of the Budget, Dade County Public Schools, dated November 2, 1990.

Although there are federal provisions for some reimbursement of state and local government costs by the federal government (described in Chapter 4), even this assistance is being reduced.[53] Furthermore, state and local governments face special challenges in documenting their expenses for reimbursement.

Speaking before a U.S. Senate subcommittee in 1990, Dade County, Florida, Manager Joaquin Avino referred to

> the inherent difficulties involved in identifying the amount and cost of public assistance and public health services provided to legalized aliens who are reluctant to identify themselves as such to our service providers. The confidentiality restriction set by IRCA *[Immigration Reform and*

Table 3-4

Estimated Unreimbursed Costs of Foreign-Born Students K-12, Dade County Public Schools, 1987-88 to 1989-90

	1987-88	1988-89	1989-90
Average state revenue per full-time student	$2,882	$3,148	$3,403
Average cost per full-time student	3,468	3,702	4,096
Unreimbursed costs per full-time student	(586)	(554)	(693)
Foreign-born student registrations	13,047	18,391	14,699
Costs unreimbursed by state	7,645,542	10,188,614	10,186,407
Federal revenues:			
Targeted assistance/entrant	4,786,800	4,729,400	4,154,019
Emergency immigrant	1,215,654	922,294	1,004,215
Transitional refugee	1,105,887	1,055,626	1,794,531
Total	7,108,341	6,707,320	6,952,765
Unreimbursed operating costs	(537,201)	(3,481,294)	(3,233,642)

Source: Attachment to a letter from Stanley R. Corces, Executive Director, Division of the Budget, Dade County Public Schools, dated November 2, 1990.

Control Act] has placed Dade County and other county programs at a disadvantage, and in some cases, in the impossible position of having to scramble after the fact to identify legalized aliens who use county services.[54]

Some observers argue that immigrants and refugees, as a whole, make up for the financial burdens they impose. Dan Stein, Executive Director of the Federation for American Immigration Reform, however, wrote that it is a myth that "immigrants pay more in taxes than they use in benefits." He added:

> Those making this claim use a definition of "benefits" that excludes medical care, education, public housing, physical infrastructure, and a wide range of other social services. At the federal level, immigration is about a break-even proposition, but at the state and local levels, where most of these services are provided, immigration is costly.[55]

Overcrowding in Public Institutions. Citing Section 1983 of a post-Civil War civil rights act and the Constitution's protection against cruel and unusual punishment, the U.S. Supreme Court has affirmed federal court decisions that mandate hundreds of state and local construction programs designed to relieve overcrowding in jails, prisons, and mental hospitals. One effect of this decision has been to make state and local spending on corrections the fastest growing part of many public budgets.

Administrative Rulemaking. Many federal statutes that regulate state and local governments go into effect only after the executive branch makes the administrative rules. This process also is a source of added costs for state and local governments. A recent ACIR report, based on GAO research, illustrates this point using the *Clean Air Act, Fair Labor Standards Act,* and *Occupational Safety and Health Act* programs.[56]

Regulatory Delays and Nonenforcement

The administration of many federal regulations and the availability of judicial remedies in addition to administrative appeals may introduce substantial delays and uncertainties that translate into extra costs. ACIR research into environmental decisionmaking procedures illustrates this point.[57]

In addition, lack of enforcement, or delayed or selective enforcement, of certain federal requirements on federal lands allows pollution to spread to other jurisdictions, increasing the costs that state and local governments must bear.

Statutory Liability Exposures

It has become common in federal statutes to provide an alternative enforcement mechanism that allows citizens to bring lawsuits against state and local governments if they are thought to be complying inadequately with federal regulations. This has the potential to induce state and local costs for legal defense, additional compliance, and penalties. One program with potentially large liabilities is the Superfund toxic wastes cleanup program in which state and local governments may be held liable for very large costs of cleaning up wastes produced by others.

Determining Costs

The growing magnitude of costs associated with these federal practices has sparked interest in establishing some form of systematic reimbursement. Yet, such costs cannot be reimbursed directly unless they can be calculated reliably.

Determining the magnitude of federally induced costs is a difficult task that is not being done well. It requires at least two steps, which are examined here: (1) identifying the types of expenses to be counted, and (2) devising practical and replicable methods for preparing reliable estimates of projected costs.

Estimating associated benefits and effects on the economy are beyond the scope of this report. Although those issues are important for other reasons, they are not essential to the first-order imperative to get costs under control.

Identifying the Types of Expenses Incurred

Federally induced costs fall into the following general categories: (1) direct financial expenses; (2) indirect financial expenses; (3) lost revenues; and (4) ancillary costs and expenses.

Direct Financial Expenses. A variety of direct financial expenses may be incurred by state and local governments that are mandated to provide new services, meet higher regulatory standards, or serve new client populations. Among other things, they may be required to hire additional personnel; enhance training; provide new personnel benefits; construct new facilities; modify existing facilities and infrastructure; test for and remove hazardous substances; purchase new equipment; serve additional clients; and pay legal fees, fines, and penalties for noncompliance.

For example:

1) The *Safe Drinking Water Act Amendments of 1986* require local water systems to test for up to 83 potential contaminants and meet new filtration and disinfection requirements.

2) The *Americans with Disabilities Act of 1990* requires modifications to public facilities and more accessible public transportation vehicles.

3) The *Fair Labor Standards Act Amendments of 1986* require changes in the pay and overtime compensation of various categories of state and local government employees. As noted earlier, recent

federal amendments to the Medicaid program have significantly expanded the eligible population that states must serve under this program.

Indirect Costs. Additional expenditures may be an indirect result of federal regulations and mandates. For example:

1) A jurisdiction may be forced to purchase a new or more costly computer system to accommodate the accounting or reporting requirements associated with mandated activities.

2) Additional management time may be required to coordinate the expanded government activities.

3) Part-time elected officials may feel pressured to become full-time public servants in order to properly monitor an expanded and more active government.

4) A preferred or more cost-effective method of service delivery may be prohibited by a federal mandate, requiring the implementation of a new and more costly alternative.

An example of this fourth point is the *Ocean Dumping Ban Act of 1988* prohibition on dumping municipal sewage sludge in offshore ocean areas. The Congressional Budget Office estimated that the affected jurisdictions would be required to pay an extra $33 million in 1991 to dispose of sludge in landfill sites. The act also has led to fines being levied on violating municipalities. Nassau County, New York, paid $30,000 per day, beginning on May 16, 1990, for failing to implement a 1989 U.S. District Court consent decree resulting from a suit brought under the act.[58] The county had paid over $1 million dollars in penalties as of August 25, 1990.

More broadly, the Colorado Municipal League released the results of a 1990 survey, which reported that:

> Local government costs associated with environmental mandates often arise not just from the direct requirements of the mandates., . ,but from the lack of organization and coordination within and between various parts of the federal and state governments charged with administering these mandates.[59]

Quantifying these costs can be especially difficult. The league also reported "a disturbing trend in developing environmental regulatory programs" that impose "upon local governments the policing and enforcement function to back up the federal regulatory scheme. No financial support is provided to local governments for execution of this function. . . ."[60] Furthermore, "the ever-changing nature of environmental mandates" restricts the ability of local governments to utilize their "resources efficiently to meet these 'moving targets.' "[61]

Lost Revenue. Reductions in state and local revenue collections constitute another category of financial impact associated with certain federal statutes and regulations. As noted earlier, several changes in federal tax law during the 1980s reduced the relative financial attractiveness of certain state and local bond offerings, thus making borrowing more difficult or costly. In addition, caps or limitations were placed on certain kinds of local bonds, and the personal income-tax deduction for state and local sales taxes was eliminated. Some federal statutory preemptions and regulations have restricted or eliminated user fee revenues.

Federal laws regulating the development of wetlands[62] also illustrate how federal policies may reduce state or local government revenue. These laws have resulted in some state and local governments losing property tax revenues when a developer cannot obtain the required permit from the U.S. Army Corps of Engineer ~However, this is also a case where proponents of mandates argue that such mandates may have long-run economic benefits overlooked when estimating short-term costs.

Ancillary Financial Impact. Finally, new or additional financial demands may be placed on state and local governments as an unintended or incidental result of federal policy decisions. For example, one effect of the failure of federal drug interdiction programs to stem the supply of drugs into the United States is to increase demands on local law enforcement and drug treatment services.

Another example involves nuclear power. The *Atomic Energy Act of 1946* assigns complete responsibility for regulating nuclear power plants to the U.S. Nuclear Regulatory Commission. Due to a lack of resources, the commission relies on state and local governments for emergency personnel and equipment to protect public health and safety in the event of a radioactive discharge at a nuclear generating station."

Confusion regarding the respective responsibilities of a state and the Nuclear Regulatory Commission induced Governor Mario M. Cuomo of New York to request U.S. Senator Daniel Patrick Moynihan of New York to

> initiate a hearing process to: (1) achieve a clarification and a precise specification of the respective responsibilities of local, state, and federal governments for off-site emergency plans at our nation's nuclear plants, and (2) devise a federal system for the administration and funding of the extensive activities undertaken by all three levels of government in the implementation, and (3) examine the consequences of decisions required by this off-site emergency planning process.[65]

Estimating the Magnitude of Costs

The full scope of federally induced state and local expenditures is unknown, in part because no government agency or individual has developed a comprehensive tabulation of such costs or established the relationship between costs and benefits. As indicated in Chapter 1, there has been an increasing number of efforts to estimate the financial im-

pacts of individual mandates and groups of requirements, but neither the Congress nor the executive branch has devoted the resources necessary to inventory, measure, and assess the full universe of federally induced costs.

Technical and definitional problems also hamper efforts to estimate the widely varying financial impacts of disparate federal requirements. These include:

1) Lack of knowledge and procedures within the federal government to develop accurate. estimates of cost impacts on state and local governments;

2) Lack of consensus about what constitutes a federal mandate or a federally induced cost and who should be responsible for paying the costs;

3) Lack of necessary data;

4) Wide variations in implementation costs among jurisdictions and in the approaches they might take to comply with federal requirements if flexibility is allowed; and

5) The large number of existing and proposed programs to be estimated.

Institutional Knowledge and Procedures. Since 1980, various procedural mechanisms have been developed to help the Congress and federal agencies assess the scope of intergovernmental regulations and estimate regulatory costs. These included

1) ***Executive Order 12291,*** which required a "regulatory impact analysis" for most major federal regulations. Such analyses require agencies to assess the benefits and costs of proposed regulations and to consider a variety of alternative approaches.

2) ***Executive Order 12612,*** on Federalism, which required a "federalism assessment" of proposed federal rules and legislation likely to have a significant impact on state and local governments. This order stipulated a series of federalism principles and criteria intended to minimize unnecessary federal regulations and to assure that needed regulations grant maximum discretion to state and local governments.

3) ***State and Local Cost Estimate Act of 1981,*** which requires the Congressional Budget Office (CBO) to prepare estimates of the anticipated costs imposed on state and local governments by "significant" bills approved by congressional committees.

None of these procedures has lived up to initial expectations, nor have they generated a comprehensive portrait of federally induced costs. This is due in part to the difficult and ambiguous nature of the task, and in part to flaws in the design and implementation of the procedures.

For example, the CBO fiscal notes process and the **E.O.** 12612 procedures have been limited in scope, lacking full institutional commitment, and applied inconsistently." For example, tax and appropriations bills are exempt from the fiscal notes process in the Congress, certain other bills are deemed to be too ambiguous or complex in their effects to enable the preparation of a reliable estimate, and some estimates are prepared in a humed and incomplete fashion.

A preliminary analysis of CBO fiscal notes in the 102nd Congress, prepared by ACIR in response to a **GAO** recommendation for a wrap-up at the end of each Congress, found that:

1) 38 laws were passed by the 102nd Congress that either CBO or the National Conference of State Legislatures (NCSL) identified as potentially affecting state and local costs significantly.

2) Only five of these laws were identified by both CBO and NCSL; 10 were identified only by NCSL and 23 were identified only by CBO.

3) CBO prepared fiscal notes for only 16 of these 38 new laws. In none of these cases did the estimated fiscal impact on state and local governments reach the $200 million threshold requiring a fiscal note.

4) 22 bills were enacted without fiscal notes—including surface transportation, crime, energy, child abuse, child support enforcement, and job training.

