IN BRIEF

Regulatory Federalism: Policy, Process, Impact And Reform

Advisory Commission on Intergovernmental Relations, Washington, D.C. 20575
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FOREWORD

During the past decade and a half, a wholly new development arose in the field of intergovernmental relations: the emergence of a host of regulatory programs aimed at, or implemented by state and local governments. In its study *Regulatory Federalism: Policy, Process, Impact and Reform*, the Advisory Commission on Intergovernmental Relations examined the growth of new forms of intergovernmental regulations; explored their legislative origins and judicial treatment; chronicled past reform efforts; and, devised an agenda for regulatory reform and relief.

This *In Brief* summarizes the ACIR study on regulatory federalism. It was written by Stephanie Becker, ACIR public information officer, based on the work of the Government Structure and Functions Section, headed by David B. Walker.

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INTRODUCTION

Over the past two decades, there has been a dramatic shift in the way in which the national government deals with states and localities. During the 1960s and 1970s, many state and local governmental activities were brought under extensive federal regulatory controls for the first time. In field after field—from meat and automobile inspection to wildlife preservation and from college sports to water treatment—the power to set standards and determine compliance methods increasingly fell within Washington's domain. These developments have seriously eroded the intergovernmental partnership underlying our federal system.

In its study, *Regulatory Federalism, Policy, Process, Impact and Reform*, the Advisory Commission on Intergovernmental Relations identified some 30 major regulatory statutes that constitute the core of the new regulatory federalism (see Figure 1). Among the best-known and most controversial examples are the *Clean Air Act Amendments of 1970*, which created federal air quality and emissions standards; the *Rehabilitation Act of 1973*, which in Section 504 barred all forms of discrimination against the handicapped; and the *National Maximum Speed Law*, which established the 55 mph speed limit. These and the many other regulatory statutes have spawned dozens (or in some cases hundreds or even thousands) of specific rules.

Of course, federal regulation is not a new phenomenon. During the Progressive Era (roughly 1901-20), and the New Deal period (1933-38), federal controls were extended over a host of activities including railroads, truck transportation, radio communications, the securities market and labor negotiations. In one sense the "new social regulation" of the past 20 years in such fields as civil rights, consumer protection, health and safety, and environmental quality was simply a third period of federal regulatory activism (see Graph 1). In another sense, from the standpoint of federalism, recent regu-

Figure 1

Major Statutes Of Intergovernmental Regulation 1960-80

1964 Civil Rights Act (Title VI)

1965 Highway Beautification Act
Water Quality Act

1967 Wholesome Meat Act

1968 Civil Rights Act (Title VIII)
Architectural Barriers Act
Wholesome Poultry Products Act

1969 National Environmental Policy Act

1970 Occupational Safety and Health Act
Clean Air Amendments

1972 Federal Water Pollution Control Act Amendments
Equal Employment Opportunity Act
Education Act Amendments (Title IX)
Coastal Zone Management Act

1973 Flood Disaster Protection Act
Rehabilitation Act (Section 504)
Endangered Species Act

1974 Safe Drinking Water Act
Hazardous Materials Transportation Act
National Health Planning and Resources Development Act
Emergency Highway Energy Conservation Act
Family Educational Rights and Privacy Act
Fair Labor Standards Act Amendment

1975 Education for All Handicapped Children Act
Age Discrimination Act

1976 Resource Conservation and Recovery Act

1977 Surface Mining Control and Reclamation Act

1978 National Energy Conservation Policy Act
Public Utility Regulatory Policy Act
Natural Gas Policy Act

Source: ACIR staff computations.

latory initiatives are a dramatic departure from past regulatory practices in that many have a direct impact on state and local governments. By and large, the federal regulatory statutes adopted in earlier periods were directed toward the private, and especially the business, sector. Many of these statutes preempted state laws, but did not otherwise tamper with state governmental processes or services. In contrast, a large proportion of the newest regulatory measures are aimed at, or implemented by states and localities (see Graph 1).

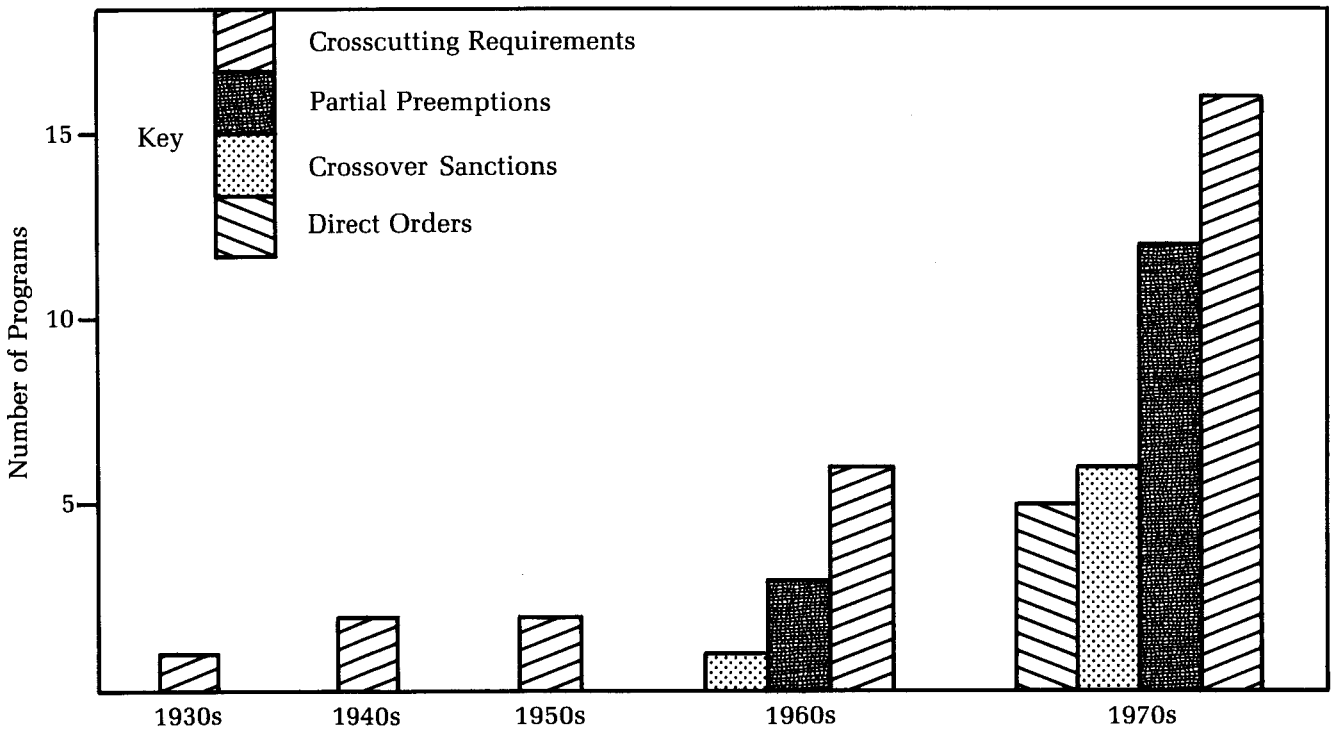
Because many of the new regulatory programs address pressing national concerns, their values and goals are widely shared by state and local officials. They, like their federal counterparts and the public generally, agree that discrimination due to race, sex, age and handicap should be eliminated; that the environment should be cleaned; that the workplace should be made safe; and that energy and other natural resources need to be conserved. In short, state and local officials have participated in the fight against social and environmental ills in large part because they share the values and goals behind national programs.

Why, then, as the ACIR concluded, have these regulatory programs become a serious threat to intergovernmental cooperation? Although the answer to this question is complex, a good summation is that conflict has arisen because rigid national rules are being implemented within a large and diverse federal system. For nearly 200 years, this system has continually balanced competing centrist and decentralist forces. Much of the newer social regulation, however, has left little room for flexibility; it has imposed substantial, and frequently unreimbursed, costs on states and localities; and, it has too often been confusing, inconsistent, and ineffective. In short, after almost two decades of social experimentation, few goals have been fully met. Furthermore, because program responsibility is shared by many, the sense of political accountability has been diminished.

By the late 1970s and early 1980s, the cumulative effects and costs of this regulatory era had become apparent. Criticism came from across the political spectrum. Conservatives who long feared that federal controls would follow federal dollars were joined by liberals crusading for reform. "The mandates are piling up so fast that liberal governors and mayors are enrolling in a cause once pressed only by arch-conservatives," editorialized the *New York Times*.[1] New York City Mayor Edward Koch spoke out against the new mandates: "We cannot allow the powerful diversity of spirit that is a basic characteristic of our federal system to be crushed

[1]"Fighting Federal Mandates," *New York Times*, August 16, 1980, p. 20.

Graph 1: The Growth of Major Programs of Intergovernmental Regulation, By Type of Instrument, By Decade, 1930-1980



under the grim conformity that will be the most enduring legacy of the mandate millstone."[2]

Declining federal aid dollars, coupled with the taxpayers' revolt and a sluggish economy, lent a sense of urgency to the regulatory relief movement. But what has been done may not be easy to undo. The ACIR study, which this *In Brief* will summarize, looks at how the era of regulatory activism came to be, analyzes what it means in the intergovernmental context, and proposes actions for making regulation less intrusive and, hopefully, more effective in achieving what are still national priorities.