5) Reasons given by CBO for not preparing fiscal notes included: the large size and complexity of the bill; cost uncertainties raised by court involvement in administering the bill, by provisions for negotiated cost-sharing, by provisions giving state and local governments discretion in compliance, and by determining state and local caseloads likely to fall within the provisions of the bill; and passage of the bill on the same day it was introduced.

6) The cost effects of bills with linkages to other programs were not interrelated (for example, the job training relationship to welfare reform).

Similarly, agency compliance with E.O. 12612 was limited and uneven. For example, numerous **EPA** rules with major intergovernmental impacts (including school asbestos removal, drinking water standards, and solid waste disposal) have been developed without a federalism impact assessment.

Even E.O. 12291, which requires the most complete and reliable cost estimates of regulatory actions, was found not to have been fully utilized. Another study found that many regulatory analysts lack an awareness of intergovernmental issues.[67] Moreover, little effort has been made to utilize regulatory assessments to compile a comprehensive overview of federally induced costs.

Lack of Definitional Consensus. Some confusion about the fiscal effects of intergovernmental regulations stems from ambiguity about what constitutes a "mandate." Many policy instruments have financial implications for state and local governments, but only a portion of them can be considered direct mandates. There is often disagreement about whether the others should be considered in discussions about federal reimbursement.

For example, many state and local government officials strongly disagree with the federal courts' finding that federal aid conditions are voluntary contractual agreements rather than mandates. Meanwhile, the Congressional Budget Office considers certain aid conditions—even matching requirements—in its fiscal note calculations. Similarly, each of the three regulatory impact analysis procedures discussed above takes a different approach to tax policy provisions, preemption, and grant conditions. Neither the fiscal notes process nor the regulatory assessment procedures incorporate the financial impact of judicial mandates. The argument also is made that constitutional interpretations do not constitute "mandates" at all.

Although the concept of federally induced costs can neither resolve these disagreements about definition nor establish the scope of federal "mandates" that may be legitimately considered for reimbursement, it is intended to produce a comprehensive portrait of the potential financial impact of the multiple federal policies that create costs for state and local governments. It also can help isolate specific areas of consensus and disagreement as focal points for further analysis and deliberation. Reimbursement policies are considered in Chapter 4.

Lack of Necessary Data and Methodologies. Data limitations have contributed to the absence of comprehensive information about federally induced costs. Some data limitations have conceptual roots, while others involve problems of measurement and information collection.

Conceptually, many analysts would agree that federally induced costs should be defined as incremental expenses that go beyond what a state or local government would do on its own accord. Thus, one should not consider the entire cost of a local sewage treatment plant to be federally induced, but only that portion of the expenditures required to meet higher federal treatment standards.

While relatively clear conceptually, incremental costs can be difficult to measure. Especially over time, such measurement requires judgments about what a jurisdiction ***would have done*** in the absence of federal instructions.

Even when regulatory costs are relatively clear-cut, their accurate measurement can be difficult and costly. As indicated earlier, federally induced costs can involve a wide variety of direct and indirect expenses—from tangible expenses for personnel and equipment to less tangible factors, such as additional paperwork, coordination expenses, and even opportunity costs.

Adding further to the lack of information about regulatory costs is the brief time available for developing many cost estimates,[68] the wide variety of different regulations and jurisdictions that may be affected by federal requirements, and the general absence of any institutionalized reporting and estimating system that links regulatory analysts to knowledgeable state and local officials. As one CBO analyst observed:

> The diversity of the data required were simply too great to allow the creation of one comprehensive database or network of contacts that could be tapped routinely for all state and local estimates. For example, in the past few years, CBO has had to analyze the potential effects of immigration reform, safe drinking-water requirements, prohibitions against sex discrimination in pension plans, and requirements for handicapped access to voting facilities.[69]

Variations in Implementation Costs. A comprehensive assessment of federally induced costs is often hampered by variations in regulatory and other policy impacts among state and local jurisdictions. In some cases, like the ***Ocean Dumping Ban Act,*** only a handful of jurisdictions may be affected. Other requirements, such as the ***Americans with Disabilities Act,*** affect thousands of jurisdictions. Even here, however, the actual cost impacts can differ enormously from place to place. Large, older jurisdictions with nonaccessible subway systems and many older public buildings may require large expenses to bring their facilities into compliance, while newer communities may have planned their facilities with full accessibility in mind. Such wide variations in regulatory impacts are common; an extensive and comprehensive impact assessment process is needed to measure them accurately.

The Large Number of Programs. The NCSL inventory of existing federal "mandates" lists about 180 statutory requirements. The ***Mandate Watch List*** listed over 150 proposals for added requirements introduced in the 103rd Congress. The ***Unified Agenda of Federal Regulations*** issued in April 1994 listed 5,105 administrative rulemakings under way or planned by federal agencies over the following 12-month period. Developing estimates of the impact of each of these cost-inducers would be more than any single agency could do.

In practice, estimates are prepared for only some cost-inducing actions. For proposed legislation that would increase state and local government costs, for example, only those reported out by a committee of Congress that would have an annual effect of $200 million or more are required to be estimated by CBO, and the estimates are not recalculated to reflect amendments to the bill before it is enacted.

There is no requirement to estimate the costs induced by existing programs. However, some agencies (such as EPA) have prepared estimates of expected state and local compliance costs, and many new administrative rules are required to consider costs as well as benefits. The task be-

comes more manageable when spread among all the administering agencies.

Conclusion

A variety of federal policies can produce financial consequences for state and local governments. In addition to the traditional statutory mandates, these instruments include certain legislated grant conditions, preemptions, tax policies, and liability exposures, plus policies implied by courts and administrative agencies. A full understanding of federally induced costs affecting states and localities requires a recognition of the potential effects of all of these activities.

It is also important to recognize that federal programs can impose several different types of financial impacts on affected jurisdictions. Some regulatory effects are clear and direct. Others are unintended and indirect. Some restrict state and local revenue sources rather than impose expenditure obligations. Moreover, each of these different cost impacts can be made up of a combination of specific expenditure items, from hiring new personnel or purchasing equipment to losses in efficiency.

Such complexity has added to the difficulties of developing accepted methodologies for estimating or calculating the costs of federal mandates. Conceptual, institutional, and data limitations all have contributed to the lack of a clear, comprehensive portrait of the scope and content of the federally induced costs borne by state and local governments. Nevertheless, where sufficient commitment and resources have been employed—as in the preparation of regulatory impact analyses for major regulations, such as EPA's underground storage tank requirements—a reasonably valid and reliable picture of the financial implications of federal policy actions is possible. Such efforts provide a foundation of information and experience that can be built on in other areas.

Each of these issues—defining the different types of federally induced costs and developing better techniques for measuring their fiscal effects—have important implications for the fundamental policy question of whether the federal government should reimburse state and local governments for their added expenditures. Although there is no systematic federal reimbursement program, elements of such a system are present in several existing programs.

Chapter 4 examines the extent of current federal reimbursement of federally induced costs and discusses the need for criteria for helping to determine which of those costs should be reimbursed.

Notes

'The extension of FLSA to state and local government employees was upheld in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). See also John Kincaid, "Constitutional Federalism: Labor's Role in Displacing Places to Benefit Persons," PS *Political Science & Politics 26* (June 1993): 172-177.

'Ocean Dumping Ban Act of 1988, 102 Stat. 4139, 33 U.S.C. § 1401A.

[3] The Congressional Budget Office estimated the added cost of this requirement would total $33 million in 1991 alone.

[4] Social Security Act of 1935, 49 Stat. 620, 42 U.S.C., § 301 et seq.

[5] Initially, the act did not require state and local governments to provide coverage to their employees, although a number of state legislatures and local legislative bodies decided to provide such coverage voluntarily.

[6] Social Security Amendments of 1983, 97 Stat. 71, 42 U.S.C., § 418.

[7] Letter to author from Delmar D. Dowling of the Social Security Administration dated June 7, 1990. (Dowling letter).

[8] Omnibus Budget Reconciliation Act of 1986, 100 Stat. 1874, 7 U.S.C. §§ 1929 note et seq.

[9] Dowling letter.

"Americans with Disabilities Act of 1990, 104 Stat. 327.

[11] Local governments also are governed by Section 504 of the Rehabilitation Act of 1973.

[12] The federal government provides approximately 55.5 percent of total funding, with the states financing the remainder. In 15 states, local governments contribute to the nonfederal share. U.S. Advisory Commission on Intergovernmental Relations, *Medicaid: Intergovernmental Trends and Issues* (Washington, DC, 1991), p. 16.

[13] Total Medicaid expenditures that year were $1.323 billion. Ibid.

[14] Ibid., p. 23.

[15] Arizona's program, the Arizona Health Care Cost Containment System, operates under a general waiver granted by the Secretary of Health and Human Services, pursuant to Section 1115(a) of the Social Security Act.

[16] Ibid.

[17] *Governors' Weekly Bulletin,* September 14, 1990, p. 3.

[18] Ibid.

"David Rapp, "Just What Your State Wanted: Great New Gifts from Congress," *Governing* (January 1991): 53.

[20] Ibid.

[21] Wilder v. Virginia Hospital Association, 110 S.Ct. 2510 (1990).

[22] Emergency Highway Energy Conservation Act of 1974, 87 Stat. 1046, 23 U.S.C. § 154 (1975 Supp.).

[23] Transportation and Related Agencies Appropriations Act of 1990, 104 Stat. 2183, 23 U.S.C. § 104 note.

[24] Ibid., p. 2189.

[25] 98 Stat. 437, 23 U.S.C., § 158. See also Sarah F. Liebschutz, "The National Minimum Drinking-Age Law," *Publius: The Journal of Federalism* 15 (Summer 1985): 39-52.

[26] South Dakota v. Dole, 483 U.S. 203 (1987).

[27] Transportation and Related Agencies Appropriation Act of 1990, 104 Stat. 2184, 23 U.S.C. 104(a)(2), (a)(3), (b), (c).

[28] P.L. 76-753.

[29] P.L. 88-352 and P.L. 91-190.

[30] Davis-Bacon Act, 46 Stat. 1494, 40 U.S.C. 276 (a) et seq.

[31] Office of Management and Budget, *Managing Federal Assistance in the 1980s, Working Papers,* Vol. 1 (Washington, DC, 1980), pp. A-8-1 to A-8-6.

[32] David R. Beam and Timothy Conlan, "Swimming against the Tide: The Growth of Intergovernmental Mandates in an Era of Deregulation and Decentralization."

[33] U.S. Advisory Commission on Intergovernmental Relations, ***Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*** (Washington, DC, 1992); Joseph F. Zimmerman, ***Federal Preemption: The Silent Revolution*** (Ames: Iowa State University Press, 1991); and Zimmerman, ed., "Federal Preemption," *Publius: The Journal of Federalism* 23 (Fall 1993): entire issue.

[34] Airport Development Acceleration Act of 1973, 87 Stat. 90, 49 U.S.C., § 1513.

[35] Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388, 49 U.S.C. 1513.

[36] Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 54, 49 U.S.C., § 11503.

[37] Trailer Train Company v. State Board of Equalization, 697 F.2d 860 at 865 (1983).

"Department of Transportation and Related Agencies Appropriation Act of 1986, 99 Stat. 1288.

[39] Interview with Mary Ann Crotty, Deputy Director of State Operations, State of New York, Albany, August 9, 1990. Holland Tunnel tolls are collected only from vehicles traveling toward New York City. See also Mary Kihl, "The Impacts of Deregulation on Passenger Transportation in Small Towns," ***Transportation Quarterly*** (April 1988): 243-268.

[40] Ocean Dumping Ban Act of 1988.

[41] Bus Regulatory Reform Act of 1982, 96 Stat. 1104, 49 U.S.C., § 10521.

[42] Mel Dubnick and Alan Gitelson, "Nationalizing State Policies," in Jerome Hanus, ed., ***The Nationalization of State Government*** (Lexington, Massachusetts: D.C. Heath and Company, 1981), pp. 56-57.

[43] For additional information, see Public Finance Network, *Tax-Exempt Financing: **A Primer*** (Washington, D C Government Finance Officers Association, Spring 1994).

[44] Tax Equity and Fiscal Accountability Act of 1982, 96 Stat. 324, 26 U.S.C. § 310(b)(1).

[45] South Carolina v. Baker, 108 S.Ct. 1355 (1988).