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

THE RISE OF REGULATORY FEDERALISM

New Regulatory Techniques

The recent "burst" of social legislation was not only cut from a new intergovernmental cloth, but took new regulatory forms as well. The "carrot" of financial subsidy in dealing with state and local governments was increasingly joined by programs based upon the "stick" of regulation. ACIR has identified and studied four major regulatory techniques that, because of their coercive nature, represent a departure from traditional "strings" that accompany assistance programs such as audit requirements and planning procedures.

The four major strategies—direct orders, crosscutting regulations, crossover sanctions, and partial preemptions—are discussed below and summarized in Figure 2.

Direct Orders. In a few instances, federal regulation takes the form of direct orders that must be fulfilled to avoid the threat of civil or criminal penalties. For example, the *Equal Employment Opportunity Act of 1972* bars job discrimination by state and local governments on the basis of race, color, religion, sex and national origin. This statute extended to state and local governments the same requirements that had been imposed on private employers since 1964. Similarly, the *Marine Protection Research and Sanctuaries Act Amendments of 1977* prohibited cities from disposing of sewage sludge through ocean dumping.

Because direct orders pit the legal authority of Congress against the Constitutional rights of the states, they have raised the most serious legal issues. The wage and hour requirements (direct orders) imposed on state and local governments by the 1974 amendments to the *Fair Labor Standards Act* were greatly circumscribed by the Supreme Court in *National League of Cities v. Usery* (1976). The

Figure 2

A TYPOLOGY OF INTERGOVERNMENTAL REGULATORY PROGRAMS

Program Type	Description	Major Policy Areas Employed
Direct Orders	Mandate state or local actions under the threat of criminal or civil penalties	Public employment, environmental protection
Crosscutting Requirements	Apply to all or many federal assistance programs	Nondiscrimination, environmental protection, public employment, assistance management
Crossover Sanctions	Threaten the termination or reduction of aid provided under one or more specified programs unless the requirements of another program are satisfied	Highway safety and beautification, environmental protection, health planning, handicapped education
Partial Preemptions	Establish federal standards, but delegate administration to states if they adopt standards equivalent to the national ones	Environmental protection, natural resources, occupational safety and health, meat and poultry inspection

Court held that the law interfered with the states' "integral operations in areas of traditional governmental functions," and thus was unconstitutional.

Much more commonly, then, Washington uses other regulatory techniques to work its will. These may be distinguished by their breadth of application and by the nature of the sanctions which back them up.

Crosscutting Requirements. Most widely used are the crosscutting or generally applicable requirements imposed on virtually all grants to further various national social and economic policies. One of the most important of these requirements is the nondiscrimination provision included in Title VI of the *Civil Rights Act of 1964*, which stipulates that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance.[3]

Since 1964, crosscutting requirements have been enacted to protect other disadvantaged groups (the handicapped, elderly and—in education programs—women). The same approach was used in the environmental impact statement process created in 1969, as well as for many other environmental purposes. Crosscutting requirements have been extended into such fields as historic preservation, endangered species and relocation assistance. A total of some 36 across-the-board requirements dealing with various socio-economic issues, as well as an additional 23 administrative and fiscal policy requirements, were identified in a 1980 inventory.[4] Of the former group, the largest numbers involve environmental protection (16) and nondiscrimination (9). Two-thirds of the 59 requirements were adopted after 1969.

Crossover Sanctions. Crossover sanctions, like the crosscutting requirements, are tied directly to the grant-in-aid system. They impose federal fiscal sanctions in one program area or activity to influence state and local policy in another. A failure to comply with the requirements of one program can result in reduced or terminated funds from another program that was separately authorized and separately begun. The penalty thus "crosses over."

Crossover sanctions were used in the wake of the 1973 OPEC oil embargo. Federal officials first urged the states to lower their speed

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[3]PL 88-352, Title VI, Section 601, July 2, 1964.

[4]Office of Management and Budget, *Managing Federal Assistance in the 1980s*, Working Paper, Volume I (Washington, DC, U.S. Government Printing Office, 1980).

limits and the Senate adopted a resolution to that effect. Twenty-nine states responded to this "moral suasion." But suasion was quickly replaced by a more authoritative measure: the *Emergency Highway Energy Conservation Act of 1974*, which originally prohibited the Secretary of Transportation from approving any highway construction projects in states having a speed limit in excess of 55 mph. The remaining 21 states complied within two months.

Partial Preemption. A final innovative technique, partial preemption, has been used extensively in the environmental field. Unlike traditional preemption statutes that rest on the authority of the federal government to totally preempt certain state and local activities, preemption in these cases is only partial. Federal laws establish basic policies, but administrative responsibility may be delegated to the states or localities if the latter meet certain nationally determined conditions or standards.

The most far-reaching application of the partial preemption device occured in the *Clean Air Act Amendments of 1970*. This path-breaking environmental statute set federal air quality standards throughout the nation, but required that the states devise effective plans for implementing and enforcing those standards. Two close observers commented that the *Clean Air Act Amendments* . . .

> are an approach allowing national policymakers and policy implementors to mobilize state and local resources on behalf of a national program. As preliminary measures, these resources can be mobilized using technical, financial, or other forms of assistance, but underlying this mechanism is the ability of national officials to formally and officially draft those resources into national service. We call this legal conscription.[5]

Partial preemption programs, despite being developed on a co-regulatory and cooperative theory of federalism, have often generated conflict among the levels of government. For example, the 1970 *Clean Air Act Amendments* require states to prepare State Implementation Plans (SIPs) showing how they will control pollution to the extent necessary to achieve federal air quality standards. These plans must be approved by the Environmental Protection Agency. If the EPA judges a state plan inadequate, states must make revisions; if a state fails to do so, EPA can step in with a plan of its own.

Partial preemption statutes can stand alone but are sometimes

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

used in tandem with other sanctions. *In the Clean Air Act,* Section 176(a) bars both the EPA and the Department of Transportation from making grant awards in any air quality control region that has not attained primary ambient air quality standards and is in a state that has failed to devise adequate transportation control plans. This, of course, is a tough crossover sanction. Furthermore, Section 176(c) of the act prohibits any agency of the federal government from providing financial assistance to any activity which does not conform to a State Implementation Plan. This provision uses the crosscutting approach to strengthen implementation.

Origins of Regulatory Federalism

The origins of regulatory federalism are complex and diverse, belying simple explanations of why they grew. As one noted expert comments: "What is striking about the origins of . . . regulatory programs is that in almost every case, the initial law was supported by a rather broadly based coalition."[6]

Regulatory federalism developed as part of a broader wave of national governmental activism; it was not precipitated by a single actor or factor. The overall climate of opinion during the 1960s and 1970s favored legislative efforts to deal with an array of social, economic, and environmental problems—though opposition to rising taxes, deficits and federal bureaucracy began to mount by the mid-1970s. Congress, because of the changes in its composition, organization and procedures, ceased to be the burying ground for new domestic initiatives. Instead, it rivaled the Presidency as their source. New regulatory measures simply reflected these more general trends and were paralleled by adoptions of a host of other federal programs.

Also, by the 1960s, intergovernmental processes had become the principal way by which the federal government conducted its domestic business. Earlier views that stressed the independence of the national and state governments had given way since the New Deal to a slowly building consensus that "cooperative federalism" was the most desirable way to provide domestic services. Just as most of the expenditure programs adopted during this period used intergovernmental mechanisms—with Medicare being the principal exception—many of the regulatory programs also relied upon state and local governments to achieve national goals.

Grants-in-aid were used typically to establish federal participation in most areas of state and local governmental responsibility. Once the legitimacy of a federal role was accepted, tougher

[6]James Q. Wilson, "The Politics of Regulation," in *The Politics of Regulation,* Jame Q. Wilson, ed. (New York: Basic Books, 1980), p. 365.

Symbolic Politics and Regulatory Policy

The modern legislator finds it hard to vote against symbolic measures. Because it is so easily perceived in terms of simple but powerful expressions of morality, regulatory policy may be uniquely susceptible to symbolic politics in Congress. The legislative history of the *Age Discrimination Act of 1975* is illustrative. The act outlaws "unreasonable" discrimination in federally assisted programs on grounds of age. It was a product of the House Select Subcommittee on Education, then chaired by Representative John Brademas (IN). Rep. Brademas inserted the age discrimination proposal into the *Older Americans Act*, which his committee was authorizing in 1975. There were no explicit hearings on the act's effects, and it was approved by the entire House without extensive clarification.

Following House approval, several executive branch agencies objected to the act's vagueness. HEW Secretary Caspar Weinberger told the Senate that:

> HR 3922 as written would leave to the executive branch the formulation of momentous policy decisions in wholly uncharted areas without the benefit of any specific legislative guidance . . . [It] bars only (unreasonable) discrimination on account of age. . . . Neither the bill nor its legislative history indicated what factors would be (unreasonable.)[1]

Consequently, the Senate acted to delay the inclusion of the act in the *Older Americans Act*, substituting for it a requirement that the U.S. Civil Rights Commission study the issue and report

and more coercive regulatory policies often appeared to be modifications and extensions of past policies, rather than major new undertakings.

Historic concerns about the proper scope of the national government's domestic activities first gave way in the face of overarching public support for strong civil rights legislation. The poor reputation many states earned on civil rights spilled over into other areas of policy and generally eroded the legitimacy of the states' rights concept as a barrier to federal regulatory intervention. This erosion was somewhat ironic given past state leadership in many of the fields later subjected to intergovernmental regulation. For example, various states pioneered in the area of handicapped education, and many states had on-going pollution and equal employment programs in place prior to federal regulation. Such innovations were

its findings to Congress. This approach proved unacceptable to the House authors of the provision, and the Senate eventually yielded in a conference committee. As Senator Eagleton explained: "We wanted to be statesmanlike and ask for evidence of discrimination, but the [elderly] organizations were pressing—it was hard to vote against the aged."[2] As finally written, the legislation included both the age discrimination prohibition—effective immediately—and called for a subsequent study of age discrimination to precede the issuance of regulations. President Ford signed the legislation but complained that, "The delineation of what constitutes unreasonable age discrimination is so imprecise that it gives little guidance in the development of regulations."[3] Once the Civil Rights Commission study was produced, Senator Eagleton argued that it showed the *ADA* to be unnecessary:

> Not only was there no record showing discrimination originally, but the subsequent Commission report failed to demonstrate age discrimination in any methodical way—even if there were problems of age discrimination, they should not have been addressed in such a broad swipe.[4]

Nevertheless, the act remains on the books, and 28 federal agencies have been required to promulgate regulations implementing it.

[1]Reprinted in *Senate Report 94-255*, p. 37.
[2]Interview with Sen. Thomas Eagleton.
[3]Executive Office of the President, *Weekly Compilation of Presidential Documents*, November 28, 1975, pp. 1326-27.
[4]Interview with Sen. Eagleton.

often overlooked, however, even when state laws formed models for subsequent federal legislation.[7] In the aftermath of the civil rights changes, Congress and the public seemed predisposed to favor uniform action on a national scale rather than wait for effective programs in these fields to be adopted by all 50 states.

It should not be concluded, however, that the first programs containing the new mechanisms of intergovernmental regulation were established easily. Even Title VI of the *Civil Rights Act of 1964*,

[7]For example, Congressional reports supporting passage of the *Education For All Handicapped Children Act* apparently over-estimated the number of handicapped students receiving an inappropriate education from the states. See U.S. General Accounting Office, *Unanswered Questions on Educating Handicapped Children in Local Public Schools* (Washington, DC: U.S. Government Printing Office, 1981), pp. 11-12.

the first crosscutting regulation prohibiting racial discrimination as a condition of federal aid, was questioned initially by both liberals and conservatives. It passed only as public support mounted in the wake of President Kennedy's assassination.

Most analysts have since commented on the relatively minor consideration given Title VI, compared to the attention given the public accommodations and private employment sections of the *Civil Rights Act of 1964*. When compared to the debate preceding enactment of many subsequent crosscutting requirements, however, Congress gave comparatively close scrutiny to Title VI. In the end, the provision was quite lengthy, with explicit procedural safeguards attached to using the sanction and with relatively clear guidance provided on the scope of the measure.

Such clarity was absent from later civil rights crosscutting requirements modeled after Title VI. The enactment of Title VI, which the courts upheld as a legitimate exercise of federal power, signalled to national policymakers that conditioning federal assistance funds was a powerful instrument that could be used to regulate state and local activities. The crosscutting regulatory device spread rapidly to a host of other program areas—including additional civil rights programs, the environment, individual privacy, and procedural goals. However, examination of several of the most significant and controversial of those additional crosscutting requirements indicates that the pattern of policymaking that produced them differed significantly from that apparent in Title VI. Section 504 of the *Rehabilitation Act of 1973*, which prohibits discrimination against handicapped individuals in federally assisted activities

> . . . did not have one day of Congressional hearings, not one word was mentioned in the Senate Committee Report, not one word was spoken about it on the floor when the original bill passed, and there was no explanation in the Statement of Managers following the House-Senate Conference.[8]

Similarly, Title IX of the *Education Amendments of 1972*, prohibiting sex discrimination in educational institutions receiving federal aid, received little Congressional scrutiny. Although hearings were held in 1970 on the general issue of sex discrimination in universities, there was no discussion about the appropriateness of the fund-withholding provision. No further hearings were ever held on Title IX despite the fact that it did not become law until two years later. Similarly, no hearings were held on the *Age Discrimination*

[8]Martin L. LaVor, "Section 504 of the *Vocational Rehabilitation Act*," Memorandum to all Minority Members, House Education and Labor Committee, June 14, 1979, p. 1.

Act, and Congress did not require a study of the issue until after the bill had been passed.

There are still other points of contrast between Title VI and later civil rights crosscutting requirements. Title IX, Section 504, and the *Age Discrimination Act* were enacted without the benefit of strong Presidential support. In fact, the executive branch played very little role in initiating any of these provisions. President Nixon signed the *Education Amendments of 1972* without mentioning Title IX and, although he twice vetoed the *Rehabilitation Act*, Section 504 did not appear to be at issue. President Ford signed the *Age Discrimination Act* only with reluctance, due to his misgivings about the legislation's imprecise definition of age discrimination. This pattern stands in sharp contrast to Title VI, which originated in the executive branch and was actively supported by President Johnson.

Congressional acceptance of the crosscutting device during the 1970s is further indicated by the dramatic increase in the number of across-the-board conditions enacted in areas other than civil rights, such as environmental protection, occupational health and safety, and individual privacy. The *National Environmental Policy Act* (NEPA) included the first major use of the crosscutting requirement in environmental policy. When enacted in 1969, NEPA was attended by very little public or special interest attention. In fact, according to several observers, only a few members of Congress were well informed about the implications of the law they were adopting. One Congressional aide concluded that "if Congress had appreciated what the law would do, it would not have passed."[9]

In short, after Title VI, members of Congress and the public at large appeared to endorse the goals of the new crosscutting regulations without necessarily understanding the policy and operational implications of the regulatory mechanisms being adopted. This same pattern applied to the other new regulatory mechanisms as well. As with the crosscutting requirements, initial enactments of other new regulatory devices were gradual and often had to overcome stiff opposition.

For example, it took ten years to accomplish a regulatory approach to highway beautification; and even the 1965 legislation had less stringent sanctions than President Johnson had requested. Once established in highway legislation, however, Congress rapidly enacted several more crossover sanctions. They were used to enforce the 55 mph national speed limit, health planning cost-containment

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[9]Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath* (Bloomington, IN: Indiana University Press, 1976), p. 35. See also ACIR, *Protecting the Environment: Politics, Pollution, and Federal Policy*, A-83 (Washington, DC: U.S. Government Printing Office, 1981).

measures, and certain environmental laws. Similarly, partial preemption became an increasingly popular way to establish national standards. From meat inspection and safety in the workplace to clean air and clean water, partial preemption was chosen frequently to achieve minimum levels of compliance . Only in the case of direct orders did Congress show reluctance. Direct orders have been sparingly employed as a regulatory mechanism and have been subjected to more stringent judicial review than other recent regulatory techniques.

In summary, no single force caused the growth of regulatory federalism. Presidents were usually instrumental in launching the earliest intergovernmental regulatory programs but no such pattern of executive branch leadership was evident in the later stages of regulatory proliferation. At the same time, even under administrations that sought to decentralize grant-in-aid programs, there was little presidential opposition to the general purpose or thrust of new regulatory initiatives. State and local officials, until recently, also voiced relatively little opposition, in part because they too supported the goals underlying the new programs—but also because they tended to focus their attention on federal aid flows rather than on the sometimes subtle accumulation of new regulatory provisions.

Ironically, perhaps, it was the dramatic expansion of federal aid and federal spending generally—with accompanying deficits—that made regulation an attractive option to cost-conscious legislators. As one observer wrote in 1976:

> Congressmen see themselves as having been elected to legislate. Confronted with a problem and a showing that other levels of government are defaulting, their strong tendency is to pass a law. Ten years ago, money was Washingtons antidote for problems. Now, the new fiscal realities—inflation, high unemployment and huge budget deficits—mean that Congress provides fewer dollars. Still determined to legislate against problems, Congress uses sticks instead of carrots.[10]

Regulatory Federalism in the Courts

True to American tradition, conflicts created by the newer and more intrusive forms of intergovernmental regulation often end up in court. After a decade and a half of rather intensive litigation, it is

[10]Samuel Halperin, "Federal Takeover, State Default, or a Family Problem?" in *Federalism at the Crossroads: Improving Educational Policymaking*, ed. Samuel Halperin (Washington, DC: Institute for Educational Leadership, the George Washington University, 1976), p. 19.

clear that the federal judiciary has, for all practical purposes, given the green light to Congressional and executive branch regulatory activism. Although judicial review could, in principle, limit both legislative and administrative policymaking, in practice it has not served to check the national government's reach into state and local operations. It is possible to point to a few areas in which the courts have applied a restraining hand—but these are comparatively few in number and even more limited in scope.