[46] Tax Reform Act of 1986, 100 Stat. 2085, 26 U.S.C. § 1.

[47] United States Constitution, Art. I, § 8.

[48] U.S. Department of Health and Human Services, Office of Refugee Resettlement, *Refugee **Resettlement Program*** (Washington, DC, 1990), p. i.

[49] Ibid., p. iv.

[50] Ibid.

[51] Seth Mydans, "Accident of Geography Prompts Local Protest," *New York **Times,*** November 13, 1990.

[52] Statement of Virginia A. Collins, Chief Administrative Office, Los Angeles County, before the U.S. House of Representatives, Appropriations Committee, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Washington, DC, April 23, 1990, pp. 1-2.

[53] Gary Enos, **"As** Feds Cut Aid, Refugees Become Locals' Burden," ***City*** & ***State,*** January 15, 1990, pp. 1, 30.

[54] Joint Statement of Joaquin G. Avino, Dade County, Florida, and Virginia A. Collins, Los Angeles County, on behalf of the National Association of Counties, before the Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Washington, DC, June 27, 1990, p. 5.

[55] Dan Stein, "Tempest in a Melting Pot," ***Sunday Times Union*** (Albany, New York), October 21, 1990.

[56] ACIR, ***Fedeml Regulation of State and Local Governments: The Mixed Record of the*** *1980s* (Washington, DC, 1993), pp. 25-26.

[57] ACIR, *Intergovernmental Decisionmaking for Environmental **Protection and Public Works*** (Washington, DC, 1992).

[58] U.S. Department of Justice, "Federal and State Governments Seek Contempt Order against Nassau County, New York," News Release, August 24, 1990.

[59] Colorado Municipal League, ***Information Received on Local Government Impact of Environmental Mandates*** (Denver, 1990), p. 1.

[60] Ibid., p. 2.

[61] Ibid.

[62] Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 884, 33 **U.S.C.** § 1345.

[63] Ibid. See also ***Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army*** *Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) **Guidelines*** (Washington, DC, February 6, 1990).

[64] Atomic Energy Act of 1946, 60 Stat. 755, 42 U.S.C. § 2011 et seq.

[65] *Congressional **Record,*** May 25, 1983, pp. S7556-7557.

"These problems are documented and discussed at length in ACIR, ***Fedeml Regulation of State and Local Governments,*** Chapters 3 and 5.

[67] Marshall Goodman and Margaret Wrightson, ***Managing Regulatory Reform*** (New **York:** Praeger, 1987).

[68] For example, between the time a congressional committee completes markup of a bill and the committee report is published, CBO analysts frequently have only a few days in which to develop a state and local cost estimate.

[69] Theresa A. Gullo, "Estimating the Impact of Federal Legislation on State and Local Governments," and Ann Calvaresi Barr, "Cost Estimation **as** an Anti-Mandate Strategy," in Michael Fix and Daphne Kenyon, eds., ***Coping with Mandates: What Are*** *the Alternatives?* (Washington, DC: Urban Institute Press, 1990), p. 44.

Federal Reimbursement Needs and Experiences

4

Examining the Need for Reimbursement

The proliferation of mandates in recent years has generated growing interest in federal reimbursement of costs incurred by state and local governments. Reimbursement raises important issues of legitimacy—whether and under what conditions one government should be allowed to require actions by another—as well as thorny practical issues involving method and approach.

These are not entirely new concerns. Numerous federal programs provide various kinds of full and partial reimbursement. The following review of their features and characteristics is presented to help inform the broader reimbursement debate.

Arguments for Federal Reimbursement

Advocates commonly cite four principal arguments in support of reimbursement of federally induced costs: accountability, efficiency, equity, and effectiveness.

Accountability. Advocates of mandatory reimbursement maintain that it fosters greater governmental accountability.[1] Intergovernmental mandating breaks the link in the voter's mind between policy and implementation. Those responsible for adopting a policy are freed from the constraints imposed by having to finance it. State and local officials, on the other hand, may be criticized by voters for a costly or unpopular policy that they were powerless to stop or change.

Ultimately, this bifurcation of responsibilities can erode an important rationale for federalism. It disrupts the ability of local communities to respond to their own priority needs, turning them more into administrative arms of a superior government rather than independent policymaking entities.

Efficiency. Supporters of reimbursement believe that it would promote government efficiency. Mandated services can appear to be free goods to the government that issues them. With reimbursement, those enacting policies would be encouraged to become more judicious in mandating new programs or benefits—and seeking the most efficient means of providing them—because they would be forced to finance them through revenue increases or reductions in other government spending.

Efficiency might be promoted locally as well. One of the principal economic advantages of federalism is that it allows local constituencies to tailor government services and tax levels to their own needs and preferences. In contrast, mandated activities are often designed to establish a uniform, national standard, which may be too high in some places and too low in others.

Equity. Equity is cited as a further argument for reimbursement.[2] This begins with a recognition that revenue raising capacity and expenditure demands vary enormously among governments, and that the federal, state, and local revenue systems are interrelated by virtue of drawing on the same overall pool of taxpayer-voters. Wide disparities in fiscal capacity mean that the impacts of a required program or benefit also differ from one jurisdiction to another. If the government requiring the costs were responsible for paying them, such inequities would be reduced.

Effectiveness. Finally, the major motivating factor underlying most existing reimbursement schemes is national interest. Although mandating may appear to be a cheap and easy way for the Congress to advance national objectives, the results may be more akin to empty symbolism if a state or local government lacks the resources and expertise. Such symbolism, however, may be viewed as an effort by the federal government to take unfair advantage of its state and local partners, thereby damaging the partnership needed to implement what should be shared goals.

Arguments against Reimbursement

Practical and philosophical objections have been raised against federal reimbursement on grounds of constitutional principles, efficiency, equity, and administrative costs.

Constitutional Principles. First, it is argued that certain federal requirements are an expression of basic constitutional responsibilities. As such, the federal government and courts need not bear responsibility for costs associated with the legal obligations of state or local governments to live up to provisions of the U.S. Constitution. Such provisions might include federal statutes designed to guarantee basic civil rights, as well as judicial mandates regarding such issues as prison overcrowding and school integration.

Efficiency. Economists also raise efficiency arguments on behalf of certain types of mandates. Although they argue that certain goods may be provided more efficiently by unhindered local governments, other goods that produce "negative spillovers" may require provision or regulation by a unit of government with a greater geographic reach. Water pollution represents a classic example of such a spillover. Why, it is asked, should the nation's taxpayers bear the costs of a sewage treatment facility to prevent one community's pollution from poisoning another community's water supply?

Equity. Despite the argument that reimbursement promotes equity, the counter-argument is that it does so only among governments, not among citizens and between the public and private sectors. For example, leaving an issue to state and local governments may lead to unequal treatment of U.S. citizens, depending on where they live. In addition, many federally induced costs are not unique to state and local governments; private enterprises bear many of the same costs.[3] To reimburse one sector and not the other would create competitive inequities, particularly in the provision of goods and services that may be either public or private, such as electric power, trash collection, or hospital care.

It is also argued that reimbursement may create inequities among governments. For example, starting a new reimbursement program for requirements that have previously been in effect will reward governments whose compliance has lagged. Conversely, discontinuing or reducing a reimbursement program, but not the federal requirement, will afford a disproportionate benefit to governments that were able to participate most fully in earlier years. In addition, the prospect of new reimbursement may cause state and local governments to delay activities they would have undertaken so they will be eligible for the new program.

Administrative Costs. Opponents of federal reimbursement fear the administrative and financial costs.[4] They argue that the federal government is burdened with large deficits and is unable to assume the potentially sizable costs of a comprehensive reimbursement program. Indeed, for some programs, monetary and personnel costs may outweigh the perceived benefits. Most reimbursement programs are, by nature, labor intensive.[5] Developing an equitable reimbursement system would be a major administrative challenge, especially for requirements that involve thousands of local governments with widely varying costs. Without a way to simplify the system, reimbursement might be impractical.

The Need for Reimbursement Criteria

Strong arguments and principles have been advanced in support of and opposition to federal reimbursement of federally induced costs. Broad principles can serve as useful guideposts for determining the wisdom and feasibility of reimbursement, but they are often blunt instruments for crafting public policy. For example, the principle of negative spillovers may create a prima facie case for federal intervention, but the specific standards and the mode of regulation may be inappropriate. Excessive federal standards and overly intrusive forms of administration or enforcement—which may be encouraged by the lack of federal fiscal responsibility—may justify some form of reimbursement.

Debates about federal reimbursement may be clarified if the term "mandates" is replaced by attention to the more specific federal practices that induce increased state and local costs. Federal reimbursement may be more appropriate and practical in some cases than in others.

To inform these debates, it is helpful to examine the types of reimbursement programs that now exist.

Types of Reimbursement

States as well as the federal government issue mandates that affect local government services, administrative practices, and revenues. Several states have established mandate reimbursement programs, sometimes to help compensate for the imposition of a property tax limitation or other revenue cap on local governments. The structure of some state programs and varying state and local experiences are reviewed and analyzed in ACIR's report ***Mandates: Cases in State-Local Relations.***[6]

Although no federal statute sets forth a comprehensive scheme for reimbursing federally induced costs, state and local governments now recover a portion of their expenses through a variety of ad hoc programs. These include both direct and indirect reimbursement mechanisms, covering some, if not all, of the costs incurred in implementing certain federal directives.

Direct Reimbursement Mechanisms

A variety of tools has been used to channel funds directly to state and local governments to compensate them for the costs of federal program implementation. These mechanisms include:

1) Grants-in-aid, loans, loan guarantees, and tax expenditures to support required services or benefits;

2) Reimbursement of administrative or enforcement costs, in whole or in part, if the states assume implementation of a federal program or enforcement of a federal law; and

3) Payment for services rendered.

Program Costs. In some cases, the Congress has appropriated money to a program designed to help state and local governments meet the costs associated with a federally required activity. This was more common in the past; federal budget strictures now are more limiting. This practice provides a finite number of dollars not tied to actual costs.

A noteworthy example is the *Refugee Act of 1980*.[7] The act assigned key roles to states for planning, administering, and coordinating refugee resettlement.[8] The Office of Refugee Resettlement of the U.S. Department of Health and Human Services promulgated regulations providing grants to cover state assistance through Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI) adult assistance, refugee cash assistance, and refugee medical assistance? The initial reimbursement period was an individual's first 36 months in the United States. This subsequently was reduced to 24 months and later to four months, effective in 1990.[10]

The ***Indochina Migration and Refugee Assistance Act of*** 1975 provided full reimbursement to states of the cost of operating a placement program for Indochinese minors" until the act was allowed to sunset in fiscal year 1981. In addition, the ***Emergency Immigrant Education Act*** of 1984 authorized $30 million in grants to assist school districts with large numbers of immigrant children.[12]

The ***Refugee Assistance Extension Act*** of 1986 directed the U.S. Attorney General to compensate states and counties for costs of confining certain Cuban nationals in prison.[13] The act also provided grants to states to assist counties with "unusually large refugee populations" and "high use of public assistance by refugees."[14]

States received approximately $315 million from the Office of Refugee Resettlement in FY 1989 for assisting refugees from Cuba and Haiti. Reimbursements covered cash and medical assistance, children's assistance, social services, and administrative expenses.[15] The Division of State Legalization Assistance of the U.S. Department of Health and Human Services reported in 1990 that state costs resulting from legalization of aliens were minimal and "grants made to the States since 1988 have exceeded reported State costs."[16]

On the other hand, the U.S. Court of Appeals for the Ninth Circuit ruled, on October 26, 1990, that an alien was entitled to free legal assistance from the Utah Legal Services under the amnesty provisions of the ***Immigration Control and Legalization Amendments Act of*** *1986*.[17] The act provides for federal reimbursement of all state and local costs associated with legal aliens during their first five years in the United States." The act, as amended, authorized $4 billion annually for fiscal years 1988-1992, to be spent over a seven-year period ending in 1994.

In other cases, the federal government has created grant programs to help state and local governments pay a portion of the costs sustained in complying with federal standards. Prominent examples of such programs include:

- The ***Federal Water Pollution Control Act Amendments of*** 1972, which provided grants to local governments for the construction of wastewater treatment facilities;
- The ***Education for All Handicapped Children Act*** of 1975, which provided federal assistance to cover a portion of the costs associated with providing a "free and appropriate education" for physically and learning disabled children; and
- The ***Intermodal Surface Transportation Efficiency Act*** of *1991*, which contains grant programs for congestion mitigation and air pollution control.

Similarly, loans and tax exemptions have been made available for construction of environmental protection facilities. Loan guarantees and insurance also are frequently used federal aid techniques with potential application to mandate compliance.

Reimbursement of Administrative and Enforcement Costs. Reimbursement occurs most frequently when states voluntarily assume responsibility for enforcing federal standards. Varying amounts of administrative costs may be reimbursed in these cases.

The ***Egg Products Inspection Act*** of 1970, for example, authorizes states to enter into cooperative agreements with the Secretary of Agriculture for the inspection of eggs according to federal standards.[19] The U.S. Department of Agriculture compensates cooperating states for operating the shell egg surveillance program. As of 1991, 45 states were performing shell egg inspections under cooperative agreements.[20]

Enforcement expenses also are reimbursed under many environmental programs. The ***Environmental Pesticide Control Act*** of 1972 authorizes state cooperation in enforcement and provides that the administrator of the Environmental Protection Agency may grant funds to states to cover part of their enforcement costs.[21]

A similar provision was contained in the ***Migrant and Seasonal Agricultural Worker Protection Act*** of 1983, which authorizes the Secretary of Labor to (1) enter into agreements with states to utilize their facilities, (2) delegate en-

forcement authority to the states, and (3) reimburse the states for costs they incur in the cooperative agreement.[22]

Payment for Services Rendered. A third method of reimbursement allows federal agencies to pay state and local governments for specific services. An example of this approach is found in the *Federal Fire Prevention and Control Act* of *1974,* which authorizes reimbursement of costs incurred by fire companies in fighting fires on federal properties.[23]

The U.S. Customs Service pays state and local law enforcement agencies for expenses sustained in any joint operations, including costs of equipment, fuel, overtime, and rent. As of October 11,1990, over $80 million in disbursements from the Customs Forfeiture Fund had been made to law enforcement agencies in four states.[24]

Indirect Reimbursement Mechanisms

Indirect reimbursement mechanisms may be easier to adopt because most do not involve the expenditure of many tax dollars. Nor do they seem to smack of "pork barrel" politics, a common complaint against many direct appropriations. These alternatives typically do not cover the full costs of implementing a federal requirement. They do, however, help cushion the impact of federal requirements. Such indirect reimbursement tools include:

1) General revenue sharing;
2) Payments in lieu of taxes;
3) Low-cost loan programs begun with federal start-up funds;
4) Authorization for state and local governments to assess user fees to cover costs of a federally required program;
5) Sharing of fines and penalties with states and local governments; and
6) Provision of free training and equipment to state and local governments.

General Revenue Sharing. General Revenue Sharing (GRS) provided essentially no strings formula grants to virtually all state and local governments between 1972 and 1980, and to local governments until 1986. Although not designed originally to be a program of mandate reimbursement, and not distributed according to variations in mandated burdens, GRS distributed up to $6 billion annually. GRS funds could be applied to mandated activities at the discretion of the recipient government. One study of federal mandates affecting local governments in the late 1970s found that the average costs of such requirements were roughly comparable to the amount of General Revenue Sharing the jurisdiction received.[25]

Payments In Lieu of Taxes. Instead of reimbursement, the federal government, in certain cases, provides financial assistance in the form of a payment in lieu of taxes (PILT).[26] These payments compensate state and local governments for the presence of tax-free federal property. Appropriated annually according to a formula set by the federal government, the payment is intended to replace the tax revenue that is lost through the tax exemption and to compensate the state or local government for services rendered to the federal government.

Loan Programs. The Congress occasionally reimburses state and local governments indirectly by establishing a loan program to assist in the costs of mandate implementation. A prime example of this approach may be found in the *Clean Water Act*.[27] Following the creation of strict new federal standards for municipal wastewater treatment in 1972, the construction grant program expanded from $1.6 billion in 1973 to over $6 billion in 1977.[28] In 1985, the federal matching share for sewage treatment facility construction was reduced from 75 percent to 55 percent, and federal grant assistance fell to $2.3 billion in 1988. Beginning in 1988, this grant program was phased out in favor of partial capitalization of state revolving loan funds. Starting in 1994, these funds will offer low-interest loans to local governments constructing water treatment facilities. Federal grant assistance is scheduled to decline to $434 million by 1994 and to be terminated thereafter.[29]

User Fees. The *U.S. Grain Standards Act of 1968* authorizes the Federal Grain Inspection Service of the U.S. Department of Agriculture to delegate to states authority to perform official inspection and weighing of grains. States incur no unreimbursed costs because the inspection and weighing are financed by user charges, which the federal government authorizes them to collect.[30]

User fees may be authorized to compensate states and local governments in a more indirect way as well. The *Surface Transportation Assistance Act* of *1982* prohibited states from excluding "big" trucks from their Interstate highways, segments of the federal-aid highway system designated by the Secretary of Transportation, and local access roads to these highways.[31] Reaching a compromise with the trucking industry and the states, the Congress included in the statute a 5-cent per gallon increase in the federal excise tax on diesel fuel. Revenues collected from that tax increase were to provide additional federal grants to states to maintain and repair the highways and bridges to compensate for the wear and tear caused by the heavy trucks.

Collections from Fines and Penalties. Frequently, individuals and businesses are fined for violating federal law. Funds collected in this fashion often are directed to the general treasury. Occasionally, however, they are earmarked for specific purposes. One purpose may be to help reimburse state and local governments for federally induced costs.

For example, the U.S. Department of Justice Assets Forfeiture Fund was established in 1984. It receives income from the disposition of seized and forfeited proper-

ty. Funds from this account may be used to finance seizing and forfeiting drug dealers' and racketeers' illegally owned, used, or acquired property.[32] These funds, administered by the U.S. Marshals Service, totaled **$701.9** million in fiscal year 1990.[33]

The enabling statute provides for equitable sharing of payments from the fund to state and local law enforcement agencies for assistance in targeting or seizing the property. A total of **$157.3** million was disbursed from the fund in fiscal year 1989.[34]

Training and Equipment. This form of federal help to state and local governments offers free or reimbursed training and equipment needed by state and local governments to implement a project or provide a service.[35]

The federal government commonly uses this method for emergency response situations. Seven federal entities[36] provide funding to, or conduct training programs for, state and local emergency response personnel.[37]

The Federal Emergency Management Agency **(FEMA)** also gives financial assistance to state and local governments through a comprehensive cooperation agreement.[38] From **1987** through **1989,** FEMA financed attendance by **8,191** students from New York State in more than **150** training activities involving hazardous material~.~~

In addition, the National Fire Academy offers two-week training programs for dealing with hazardous materials.

Other hazardous materials emergency training programs are sponsored by the U.S. Department of Energy and the U.S. Coast Guard. The Coast Guard also offers two programs for civilians—the On-Scene Coordinator/ Regional Response Team Pollution Exercise and the Hazardous Chemical Training Course.[40]

The *Superfund Amendments and Reauthorization Act* of *1986* authorized **$10** million per year for five years for training nonprofit organization employees engaged in hazardous waste removal, containment, and emergency response.[41] Eleven grants have been made to several organizations, including the International Association of Fire Fighters, the Seattle (Washington) Fire Department, and various universities.[42]

Weaknesses of Existing Reimbursement Approaches

Although the federal government has demonstrated its good intentions with the enactment of a variety of reimbursement programs, states and local governments still bear a heavy load of federally induced costs. In part, these governments suffer the shortcomings of the reimbursement programs that are designed to help them.

An examination of the reimbursement programs reveals several difficulties, such as:

1) Reimbursement is authorized, but no funds or only a portion of authorized funds are appropriated.
2) Payment is conditioned on compliance with certain unrelated requirements.
3) Restrictions are placed on the types of governments eligible for reimbursement.
4) The costs that may be recovered are prorated.
5) Applying for the funds is expensive, difficult, and uncertain.

Authorization but No (or Reduced) Appropriation

The *Federal Railroad Safety Act* of *1970,* for example, authorizes federal reimbursement of part of the costs sustained by states that assume responsibility for railroad safety inspections in accordance with federal standards.[43] The Congress, however, has not appropriated funds for the program since FY **1989.** Nevertheless, **31** states continue to participate in the program.

In other cases, federal funding may continue but at substantially lower levels. For example, the *Education for All Handicapped Children Act* authorized federal grants equaling 40 percent of the detailed and costly special education requirements. Appropriations never totaled more than **12** percent of the program's funding.

During the **1980s,** partial funding also was a general pattern in many partial preemption programs delegated to the states. For example, ACIR and GAO examined trends in funding for ten federal-state regulatory programs between **1981** and **1986.** In every instance, federal funding was reduced in constant dollar terms, in amounts that varied from **2** percent to **40** percent of original funding levels (see Table **4-1).**

Now that the hard budget caps agreed to by President Clinton and the Congress have kicked in for deficit reduction purposes, new authorizations frequently are met with appropriations worth only **10-20** cents on the dollar.

Accompanying Conditions

Although reimbursement may be authorized, payments may be conditioned on compliance with additional and unrelated requirements. *An* example maybe found in programs under the *Occupational Safety and Health Act* of *1970.*[44] The law authorizes a state to submit a plan to the Secretary of Labor to assume responsibility for the regulatory function, but the state must agree to extend to state and local employees protection equivalent to that given to private employees.[45] If the plan is approved by the Secretary, the Occupational Safety and Health Administration will pay up to half of the operating costs of the program.

Table 4-1

Funding for Administrative Costs in "Intergovernmental Partnership Programs

(millions of constant **1981** dollars)

Program	FY 1981	FY 1986	Percent Change
Clean Air Act	$83.6	$71.4	–14.6
Endangered Species Act	5.4	3.3	–38.9
FIFRA:			
Certification	3.0	2.0	–33.3
Enforcement	10.1	9.2	–8.9
Flood Disaster Protection	4.5	2.6	–42.2
Handicapped Education	899.5	884.0	–1.7
Historic Preservation	25.3	15.2	–39.9
Occupational Safety & Health Act (OSHA)	63.3	56.8	–10.3
Safe Drinking Water	37.0	27.0	–27.0
Wholesome Meat Act	28.3	23.5	–17.0

In 1990, 23 states, Puerto Rico, and the Virgin Islands had federally approved programs, and $60 million was appropriated to help reimburse operating costs.[46]

Reimbursement Limited to Certain Governments

For reasons that may not be clear to the affected government, reimbursement may be limited to certain types of governments. The ***Superfund Amendments and Reauthorization Act*** of ***1986*** recognizes what might be termed an "implied mandate" by authorizing reimbursement of costs incurred by local governments in providing an emergency response to the release of hazardous substances.[47] State governments are ineligible to receive these reimbursements.

Reimbursement Prorated

A state or local government may qualify for federal reimbursement, but may be eligible for only partial compensation. The ***Superfund Act*** cited above offers a prime example of this condition. Reimbursement decisions are based chiefly "on the ratio of eligible response costs to the applicant locality's per capita income adjusted for population, with consideration given *to* their relevant financial information provided at the applicant's discretion."[48] As of 1988, EPA had received only four applications for reimbursement.[49]

Cost, Difficulty, and Uncertainty of Applying for Reimbursement

Even if a statute or regulation calls for reimbursement and funds are available, state and local governments may still face difficulties in obtaining the funds. The ***Federal Fire Prevention and Control Act of 1974,*** for example, authorizes reimbursement of costs incurred in fighting fires on federal properties?' In 1987, the **U.S.** Fire Administration handled four claims involving eight fire services. Of the four, one claim was disallowed, one claimant was requested to provide verification of costs, which was never submitted, and two fire companies were reimbursed $1,400 and $435, respectively.[51]

In 1988, five claims were received by the administration. Two claimants did not respond to letters requesting additional information, and two fire companies were reimbursed $6,218.37 and $7,700.96, respectively.[52] ***An*** additional claim involving ten fire companies was determined to be eligible for reimbursement of $27,409.45, but the funds were not released by the federal agency where the fire occurred.[53]

Under this reimbursement program, only fire companies are eligible claimants, and claims must include only direct expenses and losses above normal operating costs. Claims typically involve loss or damage of equipment, fuel expended, repaid costs, overtime pay, and pay for specially hired personnel. No reimbursement is made for death benefits, injury costs, ordinary salaries, depreciation, normal maintenance, or administrative costs.