Overall, the courts have refused to amend the view, stemming from 1923, that grants are "voluntary" contractual agreements and have said that the conditions attached to grants need only be "reasonably related to legitimate national purpose."[11] The notion that compliance is voluntary (if you don't like the rule, don't take the money) is considered by many antiquated, if not absurd. Intergovernmental relations in 1983 are far removed from those of 1923. For example, 60 years ago, intergovernmental grants were few in number, had relatively simple "strings" attached, and were based on "cooperative" federalism. Today's grant system has some 400 programs, costs roughly $90 billion annually, and carries stringent requirements, including the crosscutting requirements and crossover sanctions. Under the contractural approach, no matter how large the grant program, regulations are just conditions—however stringent.

The Supreme Court has tended to view partial preemptions as proper exercises of Congress' power to "regulate commerce . . . among the several states" (Article I, Section 8, U.S. Constitution). Thus, the massive extension of national authority to set standards as embodied in the major environmental statutes, among others, are viewed by the courts in a "commerce-power-as-usual" light.

In only one instance has the Supreme Court significantly curtailed Congress' intergovernmental regulatory reach. In the landmark decision *National League of Cities v. Usery* (1976), the Supreme Court said the national government could not extend its authority under the commerce power to "force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental fuctions are to be made." At issue in *NLC* was extending the 1974 *Fair Labor Standards Act Amendments* to the wage and hour rates paid state and local employees.

However, those who viewed *NLC* as resurrecting the states' reserved powers under the Tenth Amendment have been disappointed by subsequent decisions. Over time, the Court has established a

[11]*Massachusetts v. Mellon*, 262 U.S. 447 (1923). Note, however, that in *Pennhurst State School and Hospital v. Halderman*, 49 LW 4363 (1981), the Supreme Court said " . . . if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously."

narrow (and rather opaque) standard for identifying the "traditional" and "integral" activities of state and local governments. It is by no means clear what areas—beyond the power to determine the location of the state capitol—are Constitutionally protected attributes of state sovereignty. Moreover, *NLC* itself addressed only the infrequently used form of intergovernmental regulation, the direct order. It suggested no limits on any of the other more common types of national mandates. Indeed, when the *NLC*-type defenses have been employed in cases dealing with other forms of regulation, they have failed.

The courts' usually generous interpretations of Congressional regulatory authority have been coupled with equally generous assessments of the power conferred on agencies by regulatory statutes. When overturning executive branch actions, the courts have generally favored more extensive requirements and more vigorous enforcement. It was the courts, for example, that gave real substance to the environmental impact statement procedure created under the *National Environmental Policy Act of 1969*.

In retrospect, it can be argued that the "liberal" posture of the Supreme Court during the 1950s and 1960s encouraged statutory efforts to regulate the states—not only in civil rights but in many other areas as well. During that time, the Court actively asserted the national will over states' rights in such areas of apportionment, school prayer, racial discrimination, and others. However, the Court's posture since the 1960s has been of a different nature. It has adhered passively to precedents established when intergovernmental relations were very different. It has hesitated to overrule the mounting regulatory handiwork of the other two national branches. Hence, although judges are regulators of other regulators, the Court has not lived up to its traditional role as the umpire of federalism. Thus, although the new forms of regulation have been litigated heavily, by and large the federal courts have done little to constrain the regulatory proclivities of Congress or the executive branch.

REGULATORY FEDERALISM: IMPLEMENTATION AND IMPACT

If the goals of many new regulatory programs enjoy broad popular support, and, based on current court interpretations, are perfectly legal, why are they perceived to be a problem? The key to how and why good intentions can and do go awry may lie in the implementation process. Laws are not self-executing. Between final passage and final product—be it new roads or new jobs, clean air or clean water—is an elaborate administrative process that requires garnering resources (including funds and personnel) and establishing procedures (rules, forms and contact points). At this stage, a lot can go wrong.[12] Consistent with "Murphy's Law," study after study has documented serious programmatic shortcomings.[13] There can be a big difference, as one analyst notes, between what governments choose to do and what, in the end, they actually do.[14] Regulatory programs, like grants, have experienced many such difficulties. Consequently, they generally have not eliminated—and in some cases, not even markedly reduced—the social or environmental problems they were intended to address. At the same time, they have exacerbated intergovernmental tensions. Mayors, governors and other state and local officials protest the growth of a "mandate millstone" that imposes on them heavy financial burdens and inflexible federal rules and requirements.

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[12]Walter Williams, *Implementation* (Berkeley, CA: University of California Press, 1980), p. 1.

[13]See, for example, Martha Derthick, *New Towns In-Town: Why a Federal Program Failed* (Washington, DC: The Urban Institute, 1972) and Jeffrey L. Pressman and Aaron B. Wildavsky, *Implementation* (Berkeley, CA: University of California Press, 1973).

[14]Alfred A. Marcus, *Promise and Performance: Choosing and Implementing an Environmental Policy* (Westport, CT: Greenwood Press, 1980), p. 3.

Intergovernmental Regulatory Problems

One of the major findings to emerge from the Commission's study of regulatory federalism is that we still do not fully understand the real nature and full impact of federal regulation of state and local governments. It is widely perceived, however, that federal regulatory programs have serious problems. Chief among these problems, as discussed in the text of this *In Brief*, is cost, probably the preeminent concern of state and local officials. In addition, the new mandates have been described as too often inflexible, inefficient, inconsistent and intrusive.

State and local officials have charged that the national government all too frequently has prescribed rigid mandates without adequate regard for the varied circumstances in which they are to be applied. Bilingual education regulations, for example, were thought by many to be unusually inflexible as originally proposed. Although most elected officials and educators agreed with the goal of helping non-English speaking students, they argued with the federal government's stipulating a particular instructional technique.

Regulations are sometimes promulgated without regard to their costs, even if alternative, less expensive choices might suffice. Many viewed the Department of Transportation's original interpretation of Section 504 rules (of the *Rehabilitation Act*) to be inefficient on economic grounds. Instead of retrofitting buses with wheelchair lifts (at an estimated cost of $38 per trip), as the department proposed, state and local officials urged that alternative, less costly, means be considered, such as special taxi service.

Highly detailed organizational and procedural standards amount to intrusiveness, critics have charged. For example, requiring every state (under the *National Health Planning and Resources Development Act of 1974*) to establish approval procedures for all major health care development projects is unnecessarily prescriptive, according to many affected. Challenges to the act, however, have been struck down in court.

Crosscutting requirements, because they are administered by many federal agencies, are particularly vulnerable to charges of inconsistency. Coordination problems have plagued such across-the-board requirements as Title VI of the *Civil Rights Act* and Section 504 of the *Rehabilitation Act*, to name but two examples. Further, anti-discrimination rules are sometimes written into legislation separately, including clauses in *General Revenue Sharing* and the *Housing and Community Development Act*, further complicating coordinated rulemaking procedures.

Regulating: Easier Legislated Than Done

It is often in implementation that problems with federal regulations become apparent. The tasks involved in rulemaking are frequently substantial and the time taken to complete them is generally measured in years, not months. Section 504 of the 1973 *Rehabilitation Act*, adopted by Congress to prohibit discrimination against the handicapped, is a good example. Its implementing rules prepared by the Treasury Department did not take effect until the summer of 1981, eight years after the statute was enacted.

The delays and confusion that frequently surround the rulemaking process arise from a variety of sources. Some lay the blame at the bureaucracy's doorstep and, indeed, federal agency mismanagement has been indentified as one contributory factor.[15] Yet another reason is the process itself—the sheer magnitude of the task; its technical complexity (at or beyond scientific limits) slows the regulatory pace.

Another widespread criticism is directed at Congress. Statutes aimed at cleaning up the environment or prohibiting discrimination or making the work place safe are often far-reaching but lacking in clarity. Not surprisingly, these sweeping laws generate political conflict even (and maybe especially) after they have been passed and signed into law. Frequently, it is only during the rulemaking stage that actual costs and likely problems become apparent.

Shortcomings in the rulemaking process have not gone unnoticed. In some specific instances, the Congressional response to frustrating delays and ineffective implementation has been to make regulatory statutes extremely specific and rigid. Tough regulatory standards became a useful political symbol, a phenomenon well illustrated by the major environmental statutes adopted in the early 1970s. The 1970 *Clean Air Act Amendments*, for example, attempted to make improved air quality an overriding national value. In contrast with previous legislation, this act held that pollution was to be eliminted regardless of technical obstacles or of the costs imposed on the national economy, specific regions or communities.[16] The 1972 *Federal Water Pollution Control Act Amendments* were, in many crucial respects, modeled on the *Clean Air Act*. Like its predecessor, it too attempted to mandate specific requirements and deadlines.

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[15]U.S. Congress, Senate Committee on Governmental Affairs, *Delay in the Regulatory Process*, 95th Cong., 1st sess., 1977, *Study on Federal Regulation*, Vol. IV, p. iv.

[16]See Advisory Commission on Intergovernmental Relations, *Protecting the Environment: Politics, Pollution, and Federal Policy*, Report A-83 (Washington, DC: U.S. Government Printing Office, 1981), pp. 23-25, 52.

Impact

Placing blame for regulatory delays or poorly written regulations is one thing. Living with what has been promulgated is another.