Special difficulties arise when the federal government creates a loan program to reimburse local governments for the costs of implementing federal requirements. Communities that may need the assistance the most also may be poor credit risks, thus making it difficult, if not impossible, to qualify for this aid program.[54]

Conclusion

Devising a system of reimbursement for federally induced expenditures by state and local governments raises issues of conflicting principles and administrative complexity. Faced with massive federal deficits and new statutory caps on discretionary federal spending, the political obstacles to a major reimbursement program are likely to be substantial.

Nevertheless, strong arguments can be made for reimbursement in a number of programs. This is true not only from the standpoint of state and local interests but in order to advance federal statutory goals. In such cases, it is important to recognize that there is a series of models that could suggest the basis for a more comprehensive program of reimbursing federally induced costs.

Notes

[1] Ray D. Whitman and Roger H. Bezdak, "Federal Reimbursement for Mandates on State and Local Governments," p. 52.

[2] Iblid., pp. 52-53.

[3] Ibid., p. 54.

[4] Ibid.

[5] Ibid.

[6] U.S. Advisory Commission on Intergovernmental Relations, ***Mandates: Cases in State-Local Relations*** (Washington, DC, 1990).

[7] 94 Stat. 102, 8 U.S.C. 1101, 22 U.S.C. 2601.

[8] Ibid. See also, U.S. Department of Health and Human Services, Office of Refugee Resettlement, *Refugee Resettlement Program* (Washington, DC, 1990).

[9] 45 CFR 100.11(a).

[10] Gary Enos, **"As** Feds Cut Aid, Refugees Become Locals' Burden," ***City & State,*** January 15, 1990, pp. 1, 30.

[11] Indochina Migration and Refugee Assistance Act of 1975, 89 Stat. 87, 22 U.S.C. § 2601 note.

[12] Emergency Immigrant Education Act of 1984, 98 Stat. 2366, 20 U.S.C. §§ 4101 et seq.

[13] Refugee Assistance Extension Act of 1986, 100 Stat. 3455, 8 U.S.C. $1522.

[14] Ibid., 100 Stat. 3453-3454, 8 U.S.C. § 1522(c).

[15] HHS, ***Refiigee*** *Resettlement Program*, p. i.

[16] Letter from David **B.** Smith, Director, Division of State Legalization Assistance, **U.S.** Department of Health and Human Services, dated September 14, 1990.

[17] Gail D. Cox, "Aliens Held Entitled to Legal Aid," *The National Law Journal* (November 12, 1990): 3.

[18] Immigration Control and Legalization Amendments Act of 1986, 100 Stat. 3359, 8 U.S.C. § 1101 note.

[19] Egg Products Inspection Act of 1970, 84 Stat. 1623, 21 U.S.C. § 301.

[20] Letter from D. Michael Holbrook, Director, Poultry Division, US. Department of Agriculture, dated January 15, 1991. Only Michigan, Missouri, Ohio, Tennessee, and Texas have not entered into cooperative agreements.

[21] Environmental Pesticide Control Act of 1972, 86 Stat. 996-97, 7 U.S.C. §§ 136u-136v.

[22] Migrant and Seasonal Agricultural Worker Protection Act of 1983, 96 Stat. 2599, 29 U.S.C. § 1871.

[23] Federal Fire Prevention and Control Act of 1974, 88 Stat. 1535, 15 U.S.C. § 1511.

[24] Funds expended included $56,884,439.44 (California); $14,535,054.94 (Florida); $7,613,425 (Texas); and $3,764,323.10 (New **York).** This information was provided in a letter from John E. Hensley, Assistant Commissioner, U.S. Customs Service, dated October 15, 1990, p. 1 and attachment, pp. 2-4, 8, and 10.

[25] Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," in *Government Regulation: **Achieving Social and Economic Balance,*** vol. 5 of ***Special Study on Economic Change,*** U.S. Congress, Joint Economic Committee (Washington, DC, 1980).

[26] Payment in Lieu of Taxes Act, 90 Stat. 2662. For more information on PILT programs, see ACIR, *The Adequacy of Federal Compensation to Local Governments for Tar Exempt Federal Lands* (Washington, DC, 1978).

[27] See the Clean Water Act as amended by the Water Quality **Act** of 1987, 101 Stat. 7, 33 U.S.C. §§ 1251 et seq.

[28] U.S. Environmental Protection Agency, ***Environmental Investments: The Cost of a Clean Environment*** (Washington, DC, 1991), p. 4-2.

[29] Ibid., p. 4-3.

[30] United States Grain Standards Act of 1968, 82 Stat. 769, 7 U.S.C. § 71.

[31] Surface Transportation Assistance Act of 1982, 96 Stat. 2097, 23 U.S.C. § 101. States restrict many types of heavy trucks because they produce more wear and tear on roads and bridges than automobiles and light trucks.

[32] Comprehensive Forfeiture Act of 1984, 98 Stat. 2052, 28 U.S.C. § 524(c). See also the Anti-Drug Abuse Act of 1986, 100 Stat. 3207, 28 U.S.C. § 524(c) and the Anti-Drug Abuse Act of 1988, 102 Stat. 4181, 28 U.S.C. § 524 (c).

[33] Letter from Jeffrey Fratter, Chief, Seized Assets Division, U.S. Marshals Service, dated November 16, 1990.

[34] U.S. Department of Justice, ***The Attorney General's Annual Report on the Justice Assets Forfeiture Fund for Fiscal Year*** *1989* (Washington, DC, 1990), p. **2.**

[35] Although the agencies do not charge for their training programs, state and local governments do incur costs in sending their employees to receive such training.

[36] The agencies are the Federal Emergency Management Agency (FEMA), the Environmental Protection Agency, the National Fire Academy, the Coast Guard, the Department of Transportation, the Department of Energy, and the Department of Health and Human Services.

[37] For a detailed description of the programs offered by five agencies, see US. General Accounting Office, ***Hazardous Materials: Federal Paining for First Responders to Highway and Railroad Incidents*** (Washington, DC, 1989).

[38] Federal Emergency Management Agency, ***CCA General Program Guidelines*** (Washington, DC, 1987).

[39] Letter from Gerald Boyd, National Energy Training Center, Federal Emergency Management Agency, dated December 12, 1989.

[40] Letter from Commander D.A. Sande, Marine Safety Branch, U.S. Coast Guard, dated October 18, 1989.

[41] Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1613, 42 U.S.C. § 9601 note.

[42] Letter from the National Institute of Environmental Health Services, dated December 12, 1989.

[43] Federal Railroad Safety Act of 1970, 84 Stat. 971, **45** U.S.C. § 431 et seq.

[44] 84 Stat 1590.§

[45] Occupational Safety and Health Act of 1970, 84 Stat. 1590, 5 U.S.C. § 5108.

[46] Letter from Bruce Hillenbrand, Occupational Safety and Health Administration, dated May 31, 1990.

[47] Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1729, 42 U.S.C. § 11001.

[48] *Federal **Register,*** October 21, 1987, p. 39388. See also 40 CFR Part 310.

[49] Letter from Karen **Z.** Burgan, U.S. Environmental Protection Agency, dated June 17, 1988.

[50] Federal Fire Prevention and Control Act of 1974, 88 Stat. 1535, 15 U.S.C. § 1511.

[51] Letter from Edward M. Wall, Deputy Administrator, U.S. Fire Administration, dated May 30, 1989.

[52] Ibid.

[53] Ibid.

[54] Georgina Fiordalisi, "Tough Mandates, Limited Funds," ***City & State,*** January 15, 1990, p. 16.

Appendix A

Mandate Effects on Individual Governments

One way of viewing the financial impact of federal mandates is to examine the estimates of costs reported by individual governments. Although a variety of reports has been issued about mandates on state and local governments, only a few have attempted to present a comprehensive financial assessment of the impacts. Some of the problems of making such assessments and interpreting the results can be illustrated by looking at such reports from the states of Tennessee and Ohio, and the cities of Columbus, Ohio, and Lewiston, Maine.

Tennessee

Tennessee compiled a list of every new federal mandate that had caused additional state expenditures from the General Fund since FY 1986-87. The estimated costs of these mandates in 1993 and 1995 are shown in Table 1:

Table 1
State of Tennessee Federal Mandate Costs
(millions)

	1993	1995	Increase
Medicaid	$113.4	$141.6	$28.2
Non-Medicaid	24.0	36.6	12.6
Loss of Sales Tax on Food Stamps	16.3	16.3	0.0
Total	**$153.7**	**$194.5**	**$40.8**
Percent of Own-Source General Revenues in 1991 ($5,612.4 million)	2.7%	3.5%	0.7%

The estimated mandate costs of $153.7 million for 1993 were equal to about 2.7 percent of the state's $5.6 billion own-source revenues in 1991, as reported by the Bureau of the Census. The projected increase of $40.8 million in mandate costs from 1993 to 1995 is equivalent to about 0.7 percent of 1991 revenues. Only general fund mandates were included in the study. The percentages might be somewhat higher if special fund mandates, such as transportation, were included.

The Tennessee report raises two important issues in evaluating cost effects. First, the estimates include only state Medicaid costs resulting from federal directives issued since 1987. This represents a middle ground between counting all Medicaid matching (about $750 million in 1991 for Tennessee) as a federal requirement imposed on states and not counting any of the matching as a mandate because states are not required to participate in Medicaid.

The second issue is whether states should, like Tennessee, count as a mandate cost the taxes not received on food stamp purchases because they are exempt from sales taxes by federal law. This issue arises only in the 20 states that tax food sales.

Ohio

Ohio, in an August 1993 report, estimated the cost of unfunded federal mandates on the state government for 1992 to 1995 (see Table 2). The 1992 estimated cost of $260.1 million is about 1.7 percent of Ohio's own-source revenues in fiscal year 1991. The increase of $129.1 million from 1992 to 1995 is equivalent to about 0.8 percent of 1991 own-source revenues. Although the bases for calculating the Ohio and Tennessee estimates are somewhat different, the percentages of own-source revenues spent on mandates are remarkably similar.

Ohio's estimated cost of Medicaid mandates includes only the new federal requirements enacted since 1987, and reflects only a small portion of total state Medicaid spending of about $1.8 billion in 1991 (see Table 2). Ohio exempts food purchases from the sales tax and shows no loss due to the federal exemption for food stamps.

Table 2
State of Ohio Federal Mandate Costs
(in millions)

	1992	1995	Increase
Medicaid	$185.4	$262.7	$77.3
Other Human Services	48.7	68.5	19.8
Clean Water Act	16.6	26.7	10.1
Transportation	4.9	31.3	26.4
Other	4.5	0.0	-4.5
Total	**260.1**	**3893**	**129.1**
Percent of Own Source General Revenues in 1991 ($15,623.0 million)	1.7%	2.5%	0.8%

Note: These cost figures do not include an additional $430 million in total *Americans with Disabilities Act* compliance costs, which will be incurred by Ohio over several years.

Ohio, unlike Tennessee, includes some estimated transportation mandate costs. These result primarily from federal requirements to (1) use rubberized asphalt, (2) follow the International Registration Plan, and (3) change requirements for commercial driver's licenses.

Although Ohio estimates that the state will incur $430 million in costs from the ***Americans with Disabilities Act,*** it is not able to allocate those costs by years. Most of these costs involve nonrecurring capital expenditures over several years, perhaps funded by **bond** issues requiring debt-service payments over an extended period. The additional annual mandate costs that should be added will depend on when and how these costs are ultimately incurred.

Columbus, Ohio

The Columbus city government, in 1991, identified estimated mandate costs it would incur from 1991 to 2000. The costs are estimated for each year from 1991 to 1995, but are summarized in total amounts for 1996 to 2000. The study includes federal and state mandates. In most instances, the state laws either parallel or implement federal laws, with the federal law providing the underlying mandate. However, in the case of solid waste disposal and infectious waste, the state appears to be the principal source of the mandate. The estimated costs for 1991 and 1995 are shown in Table 3.

The city estimates that its $62.1 million in 1991 mandate costs were about 10.6 percent of its total $591.5 million budget, with this percentage increasing to 18.3 percent in 1995. If the solid waste disposal and infectious waste costs are considered state mandates, then the remaining federal mandates are 10.4 percent in 1991 and 15.0 percent in 1995.