Beginning in the late 1970s and early 1980s, the protests of state and especially local officials began to mount. Their timing was not coincidential. First, it took time for the cumulative effect of regulatory activism from the late 1960s and 1970s to be fully felt. Secondly, federal aid flows, when adjusted for inflation, peaked in 1978, the same year that the beginning of the taxpayers' revolt was symbolized by Proposition 13 in California. State and local officials found that the costs of complying with federal mandates were high, and the outlook for increased aid from Washington was beginning to look bleak. Taxpayers made it clear that the rate of goverment spending had to be slowed, a message first and most forcibly felt at the state and local levels. Finally, the recession sapped revenues while increasing demands on government to provide services to those hit hardest.

Cost. Costs imposed by federal mandates have been a major, perhaps even preeminent, concern. Simply put, state and local government officials object to footing part of—or, in some cases, most of—the bill for someone else's program. What Washington wants done, many believe, Washington should pay for.

Accurate information on the total cost of implementing federal mandates nationwide simply is not available. However, among six major regulatory programs examined in an Urban Institute report, the 1977 *Clean Water Act* imposed by far the largest fiscal costs on the seven cities and counties studied.[17] That act, which supplemented and modified the far-reaching *Water Pollution Control Act Amendments of 1972,* requires developing and implementating wastewater treatment management plans for meeting pollution discharge standards set by the Environmental Protection Agency. The act also authorized a very large construction grant program covering 75% to 85% of construction and conversion costs, with the balance borne by local (and, in some instances, state) governments. No aid is provided for operating and maintenance expenses.

According to the Urban Institute, the cost of meeting these requirements varied widely, ranging from zero in Burlington, VT—where a new plant already was under construction to meet stringent

[17]Thomas Muller and Michael Fix, "The Impact of Selected Federal Actions on Municipal Outlays," in U.S. Congress, Joint Economic Committee, *Special Study on Economic Change,* Volume 5, *Government Regulation: Achieving Social and Economic Balance,* 96th Cong., 2d sess., December 8, 1980, p. 327.

state standards—to $62.2 million in capital outlays, plus an additional $10.4 million in operating expenses, in Newark, NJ. Here, as in many other states, a portion of this cost was borne by the state government. However, local outlays totaled $62.54 per capita for one-time capital improvements and $31.42 per capita annually for operating expenses.

As this example shows, the costs of implementing federal regulatory programs can vary widely from place to place. EPA estimated in 1980 that cities nationwide would have to spend more than $30 billion to build additional wastewater treatment plants to comply with the *Clean Water Act's* standards.[18] Even with such large expenditures, there is no assurance that the objectives of the program will be realized. GAO audits have concluded that, as a result of design and operating deficiencies, many of the plants built so far are unable to meet national performance standards. These failures, according to the GAO, "may represent the potential waste of tens of millions of dollars in federal, state and local monies."[19]

Other Concerns. In addition to cost, state and local officials find federal mandates usually inflexible, frequently inefficient in achieving their goals, inconsistent in their application, and unnecessarily intrusive and prescriptive.

The net result of these problems, critics charge, is that many programs have not realized their objectives. Of course, measuring results of more than a decade's experiment in social policy is difficult. But very few observers—including the advocates and opponents of federal efforts—are satisfied.

A good summary of experience is contained in a critique by the executive director of the Sierra Club, one of the largest and most active environmental organizations:

> What I think is clear as the '80s began is that the country has not yet translated either our beliefs or our programs into tangible results. We have lots of laws on the books. We have a great many people working on programs with billions of dollars being spent, but the pattern of results is still very spotty. One can point to limited success in terms of improving air and water quality . . . but we've probably moved only 15% to 30% of the way toward our goal. On some issues, such as hazardous waste dumps and toxic chemi-

[18]U.S. Environmental Protection Agency, *1980 Needs Survey: Cost Estimates for Construction of Publicly Owned Waste-Water Treatment Facilities* (Washington, DC: U.S. Government Printing Office, 1971), p. 4.

[19]U.S. General Accounting Office, *Costly Wastewater Treatment Plants Fail to Perform as Expected* (Washington, DC: U.S. General Accounting Office, 1980).

cals, we are still pretty much spinning out words with very little tangible action.[20]

At best, most assessments are mixed. One of the more positive is offered in the National Advisory Council on Women's Education Programs, which compares Title IX of the *Education Amendments of 1972* to a glass that is "half full or half empty, depending upon one's outlook."[21] At the other extreme, the *Highway Beautification Act* has "largely been a failure" in the view of even its strongest supporters.[22]

State and local governments continue to protest the burdens of meeting federal requirements. They cite "nit picking" rules poorly suited to their own, often quite varied, circumstances. They challenge (both in and out of court) federal regulations that have stretched the constitutional commerce and spending powers and the statements of statutory intent to or beyond the breaking point, while seriouly constraining the scope of the Tenth Amendment. The old idea of cooperative federalism has too often been replaced by new patterns of attempted coercion and protracted conflict. Thus, a new critique, rooted in considerations of intergovernmental relations, must be added to the already voluminous criticism of regulatory performance.

An additional, uniquely intergovernmental criticism can be leveled at the ways in which social and environmental change have been pursued: the loss of a sense of accountability. The question, "which level of government can be held responsible?" is tough to answer when every level has been assigned a part of the task. In a now all too familiar scenario, Congress blames bureaucrats for overzealous interpretations of legislative intent; bureaucrats blame Congress for over-specificity or a lack of adequate guidance; state and local officials charge that their hands are tied by national requirements; and, Washington points a finger at state and local officials for improper performance. Everyone, as often as not, blames the courts, while judges reply that they were only reading the law.

It is obvious that there is enough blame to go around. What is often overlooked is that enforcement is frequently weak, in contrast to the far-reaching nature of many regulatory statutes. When it comes to regulatory enforcement, Washington's monster often ends up looking like a paper tiger.

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[20]Frances Gendlin, "A Talk With Mike McCloskey," *Sierra*, March/April 1982, p. 39.

[21]National Advisory Council on Women's Educational Programs, *Title IX: The Half Full, Half Empty Glass* (Washington, DC: U.S. Government Printing Office, 1981).

[22]Charles F. Floyd, "Billboard Control Under the Highway Beautification Act—A Failure of Land Use Controls," *American Planning Association Journal* 45 (April 1979), pp. 115-26.

The environmental field, to cite an important example, is marked by extremely tough-minded and uncompromising statutes. Yet, "it appears that . . . regulation involving everything from drinking water to public lands management tends to break down at the point of enforcement."[23] In both the clean water and safe drinking water programs, EPA's enforcement actions have been found to be lacking or minimal and were neither as timely nor as effective as they should have been.[24] As a general rule, then, federal intergovernmental regulations have proven difficult to enforce, and compliance has often been limited, although it is probably better than one might expect, given the haphazard character of federal supervision.

To be sure, such requirements are not always ineffective. Desegregation of southern schools in conformance with Title VI of the *Civil Rights Act* is a good example of regulatory accomplishment. Unfortunately, southern school desegregation may be the "exception that proves the rule." Many northern schools have become more, not less, segregated over this same period. Title VI requirements have not achieved dramatic results in other kinds of federal assistance programs.[25] One study found that some federal agencies did not appear to know which of their programs were subject to the law and sometimes did not know (and could not determine) if nondiscrimination requirements were being carried out by their grantees.[26]

The reasons for poor enforcement are varied. Sheer numbers provide one indication of the magnitude of the enforcement problem. There are some 32,000 potentially hazardous waste sites to be monitored, some 15,000 sewage treatment plants to be upgraded, nearly 300 species of plants and animals to be protected, and more than 3.5 million workplaces to be inspected for health and safety. Federal agencies typically lack the resources required to monitor actual performance closely. Also, they frequently lack the will to impose tough sanctions on violators. No one—from a member of Congress to the mayor and the 'proverbial' man on the street—likes to hear that his or her community is about to lose education, highway or other grant funds.

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[23]"Enforcement May be Weakest Link in States," *Conservation Foundation Letter*, November 1980, p. 1.

[24]U.S. General Accounting Office, *Costly Wastewater Treatment Plants Fail to Perform as Expected* (Washington, DC: U.S. Government Printing Office, 1980) and U. S. General Accounting Office, *State's Compliance Lacking in Meeting Safe Drinking Water Standards* (Washington, DC: U.S. Government Printing Office, 1982).

[25]U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974* (Washingon, DC: U.S. Government Printing Office, 1975), pp. 756-7.

[26]U.S. General Accounting Office, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance With Title VI* (Washington, DC: U.S. Government Printing Office, 1980).

REGULATORY REFORM: CURRENT, PAST AND PROLOGUE

Only during the recent past has reforming regulatory federalism been high on the nation's domestic agenda. Shortly after assuming office, President Reagan formed the Presidential Task Force on Regulatory Relief to review both old and proposed regulations; announced a temporary freeze on a number of pending regulations; and established Executive Order 12291, a cost-benefit analysis procedure for federal requirements. Although the Administration's deregulatory drive was aimed principally toward businesses, it contrasts with earlier reform efforts in the amount of attention devoted to intergovernmental regulatory issues.

E.O. 12291, for example, called for the analyzing rules likely to result in "a major increase in costs or prices for . . . federal, state, or local government agencies." The task force solicited and obtained proposals for rule revisions from public interest groups representing state and local governmental officials, as well as from a number of individual states, counties, cities and regional planning organizations. During 1981, some 100 specific rules were designated by the task force for review and possible modification. Of these, about one-quarter were intergovernmental in character.

Notably, revisions were made in a number of major regulations affecting state and local governments, including bilingual education requirements, standards affecting mass transportation access for the handicapped, *Davis-Bacon* prevailing wage rules, and surface mining reclamation standards. In addition, the Office of Management and Budget asserted its expanded power in the rulemaking process to cut to the "bare bones" minimum regulations agencies drafted to implement the nine recently-enacted consolidated block grant programs.

On the legislative side, Congress in 1981 adopted the *State and Local Cost Estimate Act*, which requires the Congressional Budget

Office to prepare a "fiscal note" estimating the potential costs of significant bills reported by committees. This procedure, recommended by the ACIR in a previous study, is intended to assure that Congress is aware of any substantial costs that new legislation may impose on states, cities, counties and other jurisdictions. In 1980, Congress had passed the *Regulatory Flexibility Act* to make it easier for small governments and businesses to comply with federal requirements.

Impressive accomplishments notwithstanding, both administrative and legislative regulatory relief initiatives have encountered difficulties. Proposed *Davis-Bacon* modifications were tied up in court action. Certain regulatory changes affecting the handicapped created a furor on Capitol Hill and were withdrawn. In a June 1983, decision, the Supreme Court cast in limbo the legislative veto, incorporated in at least 200 federal statutes and a central feature of the regulatory reform measure passed by the Senate in 1982. Legislative veto provisions allowed either house of Congress to reject administrative rules. It remains to be seen whether the momentum to reduce the regulatory burden on states and localities will continue. As the past two decades have shown, the temptation to regulate is great, and the rewards for restraint are few.

Past Regulatory Relief Efforts

Prior to 1980, excessive government regulation was viewed primarily as a problem of the private sector, not the public one. However, a number of changes did benefit state and local governments as part of broader deregulatory drives. Beginning with President Ford, each administration has required agencies to assess the costs and benefits of proposed major regulations; most observers agree, however, that, until very recently, these efforts were undertaken in a pro forma fashion.

Efforts to include state and local officials in the rule-making process were also not very successful. Budget Circular A-85, adopted in 1967, provided for consultation with state and local officials (and their representative organizations) before final rules could be promulgated. A-85 did not, by most evaluations, work very well and ultimately was challenged on legal grounds. President Carter replaced the process with a more decentralized, less formal procedure that was largely ignored by federal agencies and subsequently rescinded by President Reagan.

Today, despite their unique Constitutional position, state and local governments presently have no legal rights to participate in the rulemaking process beyond those afforded the general public. The *Administrative Procedure Act of 1946* established these minimum rights in making rules but specifically exempted grants, loans, bene-

fits or contracts. Because much intergovenmental regulation falls into these categories, state and local officials have no legal participation guarantees in areas of primary concern.

To date, efforts to reform regulations and the regulatory processes involving state and local governments have been mixed. In ACIR's study of regulatory problems, certain fundamental questions concerning regulatory federalism surfaced. What are—and what should be—limits on the national government's intergovernmental regulatory powers? And, once a regulatory goal has been deemed within the national government's scope, what form should the regulations to implement it take? Finally, how can state and local officials become effective actors in the rulemaking process, rather than "reactors" to perceived regulatory burdens?

ACIR's Regulatory Reform Agenda

Regulatory reform, the Commission found, could not be a piecemeal undertaking. General operational principles are needed to establish guidelines for when the national government should, or should not, regulate state and local activities or use states and localities to regulate others. Further, when Congress chooses the intergovernmental regulatory mold, the Commission stated, it should reimburse states and localities for the costs of compliance. Specifically, the Commission urged rethinking and redoing the newer types of regulatory techniques. Because of their coercive nature, they have special implications for a federal system. Finally, state and local officials should be part of the process, not just onlookers awaiting the results.

ACIR's complete regulatory reform agenda may be found in the *Recommendations* at the end of the *In Brief*. In summary, the Commission's proposal falls into three separate categories, as follows:

General Operational Principles. The Comisssion recommends that the federal government strive to confine its regulation of legitimate state and local government activities to the minimum level consistent with compelling national interests. Enactment of federal intergovernmental regulation may be warranted to:

1) protect basic political and civil rights guaranteed to all American citizens under the Constitution;
2) ensure national defense and the proper conduct of foreign affairs;
3) establish certain uniform and minimum standards in areas affecting the flow of interstate commerce;
4) prevent state and local actions which substantially and adversely affect another state or its citizens; or,

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

Even when these criteria are met, however, the Commission warns that federal intergovernmental regulation is warranted only when a clear and convincing case has demonstrated both the necessity for such intervention and the marked inability of state and local governments to address the regulatory problem involved.

Further, when it has been determined that the national government's involvement in a regulatory area is appropriate, the Commission urges that the national 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.

ACIR developed these operational guidelines to encourage Congress to "stop and think" before it passes legislation regulating state and local governments. To further encourage careful deliberation, 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.

The Federalism Context. The Founders of the U.S. Constitution established a federal system as a fundamental institutional arrangement. The division of authority between the national government and the states was regarded as critical in designing a Constitutionally limited government. In the Commission's view, these relatively new forms of federal intergovernmental regulation raise serious questions about the Constitutional limits of national authority.

To remedy this problem, the Commission recommends that the national legislative, executive and judicial branches reassess the legal doctrines that delimit the boundaries of national Constitutional authority vis-a-vis the reserved powers of the states.

Specifically, the Commission looked at current interpretations of the commerce and spending powers as they apply to recent forms of federal regulation, including direct orders, partial preemptions, crossover sanctions, and crosscutting grant requirements.

• **Direct orders.** Because subsequent federal court (including Supreme Court) decisions have eroded basic Tenth Amendment principles expressed in the 1976 case, *National League of Cities v. Usery*, the Commission hopes that the federal judiciary will revive and expand upon the principles embodied in the *NLC* case, especially those addressing the "basic attributes of state sovereignty" and

the "integral functions" of state and local governments. In addition, the Commission calls upon the Department of Labor to rescind its regulations that extend the *Fair Labor Standards Act Amendments* of 1974 to so-called "non-traditional" state and local activities.

• **Partial preemption.** In theory, partial preemption programs are cooperative endeavors. In practice, they have too often generated conflict among the levels of government. To improve their operation, the Commission recommends providing better consultation and coordination among levels; allowing states to opt for full federal administration without penalty; and considering direct federal administration in those few areas when uniform standards are necessary.

• **Crossover sanctions.** The Commission recommends that Congress repeal the provisions of grant statutes that authorize crossover sanctions. Crossover sanctions, the Commission finds, violate the spirit—if not also the legal foundations—of cooperative federalism.

• **Crosscutting requirements.** Because crosscutting requirements apply nearly universally to grant programs, they have created significant administrative and fiscal burdens on state and local governments. Many of these requirements address important national goals—yet there is a need to ensure that they advance these goals effectivey and do not outlive their usefulness. Therefore, 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 excessively burdensome, impracticable or no longer worth the effort to implement. Further, the Commission reiterates its support for assigning each crosscutting requirement to a single federal agency and for standardizing compliance guidelines that apply to all federal agencies.

Intergovernmental Consultation and Regulatory Flexibility. Regulatory reform, in the Commisson's view, requires that state and local concerns be appropriately weighed at each step in the regulatory process. Therefore, the Commission proposes a series of changes to increase state and local participation in the rulemaking process. Further, the Commission urges that greater flexibility be allowed in complying with federal mandates and that alternative regulatory means be considered when regulating state and local activities.

SUMMARY FINDINGS

The Commission's review of federal regulation of states and localities yielded six major summary findings:

During the 1960s and 1970s, state and local governments for the first time were brought under extensive federal regulatory controls;

Federal intergovernmental regulation takes a variety of new administrative and legal forms;

Although the new forms of regulation have been litigated heavily, by and large the federal courts have done little to constrain the regulatory proclivities of Congress or the executive branch;

The real nature and extent of the impact of federal regulation on state and local governments are still not fully understood;

Intergovernmental conflict and confusion have hampered progress toward achieving national goals; and,

Past efforts at regulatory reform have given little attention to problems of intergovernmental concern.

RECOMMENDATIONS

Part I.

PRINCIPLES CONCERNING FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS

1. 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 interests. Enactment of federal intergovernmental regulation may be warranted under the following circumstances:

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

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

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

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

e) to assure essential fiscal and programmatic integrity in the use of federal grants and contracts into which state 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 permissible.

ASSURING ADEQUATE FUNDING FOR NEW FEDERAL REGULATORY STATUTES*

2. The Commission finds that many governmental regulations impose substantial costs on state and local governments and constitute a major source of intergovernmental tension and conflict. Furthermore, the lack of adequate resources may seriously undermine successful program implementation and delay or obstruct attaining important national goals. Consequently, the Commission applauds the enactment of the *State and Local Cost Estimate Act of 1981*, implementing a 1980 ACIR recommendation to establish a fiscal notes process in Congress. To further address the problems of mandate funding,

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.