Table 3
City of Columbus, Ohio, Federal and State Environmental Mandate Costs
(in millions)

	1991	1995	Increase
Clean Water Act	$54.7	$75.5	$20.8
Resource Conservation	4.2	2.8	-1.4
Safe Drinking Water	1.4	**7.5**	6.1
Solid Waste Disposal	0.5	18.9	18.4
Other	1.3	2.7	1.4
Total	**62.1**	107.4	45.3
Percent of Total City Budget ($591.5 million)	10.6%	18.3%	7.7%
Percent Without State Mandates	10.4%	15.0%	4.6%

In preparing the estimates, the city surveyed every municipal department and looked for costs incurred under 13 separate federal mandates. Just three programs—the ***Clean Water Act,*** the ***Safe Drinking Water Act,*** and solid waste regulations account for 95 percent of the total 1995 costs.

The Columbus study provides additional perspective on mandate cost estimates by separating those supported by sewer and water charges from those supported by general taxes and converting both types to costs per household (see Table 4).

Table 4
Columbus Mandate Costs by Source of Payments and by Household Costs

	1991	1995	Increase
Source of Payments (in millions):			
Sewer and Water	$56.6	$84.8	$28.2
General Taxes	5.5	22.6	17.1
Total	**62.1**	**107.4**	45.3
Payments per Household (in dollars):			
Sewer and Water	$163.00	$244.00	$81.00
General Taxes	21.00	86.00	65.00
Total	184.00	330.00	**146.00**

By 1995 nearly 80 percent of the total estimated costs of mandates will be charged to sewer and water users, leaving a relatively small amount, almost entirely for solid waste, to be charged to general taxpayers. In some local governments, solid waste costs are also charged to users.

No estimates are provided of how these costs are split between charges and taxes, nor are the costs shown on a per household basis. However, because most of the anticipated costs are associated with safe drinking water and clean water activities, it appears they would mainly result in increased sewer and water charges.

Lewiston, Maine

The city, in 1992, analyzed the capital, operational, and maintenance costs of complying with federal mandates. Lewiston's estimates include the amounts actually budgeted in 1992, the amounts projected based on existing requirements, and the amounts needed to meet proposed regulations under consideration by federal agencies (see Table *5).*

These results do not include solid waste costs that the city considers to be state requirements, even though they may relate indirectly to federal requirements. It also was necessary to estimate annual debt service costs based on the lump-sum capital spending estimates.

The $414,000 currently budgeted for federal mandates represents about 0.8 percent of Lewiston's budget. Complying with projected requirements at a cost of $1.6 million would add 3.1 percent, and complying with all proposed regulations would add 14.5 percent. Thus, at some time in the future, the costs of complying with all potential federal requirements could equal about 18.4 percent of the city budget.

Chicago, Illinois

The City of Chicago, in conjunction with Roosevelt University's Institute for Metropolitan Affairs, surveyed all city departments for the costs (1991) of unfunded mandates and regulations. This survey included federal and state-imposed costs. The federal costs totaled $191.2 million, or the equivalent of **8.3%** of the city's 1991 own-source revenues (see Table 6). No projections of costs were made for subsequent years.

However, a separate estimate **for** environmental mandates projects those costs as declining from $95.1 million in 1991 to $68.2 million in 1995. Unlike the other cities, most Chicago environmental costs result from the ***Resource Conservation and Recovery Act*** and clean air requirements, and not from water-related mandates. The responsibility for drinking water and sewage treatment rests with noncity agencies in Chicago. ***As*** a result, the environmental costs to residents are undoubtedly much higher than shown in this analysis.

Table **5**
Lewiston, Maine Cost of Federal Mandates
(in thousands)

	Current	Projected	Proposed
Safe Drinking Water			
Debt Service	$305.1	$ 392.3	$1,107.2
Operation and Maintenance	30.0	300.0	1,250.0
Clean Water			
Debt Service	18.4	453.4	4,322.6
Operation and Maintenance	10.0	410.0	1,000.0
Occupational Safety			
Debt Service	10.5	5.2	0.0
Operation and Maintenance	40.0	70.Q	0.0
Totals:			
Debt Service	334.0	850.9	5,429.8
Operation and Maintenance	80.0	700.0	2,250.0
Grand Total	**414.0**	**1,630.9**	**7,679.8**
Percent of 1992 Budget ($53 Million)	0.8%	**3.1%**	14.5%

Note: Debt service based on projected capital costs amortized with level debt service over **20** years at 6%.

Table 6
City of Chicago, Illinois, Unfunded Federal Mandates

	1991 Costs
Agency Direct	$88.2
Indirect Administrative	27.3
Airport Restrictions	12.7
Arbitrage Rebate	18.0
Bond Refinancing Restrictions	45.0
Total	**191.2**
Percent of 1991 General Revenues from Own Sources ($2,307.9 million)	8.3%

There are several unique features in the Chicago study. The city estimates that it incurs annual costs as a result of federal limitations on slots at O'Hare Airport. The city also considers the costs of arbitrage rebates a federal mandate. These costs stem from the 1986 federal tax reform that prohibited state and local governments from profiting by investing federally tax-exempt bond funds in higher yielding taxable securities. Similarly, the 1986 law permits only one advance refunding of tax-exempt bonds, secured by escrowed higher interest federal securities. In both instances, the city believes its debt management has been impaired by federal laws intended to eliminate an abuse of the federal income tax laws.

Other Studies

Anchorage, Alaska, estimated the costs of federal mandates in 1993 using a method similar to that used in the Columbus study (see Table 7).

Expressed as a percentage of own-source revenues, the costs were less than 1 percent in 1993 and are expected to increase to only 1 percent by 1996. This impact is much lower than the Columbus and Lewiston estimates, and Anchorage cautions that "they should not be viewed as representative of other cities or counties for several reasons." These reasons include limited problems of industrial development, relatively new infrastructure, and considerable wealth from oil production.

Table 7
Anchorage, Alaska, Costs of Federal Environmental Mandates
(in millions)

	1993	1996	Increase
Clean Water	$4.4	$13.1	$8.7
Clean Air	3.9	11.0	7.1
Resource Conservation and Recovery	7.8	**6.0**	-1.8
Toxic Substances	1.2	1.1	-0.1
All Other	5.2	6.4	1.2
Total	**22.5**	**37.6**	**15.1**
Percent of 1991 General Revenues from Own Sources ($386.9 million)	0.6%	1.0%	**0.4%**

Nine Ohio cities, including Columbus, attempted to compile uniform financial costs for 14 environmental mandates. Only five cities submitted complete data. The information that was available was converted to an average cost per household for the nine cities. The resulting estimate was $137 in 1992, estimated to increase by $88 to $225 in 1996. These amounts, as in the Columbus study, include solid waste disposal costs that are technically a state mandate.

Virginia, in a 1993 report, concluded that "at least 20 percent of annual general fund expenditures are driven by federally mandated programs." This far exceeds the Tennessee and Ohio estimates, and results from a very broad definition of mandates to include any program that is either "driven, defined, or constrained by federal laws, regulations, or federal agency decisions." As a result, the entire state matching payments of over $1 billion for Medicaid and AFDC are included in the estimate, as are a variety of other federal grant programs generally classified as being subject to state discretion.

Appendix B

Excerpts of Recommendations From ACIR Reports on the Unfunded Federal Mandates Issue

ACIR Reports

- *The Federal Role in the Federal System: The Dynamics of Growth. An Agenda for American Federalism: Restoring Confidence and Competence,* Report **A-86,** June **1981,** (Approved June **20,1980).**
- *Regulatory Federalism: Policy, Process, Impact and Reform,* Report **A-95,** February **1984.**
- *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues,* Report **A-121,** September **1992.**
- *Intergovernmental Decisionmaking for Environmental Protection and Public Works,* Report **A-122,** November **1992.**
- *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s,* Report **A-126,** July **1993.**
- *High Performance Public Works: A New Federal Infrastructure Investment Strategy for America,* Report **SR-16,** November **1993** (Action agenda endorsed by the Commission, February **14, 1994).**

THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH
An Agenda for American Federalism: Restoring Confidence and Competence

(Report A-86, June **1981)**

Recommendation 2

Avoiding Unintended Impacts on State and local Governments.. .

Fiscal Notes.. .

The Commission recommends that Congress amend the *Congressional Budget Act of 1974* to require the Congressional Budget Office (CBO), for every bill or resolution reported in the House or Senate, to prepare and submit an estimate of the cost which would be incurred by state and local governments in carrying out or complying with such bill or resolution.

Temporary Suspension of Crosscutting Policies. . .

The Commission recommends that Congress enact legislation authorizing standby authority to the President (acting through the Office of Management and Budget) to suspend temporarily implementation of enacted crosscutting national policy requirements when it becomes clear that serious and unanticipated costs or disruptions will otherwise occur. The Commission further recommends: (a) that prior to any suspension, the President ascertain through an assessment of the requirement's legislative history and, where needed, through direct contact with the appropriate congressional committees that the impending disruptions were not anticipated by Congress; (b) that the suspension of the implementation of any given policy requirement by the President be limited to no more than **180** days; (c) that the President immediately notify the appropriate committees of Congress of his action and the reasons for it; and (d) that within 60 days of the suspension, the President present to Congress an alternative remedial legislative proposal.

Regulatory Impact Analyses. . .

The Commission recommends that the Congress enact legislation requiring each federal department and agency, including each of the independent regulatory agencies, to prepare and make public a detailed analysis of projected economic and noneconomic effects likely to result from any major new rule it may propose.

REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM

(Report A-95, February 1984)

Part A: POLICIES AFFECTING ALL FORMS OF FEDERAL INTERGOVERNMENTAL REGULATION. . .

Recommendation A1 Principles Concerning Federal Regulation of State and Local Governments

The Commission recommends that Congress and the Administration carefully consider the appropriate allocation of responsibilities among the different levels of government when establishing new regulatory programs or when evaluating existing ones. As a general principle, the Commission strongly recommends that the federal government strive to confine its regulation of state and local governments and their legitimate activities to the minimum level consistent with compelling national interest. Enactment of federal intergovernmental regulation may be warranted under the following circumstances:

(1) to protect basic political and civil rights guaranteed to all American citizens under the Constitution;

(2) to ensure national defense and the proper conduct of foreign affairs;

(3) to establish certain uniform and minimum standards in areas affecting the flow of interstate commerce;

(4) to prevent state and local actions which substantially and adversely affect another state or its citizens; or

(5) to assure fiscal and programmatic integrity in the use of federal grants and contracts into which states and local governments freely enter.

The Commission emphasizes, however, that these criteria do not justify every federal regulatory action that has a tenuous relationship to one or more of these principles. Rather, federal intergovernmental regulation is warranted only when a clear and convincing case has demonstrated both the necessity of such intervention and a marked inability of state and local governments to address the regulatory problem involved. In making this determination, the Commission strongly believes that the criteria above must be weighed against the federal government's commensurate responsibility to maintain the viability of the federal system and to respect the institutional integrity of states and their localities.

If, according to this test, the federal government's involvement in a regulatory program is appropriate, the Commission further recommends that the federal government choose the least intrusive means of intergovernmental regulation consistent with the national interest, allowing state and local governments the maximum degree of flexibility possible. . . .

Recommendation A2 Assuring Adequate Funding for New Regulatory Statutes'. . .

The Commission recommends that Congress establish a system that guarantees full federal reimbursement to state and local governments for all additional direct expenses legitimately incurred in implementing new federal statutory mandates, including costs imposed by federal direct order mandates, crosscutting requirements, partial preemptions and provisions enforced by crossover sanctions.

The Commission further recommends that the legislation establishing such a system specify that no state or local government be obligated to carry out a federal statutory mandate that does not fulfill this requirement. . . .

Recommendation A3 Restoring Constitutional Balance in Intergovernmental Regulation. . .

A3(a) Reassessing Constitutional Boundaries

The Commission recommends a reassessment of the legal doctrines delimiting the boundaries of national constitutional authority vis-a-vis the reserved powers of the states so that those reserved powers again become meaningful and viable. To help restore a sense of balance between the levels of government, the Commission urges reconsideration by the national legislative, executive and judicial branches of current interpretations of the commerce and spending powers as they apply to the newer and more intrusive forms of federal regulation, such as partial preemptions, crosscutting grant requirements, crossover sanctions applied to federal aid, and direct orders.