RESTORING CONSTITUTIONAL BALANCE IN INTERGOVERNMENTAL REGULATION

3. The Commission finds that the newest forms of intergovernmental regulation—the partial preemption, the crosscutting grant requirement, the crossover fiscal sanction, and the direct

*Senator 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.

order—have been the source of considerable friction and confusion despite their ostensibly legitimate foundation in such sources of Congressional authority as the interstate commerce clause (partial preemptions and direct orders) and the conditional spending power (crosscutting requirements and crossover sanctions). The Commission believes that this intergovernmental friction and confusion have been exacerbated by static judicial interpretations narrowly defining those functions of state and local governments that are Constitutionally protected against federal intrusion, while at the same time vastly expanding the scope of Constitutionally sanctioned federal prerogatives.

The Commission is convinced that the new regulatory techniques represent major departures from past intergovernmental practice—not only in a pragmatic sense but in a legal and constitutional sense as well. Therefore,

3(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.

3(b). Judicial Interpretations

The Commission applauds the Supreme Court's recognition in *National League of Cities 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 tine, however, the Commission finds that several recent Supreme Court decisions and many lower court judgements have eroded the basic Tenth Amendment principles expressed in the National League of Cities case.

The Commission, therefore, expresses its hope that the federal judiciary will revive and expand 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 as injurious to state sovereignty. The Commission notes that despite vast differences between the grant system of six decades ago and that which exits 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.

3(c). The Solicitor General's Role*

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.

3(d). Supporting the State and Local Legal Center

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

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*Deputy Under Secretary Koch, County Executive Murphy, and County Supervisor 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.

Part II.

A REFORM STRATEGY FOR THE NEWER FORMS OF INTERGOVERNMENTAL REGULATION

Over the past 20 years, there has been a substantial expansion of both the ends and means of federal regulation of state and local governments. Prior to the 1960s, federal conditions were commonly attached to individual grant-in-aid to assure fiscal and programmatic accountability in using federal funds. More recently, however, Congress has enacted regulatory statutes greatly extending the federal presence into a variety of new fields. As this report details, many of these programs utilize important new regulatory techniques, including:

- *crossover sanctions*, in which the failure to comply with the requirements of one program may result in the reduction or elimination of aid funds provided under other specified programs, as exemplified by the national 55 mile per hour speed limit and the *National Health Planning Act*;

- *partial preemptions*, which establish a national federal regulatory presence, but authorize states to implement the program if they adopt standards at least as stringent as the federal ones, as provided by the clean air, clean waer, and OSHA laws;

- *direct orders*, which mandate state or local actions under the threat of criminal or civil penalties, as in the equal employment opportunity act; and,

- *crosscutting requirements*, which apply generally to many or all assistance programs, including bans on discrimination on the grounds of race, sex, and handicap; environmental impact statement procedures; *Davis-Bacon Act* prevailing wage rules, and many others.

The Commission finds that these newer forms of federal intergovernmental regulation, both singly and in combination, raise serious questions about the Constitutional limits of federal and state authority that have yet to be addressed adequately, ignore the political principles that undergirded the conventional concept of cooperative federalism, and inject an excessive element of federal compulsion into a range of intergovernmental relationships. The Commission further believes that these newer forms raise special problems in their implementation, in part because of their departures from past practice and their more intrusive intervention into

the affairs and operations of subnational governments. Because each involves a different approach to achieving national regulatory objectives, the Commission is convinced that each type must be treated separately, establishing a body of principles that applies to pertinent provisions of existing federal grant and regulatory statutes and that serves as a guide to future efforts of national policymakers in drafting and enacting regulatory legislation.

ELIMINATING CROSSOVER SANCTIONS IN FEDERAL GRANT STATUTES

1. The Commission finds that Congress has used the crossover sanction mechanism in several federal programs since 1965. The uses of this device have become a source of much concern among observers at all levels of government, who believe the penalty mechanism is excessively coercive and confrontational in character. Serious objections also have been raised about the practical effects of this device, which may involve penalties so severe that they can scarcely be invoked. Therefore,

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 of the conditions of such a program. The Commission believes that such provisions alter drastically the traditional legal concept under which each grant is viewed as a quasi-contractural relationship, freely entered into but with differing obligations for the grantor and grantee that are clearly established by the statute authorizing such relationships in the program area covered by the grant. More specifically, the Commission recommends that, among others, the relevant provisions of the Highway Beautification Act of 1965 (23 U.S.C. 131), the National Health Planning and Resource Development Act of 1974 (42 U.S.C. 300m(d)), the Federal Aid Highway Amendments of 1974 (23 U.S.C. 154), the Education for All Handicapped Children Act of 1975 (20 U.S.C. 1416), and the Clean Air Act Amendments of 1977 (42 U.S.C. 7506(c) and 7616) be amended to restrict the cut-off of funds in the event of noncompliance to the specific aid program containing the requirement.

IMPROVING THE EFFECTIVENESS OF PARTIAL PREEMPTION PROGRAMS

2. The Commission finds that the principle of federal partnership has not been effectively realized in many of the recent intergovernmental regulatory programs that make use of the statutory

device known as "partial preemption." In such programs—major examples of which include the *Clean Water Act*, the *Clean Air Act*, the *Surface Mining Control and Reclamation Act*, the *Resource Conservation and Recovery Act*, the *Safe Drinking Water Act*, and the *Occupational Safety and Health Act*—state governments are authorized by federal law to develop and implement plans for the achievement of national environmental, health, and safety standards.

In theory, this approach provides a usefull tool for reconciling the independent status and varied circumstances of the 50 states within the federal system with the need to advance important national goals. It is on the basis of this theory of "cooperative federalism" that such programs have been accepted by the Supreme Court as proper exercises of that national power to regulate interstate commerce without abridging the 10th Amendment.

Rather than being administered on a cooperative basis, however, the Commission finds that such programs often have resulted in intergovernmental conflict, confusion and excessive intrusion by the federal government into state legislative, administrative, and political processes. On the basis of this assessment,

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 gov-**

ernment of 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. More specifically, the Commission recommends that Sections 107, 110, 113, 176, and 316 of the Clean Air Act of 1970 and Section 303 of the Federal Water Pollution Control Act Amendments be amended to conform with this cooperative principle.

Finally, the Commission further 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 contact.

DIRECT ORDER MANDATING AND THE PROTECTION OF INTEGRAL STATE AND LOCAL GOVERNMENTAL FUNCTIONS

3. On June 24, 1979, the United States Supreme Court ruled in *National League of Cities v. Usery*, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the *Fair Labor Standards Act* (FLSA) were not Constitutionally applicable to the integral operations of the states and their political subdivisions in areas of traditional governmental functions. As examples of such functions, the Court listed fire prevention, police protection, sanitation, public health, and parks and recreation.

The Commission finds that this Constitutional principle has been construed very narrowly by the executive branch. One of the most troublesome examples of infringement upon the states' Tenth Amendment rights has been the Department of Labor's (DOL) designation of certain state and local functions as "nontraditional" for the purpose of applying the *Fair Labor Standards Act* minimum wage in overtime provisions to a substantial number of state and local employees.[1] The following functions have been designated as nontraditional by DOL:

1) local mass transit system;
2) generation and distribution of electric power;
3) alcoholic beverage stores;
4) off-track betting corporations;
5) provision of residential and commercial telephone and telegraphic communications;
6) production and sale of organic fertilizer as a by-product of sewage processing;
7) production, cultivation, growing, or harvesting of agricultural commodities for sale to customers; and,
8) repair and maintenance of boats and marine engines for the general public.

The Commission believes that certain of these functions are indisputably integral state or local government activities. Therefore,

The Commission recommends that the Department of Labor rescind 29 C.F.R. Section 775.3.

ADMINISTRATION OF GENERALLY APPLICABLE (CROSSCUTTING) GRANT REQUIREMENTS

4. The Commission finds that crosscutting requirements, because they apply to all or most grant programs, have had a pervasive impact on state and local governments and have been the source of significant administrative and fiscal burdens. Many of these requirements—such as those directed toward preventing discrimination and protecting the environment under federal programs—do address important and widely accepted national goals. As this Commission pointed out in both 1978 and 1981, there is a pressing need to ensure that crosscutting requirements continue to foster achieving national policy objectives in an effective manner and do not outlive their usefulness. Hence,

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

Whatever crosscutting requirements are retained should be administered effectively and efficiently by federal agencies.

The Commission therefore commends the President's Task Force on Regulatory Relief for initiating a process that highlights

the unnecessary burdens imposed on state and local governments by particular crosscutting requirements.

The Commission believes, moreover, that effective and efficient administration of these requirements is impossible unless federal agencies share a common interpretation of Congressional intent and employ uniform implementing procedures, and, therefore,

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 federal 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. To these ends, the Commission also reiterates its support for the enactment of Title III of the Federal Assistance Improvement Act of 1981 (S. 807) as introduced.

Because crosscutting requirements normally apply to all federal aid programs, they can be a major source of administrative complexity and red tape even in those areas, such as block grants, where Congress intends to simplify administration and decentralize decisionmaking responsibility. Therefore,

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

Part III.