A3(b) Judicial Interpretations

The Commission applauds the Supreme Court's recognition in *National League of Cities* (NLC) v. *Usery*, 426 U.S. 833 (1976), that "Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral government functions are to be made." At the same time, however, the Commission finds that several recent Supreme Court decisions and many lower court judgments have eroded the basic Tenth Amendment principles expressed in the NLC case. The Commission, therefore, expresses its hope that the federal judiciary will revive and expand upon the principles expressed in *NLC* v. *Usery*, particularly those addressing the "basic attributes of state sovereignty" and "integral functions" of state government.

Although the Supreme Court in *NLC* v. *Usery* constitutionally limited Congress' power to regulate the states under the interstate commerce clause, the Commission believes that in certain instances regulations promulgated under the conditional spending power may be equally injurious to state sovereignty. The Commission notes that despite vast differences between the grant system of six decades ago and that which exists today, the Court has done little to alter its original grant-in-aid doctrines. Thus, given the substantial fiscal reliance of state and local governments upon federal financial aid and the often intrusive nature of regulations attached to modern federal grants, the Commission expresses its further hope that the federal judiciary, when judging grantor-grantee disputes, will recognize that "compulsion" rather than "voluntariness" and "coercion" rather than "inducement" now characterize many federal grants-in-aid and their requirements.

A3(c) The Solicitor General's Role[2]

The Commission recommends that the Administration, through the Office of Solicitor General, show special sensitivity to the claims of state and local government in arguing or otherwise entering into relevant cases before the federal judiciary when such cases pertain to the newer and more intrusive forms of regulation described above.

A3(d) Supporting the State and Local Legal Center

The Commission recommends that state and local governments and their associations give full institutional and adequate financial support to the State and Local Legal Center in its monitoring, analytic and training efforts and in its effort to assist in presenting common state and local interests before the federal courts. . . .

Part B:
A REFORM STRATEGY FOR THE NEWER FORMS OF INTERGOVERNMENTAL REGULATION. . .

Recommendation B1
Eliminating Crossover Sanctions in Federal Grant Statutes. . .

The Commission recommends that Congress repeal the provisions of grant statutes that authorize the reduction or termination of funds from other specified grant programs, as well as from the grant program stipulating this requirement, when a recipient government fails to comply with all the conditions of such a program. . . .

Recommendation B2
Improving the Effectiveness of Partial Preemption Programs. . .

The Commission recommends that the Congress and the President recognize that the device of partial preemption can be properly and successfully employed only in areas where Congress identifies broad national regulatory goals, while leaving primary responsibility for devising appropriate systems of implementation in the hands of the states. To this end, such programs must utilize regulations allowing states considerable flexibility in selecting among alternative effective and appropriate means for achieving national goals, in light of regional differences among the states and particular conditions unique to each state.

To be administered effectively, such partial preemption programs require the full cooperation and joint effort of the federal and state governments in both planning and implementation. Therefore, in instances in which states are expected to assume a co-regulatory role, the Commission recommends that the Congress and the President provide for a system of improved consultation and coordination between the states and the federal government by:

- authorizing participation by states at an early stage in developing federal intergovernmental regulations and program standards;
- providing for a system of joint standard setting or of state concurrence in developing national program standards, while recognizing the ultimate authority of the federal government to issue such standards in the event of irreconcilable conflicts;
- establishing joint committees of federal and state officials to review each program, identify implementation problems, and advise the cognizant department or agency head on appropriate remedies;
- incorporating realistic statutory timetables **for** issuing federal regulations and for state compliance with federal standards; and
- providing states with adequate advance notification of available federal funding to assist in meeting state program costs.

To assure that opportunities for state participation are extended on a truly voluntary and cooperative basis, the Commission further recommends that states be authorized to elect the option of direct federal administration without incurring any other legal or financial penalty. . . .

Finally, the Commission recommends, that, in those few program areas in which rigid, uniform national standards and implementation systems are clearly necessitated, the Congress consider full federal preemption, standard setting and administration, while allowing for state administration by contract. . . .

Recommendation B4
Administration of Generally Applicable (Crosscutting) Grant Requirements. . .

The Commission recommends that the President and Congress examine all applicable statutes and regulations and modify or eliminate, by statutory action where necessary, crosscutting requirements that have proven to be ex-

cessively burdensome, impracticable to implement, or otherwise no longer worth the effort required to implement them.. . .

The Commission reiterates its 1978 recommendation that Congress and the President assign each crosscutting requirement to a single unit within the executive branch, with clear responsibility and authority for achieving, in consultation with other affected agencies, as well as state and local governments, standardized guidelines and simplified administration for effective compliance by all affected federal agencies; and that the Office of Management and Budget be authorized to establish a uniform procedure for developing, implementing, and evaluating, all such guidelines and monitor their administration. . . .

The Commission recommends that Congress provide a clear statutory indication of those crosscutting requirements applicable to each block grant and of how responsibility for implementation is to be shared between the national government and recipient jurisdictions. . . .

Part C
IMPROVING THE FEDERAL REGULATORY PROCESS. . .

Recommendation C1
Increasing State and local Government Participation in Intergovernmental Regulatory Policy Development and Regulatory Drafting. . .

The Commission recommends that Congress and the Executive Branch recognize the right of state and local officials "both as individuals and through their national associations" to participate from the earliest stages in developing federal rules and regulations that have a significant impact upon their jurisdictions.

C1(a) Amending the Federal Advisory Committee Act (FACA). . .

The Commission recommends that Congress amend the *Federal Advisory Committee Act to* exempt from the requirements of the act any national organization composed wholly of elected officials of state and local governments when acting in their official capacities or their representatives or representatives of their national associations when engaged in consultation with agencies for the purposes of rulemaking.'

C1(b) Instituting a State and local Government Consultation Process for Federal Agency Rulemaking

The Commission further recommends that the President adopt a process providing for full state and local government consultation with federal agencies on rulemakings expected to have significant intergovernmental effects, economic or noneconomic. The process should apply to grant as well as nongrant related rulemaking. To ensure full consideration of the views of state and local governments, consultation should occur as early as is practicable in the first stages of intergovernmental regulatory policy development and initial drafting, long before the publication of the Notice of Proposed Rulemaking in the Federal Register. . . .

C1(c) Providing a Statutory Basis for State and local Governments' Consultation in Federal Agency Rulemaking

To provide a firm statutory basis for such a consultation process in all rulemakings of intergovernmental significance, the Commission further recommends that Title *IV* of the *Intergovernmental Cooperation Act of 1968,* which requires that all viewpoints—national, state, regional and local—shall be fully considered and taken into account in planning federal or federally assisted development programs and projects, be amended to include regulatory programs of intergovernmental significance. . . .

Recommendation C2
State and local Participation in the Notice and Comment Stage of Rulemaking: Including Federal Grants and loans Under the Administrative Procedure Act. . .

The Commission recommends that Congress amend provision 5 U.S.C. **553** (a)(2) of the *Administrative Procedure Act* to eliminate its exemption of grants, loans, benefits and contracts from Notice and Comment rulemaking requirements. . . .

Recommendation C3
Ensuring Consideration of Intergovernmental Effects in Agency Regulatory Impact Analysis and Regulatory Review. . .

C3(a) Consideration of Intergovernmental Effects.. .

The Commission reaffirms its 1980 recommendation to the President that all federal agencies conduct regulatory analyses of proposed major rules and further recommends that agencies be required to incorporate into such analyses a full consideration of intergovernmental effects "economic and noneconomic" of proposed regulations.

C3(b) Redefining Major Rules. . .

The Commission recommends that the President, by executive order, expand the current definition of major rules to include regulations requiring state and local governments to make significant changes in their laws, regulations, ordinances, organization and fiscal affairs. The

Commission further recommends that when state and local governments determine in the 60-day comment period that a proposed rule or regulation requires such changes, the fedcral agency should be required to designate the rule as major or to issue a statement indicating that no such changes are required, thereby establishing a judicially reviewable basis for its finding and enabling state and local governments to bring a court challenge to an agency s refusal to designate the rule as major.

C3(c) Review of Nonmajor Rules. . .

The Commission recommends that the President direct that in any review program or as part of the regulatory criteria established under such a program, full consideration be given to the intergovernmental effects—economic and noneconomic—that will be generated by any proposed rule.

Recommendation C4

An Omnibus Approach to State and Local Government Certification in Meeting Federal Rules and Regulations. . .

The Commission recommends that certification of state and local regulations, procedures, recordkeeping and reporting requirements be used increasingly by the federal government to avoid duplication by equivalent federal requirements.

To encourage greater use of such certification, the Commission recommends that Congress and the President enact legislation encouraging the heads of all federal agencies regulating state and local governments to consider accepting the substitution of state and local regulations, procedures, recordkeeping and reporting requirements in lieu of fcdcral ones upon certification by the appropriate official or officials that applicable federal requirements will be met. Such self-certification shall no longer be accepted upon a finding by the head of the federal agency that the recipient government fails to comply with applicable federal laws and regulations adopted thereunder. . . .

Recommendation C5

Toward Greater Flexibility: The Use of Alternative Means in Regulating State and Local Governments.. .

The Commission recommends that the President, executive agencies, and independent regulatory commissions fully consider alternative means of regulation when making rules to implement legislation calling for federal regulation of state and local governments and that they seek to provide maximum flexibility to state and local governments consistent with national objectives and provisions of federal law. In cases where prescriptive federal law prohibits the flexible use of alternative means for achieving regulatory objectives, the Commission recommends that the President and Congress consider amending such legislation to allow the use of alternatives. Among the alternative regulatory means considered should be performance standards, special provisions for small governments, marketable rights, economic incentives and compliance reforms.

FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: History, Inventory, and Issues

(Report A-121, September 1992)

Recommendation 1

Reaffirmation of Requirements for Explicit Intent to Preempt and Principles for limiting Federal Preemptions.. .

The Commission, therefore, reaffirms its earlier recommendations to the effect that (1) the Congress not preempt state and local authority without clearly expressing its intent to do so; (2) the Congress limit its use of the preemption power to protecting basic political and civil rights, managing national defense and foreign relations, ensuring the free flow of interstate commerce, preventing state and local actions that would harm other states or their citizens, and protecting the fiscal and programmatic integrity of federal-aid programs into which state and local governments freely enter; (3) the Executive Branch not preempt by administrative rulemaking unless the Congress has expressly authorized such action and established clear guidelines for doing so, and unless the administrative agency taking such action clearly expresses its intent to preempt; and (4) the federal courts not confirm the validity of statutory and administrative preemptions unless accompanied by a clear statement of intent to preempt and unless the extent of preemption is no greater than necessary to give effect to that intent within the limits of constitutional authority.

Recommendation 2

Congressional Preemption Notes and Executive Agency Notifications. . .

The Commission recommends, therefore, that the Congress provide by legislation for the preparation and consideration, in both committee and floor debate in both houses of the Congress, of preemption notes concerning any bill affecting the powers of state and local governments. Such notes should express, in clear language, any intent of the legislation to preempt or not to preempt state and local government powers, justify the preemption in accordance with the United States Constitution, stipulate and justify the scope of such preemption, present options for minimizing the extent of federal preemption and for providing flexibility to state and local governments in com-

plying with any proposed preemption, and provide either for a sunset provision or for periodic review of the preemption.

The Commission recommends, furthermore, that the Congress amend the ***Administrative Procedure Act*** to provide that any administrative rulemaking proposed by the Executive Branch that would affect the powers of state and local governments be required to be published in the Federal Register with a preemption note stating, in clear language, the extent of any federal preemption intended and citing the explicit statutory provision on which any preemptive rules would be based.

Recommendation 3

Preemption Notes in the Executive Branch.. .

The Commission recommends, therefore, that the executive branch of the federal government prepare a preemption note for any legislative or regulatory proposal affecting the powers of the states or their local governments and attach the preemption note to the proposal for consideration within the originating department or agency and any reviews by the Office of Management and Budget (OMB), the White House, the Congress, and formal rulemaking processes. The preemption note should be guided by the principles set forth in the Federalism Executive Order (No. 12612) and should be incorporated into any federalism assessment prepared thereunder. The preemption note should express, in clear language, any intent of the proposal to preempt or not to preempt state or local government powers, justify the preemption in accordance with the United States Constitution, stipulate and justify the scope of such preemption, present options for minimizing the extent of federal preemption and for providing flexibility to state and local governments in complying with any proposed preemption, and provide either for a sunset provision or for periodic review of the preemption.