IMPROVING THE FEDERAL REGULATORY PROCESS

The Commission believes that considerable progress may be made in reducing regulatory burdens and improving regulatory performance through the case-by-case review of specific statutes and rules. Principles to guide such efforts were suggested in the foregoing recommendations.

Yet, the Commission is convinced that comprehensive, permanent regulatory relief efforts also depend upon systematic improvements in the processes that surround intergóvernmental regulation. The development of an effective intergovernmental partnership requires that state and local concerns be appropriately

weighed at each stage in regulation—in developing and drafting rules as well as in refining, implementing, and evaluating them.

Hence, the Commission offers a series of recommendations to improve the structure and procedures that surround federal regulation. Taken together, these five recommendations apply to most of the stages of the regulatory process mentioned above. Some are directed at the period in which regulations are developed and drafted, and others to the period during which proposed rules are refined in response to public comment. Still others concern the implementation of regulatory policies.

Proposed rules are shaped and reshaped during several phases of regulatory policymaking. The first stage, commonly called the "pre-notice and comment" period, may take years. It begins with a legislative provision, followed administratively by its conceptualization as a policy, and finally the drafting of that policy in the form of a proposed rule or rules to be published in the *Federal Register*. *Recommendations C.1 and C.3* refer to this stage of rule development.

The publication of a notice of proposed rulemaking (NPRM) marks the beginning of the second stage of regulatory policymaking and the point at which rulemaking procedures are prescribed by the *Administrative Procedure Act*. This stage includes the "notice and comment" period under which the public is afforded an opportunity to react to proposed rules. *Recommendation C.2* refers to this period during which regulations are refined, but before they are published as final rules in the *Federal Register*.

INCREASING STATE AND LOCAL GOVERNMENT PARTICIPATION IN INTERGOVERNMENTAL REGULATORY POLICY DEVELOPMENT AND REGULATORY DRAFTING

1. The Commission believes that many of the problems of intergovernmental regulation stem from inadequate participation by state and local governments in the process through which rules are developed. In part, this faulty participation results from the failure of the federal government to provide adequate opportunities for it throughout the rulemaking process. Therefore,

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 jurisdiction.

1(a). Amending the *Federal Advisory Committee Act (FACA)*

Consultation is further impeded by certain statutes that have

been interpreted in ways which undermine opportunities that have existed. The Commission finds that FACA has been interpreted by federal agencies in a manner which unnecessarily obstructs early consultation by state and local officials in developing intergovernmental regulations. Therefore,

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 or 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.*

1(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 and noneconomic. The process should apply to grants as well as to non-grant-related rulemaking. To ensure full consideration of the views of state and local governments, consultation should occur as early as 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.

1(c). Providing a Statutory Basis for State and Local Governments' Consultation in Federal Agency Rulemaking

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*Representative 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 acts' 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 which 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 judgement, would be to elicit a more reasonable interpretation of the act's requirements within the executive branch.

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.

STATE AND LOCAL PARTICIPATION IN THE NOTICE AND COMMENT STAGE OF RULEMAKING: INCLUDING FEDERAL GRANTS AND LOANS UNDER THE ADMINISTRATIVE PROCEDURE ACT

2. Since 1946, the *Administrative Procedure Act* has been the guarantor of minimum legal rights of public participation in federal agency rulemakings. Under one of its provisions, however, rulemakings relating to "agency management or personnel or to public property, loans, grants, benefits and contracts" have been exempted from such participation requirements.

The Commission finds this exclusion detrimental to full participation of state and local governments in federal grant and grant-related rulemakings and to insuring the minimal legal rights of the state and local governments in such proceedings. Therefore,

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.[1]

ENSURING CONSIDERATION OF INTERGOVERNMENTAL EFFECTS IN AGENCY REGULATORY IMPACT ANALYSIS AND REGULATORY REVIEW

3. Federal intergovernmental regulations often are enacted without an adequate assessment of the potential costs that they impose on state and local governments and on the private sector. In 1980, the Commission recommended that Congress enact legislation requiring each federal department and agency, including each of the independent agencies, to prepare and make public a detailed analy-

[1]The term "benefit as used in this recommendation refers to payments made to an individual. The Administrative Conference of the United States has found that the exemption from APA participation requirements has included not only rulemaking concerning benefits and benefit programs, but rulemaking *in all matters related thereto*. Thus, such an exclusion has been deemed to cover many programs administered by the states including AFDC, Medicaid, and unemployment insurance as well as such nationally administered ones as old age, survivors, and disability insurance.

sis of the projected economic and noneconomic intergovernmental effects likely to result from any proposed major new rule.[2]

Since 1974, every President has required that agencies undertake some form of cost-benefit analysis of major proposed rules. The comprehensive regulatory review program initiated by President Reagan through Executive Order 12291 provides for a regulatory analysis of all "major" rules as well as a less rigorous review of the probable impacts on nonmajor rules. The President's Task Force on Regulatory Relief also is undertaking a review of selected existing rules.

3(a). Consideration of Intergovernmental Effects

The Commission finds, however, that the implementation of executive branch regulatory review and analysis programs over the past three administrations has insufficiently recognized and considered the intergovernmental effects of regulations. The Commission also believes that, while the most recent Executive Order requiring agency analysis of proposed rules identifies intergovernmental costs as relevant for calculating expected costs, agencies have not been expressly required to include such costs in their analyses of major rules.

The Commission finds that the benefits of regulatory programs often accrue to individual citizens or groups of citizens while many of their costs are borne by subnational governments and that these intergovernmental costs are not now fully considered in regulatory review. Hence,

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 the intergovernmental effects—economic and noneconomic—of proposed regulations.

3(b). Redefining Major Rules

Moreover, the Commission also believes, as public interest group studies have indicated, that agencies tend to underestimate the total impact of proposed rules and that many regulations presently defined as "nonmajor" by agencies in fact impose significant financial and nonfinancial costs on state and local government. To help restore balance to the system, federal regulations requiring

[2]The Advisory Commission on Intergovernmental Relations, *Agenda for American Federalism: Restoring Confidence and Competence*, A-86 (Washington, DC: U.S. Government Printing Office, 1981), p. 130.

significant changes in how state and local governments operate should be categorized as major and be subject to cost-benefit analyses. Therefore,

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 federal 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.

3(c). Review of Non-Major Rules

Although the Commission believes that regulatory analyses can be an important tool for reducing the overall burden of intergovernmental regulation, administrative costs and practical considerations suggest that such analyses be conducted solely for major federal regulations. The Commission also believes, however, that non-major regulations represent a significant proportion of the total regulatory burden imposed on state and local governments. Therefore,

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.

AN OMNIBUS APPROACH TO STATE AND LOCAL GOVERNMENT CERTIFICATION IN MEETING FEDERAL RULES AND REGULATIONS

4. The Commission finds that there is a great need to make compliance with federal regulations easier and less costly, and to reduce duplication of state and local regulations. Increasingly, states have developed programs and regulatory mechanisms for themselves and their local governments that respond to many of the same problems and concerns addressed by federal requirements. Certification of appropriate state and local compliance mechanisms in place of federal ones can help ease compliance burdens, duplication

of effort, and displacement of state and local policymaking prerogatives. Therefore,

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 federal 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 be the head of the federal agency that the recipient government fails to comply with applicable federal laws and regulations adopted thereunder.

TOWARD GREATER FLEXIBILITY: THE USE OF ALTERNATIVE MEANS IN REGULATING STATE AND LOCAL GOVERNMENTS

5. The Commission concludes that, when the federal government regulates state and local governments, unnecessary burdens have arisen from an over reliance upon traditional, rigid, and increasingly intrusive means of regulation. The Commission finds that a range of alternative means of regulation exists that provides opportunities to increase flexibility and reduce the burdens of intergovernmental regulation. Indeed, some of those alternative means may enhance the achievement of national goals while reducing direct involvement by the federal government. Therefore,

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.

Advisory Commission on Intergovernmental Relations

June 14, 1983

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What is ACIR?

The 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 a permanent national bipartisan body representing the executive and legislative branches of Federal, state, and local government and the public.

The Commission is composed of 26 members—nine representing the Federal government, 14 representing state and local government, and three representing the public. The President appoints 20—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 Congressmen by the Speaker of the House.

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

As a continuing body, the Commission approaches its work by addressing itself to specific issues and problems, the resolution of which would produce improved cooperation among the levels of government and more effective functioning of the federal system. In addition to dealing with the all important functional and structural relationships among the various governments, the Commission has also extensively studied critical stresses currently being placed on traditional governmental taxing practices. One of the long range efforts of the Commission has been to seek ways to improve Federal, state, and local governmental taxing practices and policies to achieve equitable allocation of resources, increased efficiency in collection and administration, and reduced compliance burdens upon the taxpayers.

Studies undertaken by the Commission have dealt with subjects as diverse as transportation and as specific as state taxation of out-of-state depositories; as wide ranging as substate regionalism to the more specialized issue of local revenue diversification. In selecting items for the work program, 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 specific intergovernmental issues for investigation, ACIR follows a multistep procedure that assures review and comment by representatives of all points of view, all affected levels of government, 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 developed to assist in implementing ACIR policies.