INTERGOVERNMENTAL DECISIONMAKING FOR ENVIRONMENTAL PROTECTION AND PUBLIC WORKS

(Report A-122, November 1992)

Recommendation 1

Integrated Administration of Federal Environmental Laws through the National Environmental Policy Act and the Council on Environmental Quality.. .

The Commission recommends. . .

(c) Directing each federal agency to exercise its permitting, grantmaking, licensing, and evaluation responsibilities in a cooperative, consultative fashion; to be receptive to state and local requests for administrative dispute resolution under P.L. 101-552; and to provide assistance to state and local governments to advance the public purposes of proposed infrastructure projects by helping to identify cost-effective alternatives that can be granted permits;. . .

(i) In the event of a proposed federal decision overriding state and local decisions implementing federal environmental standards, require the federal government to provide the parties at interest reasonable access and time to review and rebut information in the public record on which a federal decision is to be based. In addition, the final decision should be required to be accompanied by a written explanation setting forth specifically the decision and the basis for that decision in relation to the criteria established for evaluating the project. The "record of decision" requirement in **NEPA** provides a good model for this procedure. . . .

Recommendation 4

State Implementation of Federal Environmental Protection Laws.. .

The Commission recommends, therefore, that the federal government encourage the states to administer a greater number of federal environmental standards with appropriate safeguards and oversight. Furthermore, to encourage states to accept delegation of federal programs, the federal government should institute funding and program changes and give assurances that the states will not be overruled arbitrarily. . . .

Recommendation 5

Federal and State Use of Environmental Mediation for Dispute Resolution and Negotiated Rulemaking.. .

The Commission recommends, therefore, that the federal government **(1)** create an environmental mediation service to help settle disputes and negotiate new regulations and **(2)** enhance the capacity of state and local governments to provide for mediation of diverse views. Such a service should provide for public involvement.

The Commission recommends, further, that the federal government take evety possible opportunity to rely on state and local governments to convene the parties at interest, help broker suitable compromises, and make the situation-specific decisions necessary to implement standards established by the federal government. Federal agencies participating in this process should respect lawful state and local determinations of infrastructure needs, absent clear evidence of violation of federal law, and refrain from substituting federal agency discretion for the determinations made by the duly elected officials of state and local governments. Means of enhancing the capacity of state and local governments to provide for mediation of

diverse views, to help broker mutually satisfactory accommodations of competing goals, to make ecologically and economically sound development decisions, and to apply these decisions fairly, effectively, and efficiently, should include technology transfer, education, training, and financial assistance.

Recommendation 6

Federal Reimbursement of Mandated Environmental Protection Costs.. .

The Commission recommends, therefore, that the Congress and the President enact legislation requiring the federal government to reimburse state and local governments for the additional costs of complying with federal environmental standards, over and above the costs of providing strictly state, local and private benefits. The costs to be shared equitably among all the benefited parties should include the full costs of maintaining healthy and stable ecologies over the long run. . . .

FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS: The Mixed Record of the 1980s

(Report A-I 26, July **1993)**

Recommendation 7

Reconsidering the Constitutionality of Unfunded Federal Mandates. . .

The Commission recommends, therefore, that the Congress, the Executive Branch, and the federal Judiciary declare and honor a moratorium on the imposition of unfunded or underfunded mandates by statutory, administrative rulemaking, and judicial means for a period of at least two years, and that the Congress and the Executive Branch conduct a complete and thorough review of mandating for the purpose of restoring balance, partnership, and state and local self-government in the federal system.

The Commission recommends, further, that the U.S. Supreme Court reexamine the constitutionality of mandating as a principle and also consider the constitutionality of particular mandates in the context of the cumulative impact of mandates on the federal fabric of the Constitution of the United States.

Recommendation 2

Using Existing Mechanisms to Press Harder for Relief from Burdensome Federal Regulations

The Commission recommends, therefore, that those parties responsible for administering and utilizing the congressional fiscal notes process, the ***Paperwork Reduction Act,*** the ***Regulatory Flexibility Act,*** and the Federalism Executive Order redouble their efforts to take fullest advantage of these mechanisms. The Commission recommends, further, that:

(a) State and local governments (i) identify those bills pending in the Congress and regulations to be prepared within the executive branch of the federal government that may have significant effects on state and local governments, (ii) press the committees and subcommittees of Congress responsible for the identified bills, early and often, to consider the effects on state and local governments, (iii) call for preparation of fiscal notes by the Congressional Budget Office on significant provisions of those bills before final subcommittee and committee action, (iv) provide the committees, subcommittees, and the Congressional Budget Office with relevant fiscal and other information that should be taken into account in the legislative process, (v) press for early access to the administrative rulemaking process, and (vi) educate the public and the press about the impact of federal regulation on state and local governments, for example, by indicating the cost of unfunded federal mandates on tax and utility bills.

(b) The Congress and all appropriate agencies of the federal government should make compliance with the letter and the spirit of the ***State and Local Cost Estimate, Paperwork Reduction, and Regulatory Flexibility*** acts and the Federalism Executive Order a high priority.

(c) The federal, state, and local governments should continue to evaluate ways to improve regulatoxy relief mechanisms and give high priority to the development of a more effective, and equitable intergovernmental partnership to achieve shared objectives with minimal unilateral and costly regulation. . . .

HIGH PERFORMANCE PUBLIC WORKS: A New Federal Infrastructure Investment Strategy for America

(Report **SR-16,** November **1993;**
Action Agenda endorsed by the Commission,
February **14, 1994)**

AN ACTION AGENDA

PRESIDENTIAL AND CONGRESSIONAL LEADERSHIP.. .

The President's Role. . .

The President should take advantage of.. .opportunities to:

- Issue an Executive Order (1) establishing governmentwide principles, . . [that] should require federal agencies to:

  > . . . Analyze existing and proposed regulations affecting infrastructure to ensure that they are necessary and that the least burdensome and most flexible forms of regulation that can get the job done are being used.

- Develop an infrastructure legislative program incorporating at least the following three proposals:

  > The Infrastructure Investment Act. . .
  >
  > The Environmental Integration Act. . .
  >
  > The Mandate Relief Act, which would require (1) regular inventory and cost estimation of all existing and proposed federal mandates, (2) analysis of the incidence of costs and the ability to pay of those parties on whom the costs fall or would fall, and (3) equitable federal sharing of the mandated costs or an affordable prioritization and scheduling of compliance by the non-federal parties. . . .

The Role of Congress. . .

The Congress should consider the following high priority proposals:

- Hold hearings and act on the President's infrastructure legislative program. . . .
- Take the opportunity, when reauthorizing infrastructure and environmental programs, to introduce the principles of. . . mandate reform. . . .

GOVERNMENTWIDE GUIDANCE ON INFRASTRUCTURE INVESTMENT AND REGULATION

In accordance with the President's Executive Order on Infrastructure, the following agencies should issue additional guidance, in consultation with affected federal agencies, state and local governments, and other affected parties, and should exercise implementation oversight.

- The Office of Management and Budget (OMB) should revise its circulars on . . . legislative clearance (A-19), and benefit-cost analysis (A-94) . . . to emphasize the need to examine alternative program designs and the potential impacts of federal mandates more carefully from the viewpoint of the state and local partners. The principles of Executive Order 12612 (Federalism) should be incorporated into this clearance process. . . .
- OMB s Office of Information and Regulatory Affairs (OIRA) should revise its regulatory review guidance to emphasize (1) the need for mandate relief, performance-based regulation, market incentive regulation, the use of technologically advanced means of complying with regulations, and regulatory flexibility; (2) greater use of negotiated rulemaking in suitable cases; and (3) limiting the use of interim guidance in place of formal regulations (including provisions to sunset interim guidance after a reasonable time).

  OIRA should be charged with the responsibility for maintaining a cumulative inventory of federal mandates, ensuring that their costs are estimated, and requiring a cost and affordability analysis of proposed rulemakings (including an analysis of the incidence of costs, the ability-to-pay of those responsible for paying, and an evaluation of alternative rules that might be less burdensome).

  Periodically, OIRA should require federal agencies to conduct a zero-based review of their regulations affecting infrastructure to ensure that, as a group, they remain up to date, effective, practical, understandable, coordinated, and affordable.

GOVERNMENTWIDE SUPPORT FOR INFRASTRUCTURE AGENCIES

The following support activities should be provided in consultation and cooperation with relevant state, local, and Indian tribal governments, and the private sector. . . .

- The Administrative Conference of the United States (ACUS) should provide advice, referral services, and training in administrative dispute resolution and negotiated rulemaking.
- ACIR should develop and promote improved methods of regulatory analysis, federal mandate cost estimating, and intergovernmental impact analysis.
- GAO, in cooperation with agencies' internal audit programs, should audit and evaluate . . . mandate cost estimates and regulatory analyses. . . .

Notes

[1] Sen. Dave Durenberger requested to be recorded as opposing this recommendation on the grounds that a selective, not a full, reimbursement policy is the only one that is currently realistic and fiscally responsible.

[2] Deputy Under Secretary Koch, County Executive William Murphy, and County Supervisor Peter Schabarum requested to be recorded as opposing this recommendation. Deputy Under Secretary Koch provided the following statement of her position, with County Executive Murphy concurring:

> It is the responsibility of the Solicitor General to represent his client the United States Government in cases in

which the U.S. is involved, and to defend the best interests of the U.S. as he sees them. The Solicitor General is not in a position to make policy decisions by modifying his actions to take account of the interests of opposing parties. In fact, this could be seen as running directly counter to his duty. Such policy issues are properly directed toward Congress and the President. Therefore, it is inappropriate for ACIR to ask the Solicitor General to alter his manner of meeting his responsibility to the U.S. government as this resolution suggests.

[3] Rep. L.H. Fountain requested to be recorded as opposing this recommendation on the following grounds:

> I agree that state and local officials, and their national associations, should have the right and the opportunity to participate fully in the development of federal rules and regulations affecting them. However, amending the *Federal Advisory Committee Act* to exempt state and local officials from the act's requirements appears to be both unnecessary and unwise. I am sure there are many ways in which state and local governments can express their views on proposed rules and regulations without becoming subject to FACA. This legislation was enacted to assure openness and accountability in the operation of federal advisory bodies. To exempt state and local officials and their national associations from the act's procedural safeguards would surely invite demands for the exemption of other groups and, ultimately, could lead to the destruction of an important federal law. I believe this is the wrong remedy if FACA has been interpreted by federal agencies in a manner that unnecessarily obstructs early consultation by state and local officials in the development of intergovernmental regulations. This, surely, was not the intent of Congress. The proper remedy, in my judgment, would be to elicit a more reasonable interpretation of the act's requirements within the executive branch.

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What Is ACIR

The U.S. Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is an independent, bipartisan commission composed of 26 members—nine representing the federal government, 14 representing state and local government, and three representing the general public.

The President appoints 20 members—three private citizens and three federal executive officials directly, and four governors, three state legislators, four mayors, and three elected county officials from slates nominated by the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Representatives by the Speaker of the House of Representatives.

Each Commission member serves a two-year term and may be reappointed.

As a continuing body, the Commission addresses specific issues and problems the resolution of which would produce improved cooperation among federal, state, and local governments and more effective functioning of the federal system. In addition to examining important functional and policy relationships among the various governments, the Commission extensively studies critical governmental finance issues. One of the long-range efforts of the Commission has been to seek ways to improve federal, state, and local governmental practices and policies to achieve equitable allocation of resources, increased efficiency and equity, and better coordination and cooperation.

In selecting items for research, the Commission considers the relative importance and urgency of the problem, its manageability from the point of view of finances and staff available to ACIR, and the extent to which the Commission can make a fruitful contribution toward the solution of the problem.

After selecting intergovernmental issues for investigation, ACIR follows a multistep procedure that assures review and comment by representatives of all points of view, all affected governments, technical experts, and interested groups. The Commission then debates each issue and formulates its policy position. Commission findings and recommendations are published and draft bills and executive orders are developed to assist in implementing ACIR policy recommendations.