

The Role of Federal Environmental Mandates in Intergovernmental Relations¹

by Jeffrey Marks

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.²

James Madison, Federalist Paper No. 51

Introduction: Determining an Appropriate Federal Role in Environmental Regulation

From the moment the United States won autonomy as an independent nation, the debate has raged over the proper roles of federal, state, and local governments. The United States has continued to define and redefine how federalism can best be balanced in a changing world. Even the U.S. Supreme Court has shrugged its shoulders and concluded that clear lines defining the appropriate scope of federal activities cannot be drawn once for all times.³ In the Court's opinion, the boundaries between federal, state, and local activities are more properly developed through the political process and can be expected to shift with time.⁴

Despite the good intentions of these directives, unfunded mandates are crippling the ability of state and local officials to confront demanding local priorities within shrinking budgets.

At various points in our nation's history, the legislative and executive branches have determined that certain governmental activities are so important to national interests that a dominant federal role is necessary. Among these are national defense, foreign affairs, and the protection of civil rights. The Great Depression and the Supreme Court's expanded interpretation of the Commerce Clause in 1937⁵, however, opened the door to greater federal involvement in other areas, including the environment. With

the judiciary's blessing, Congress enacted the battery of regulations that today constitute the body of federal environmental law.⁶ These statutes, for the most part, exact an acceptable toll on state and local governments.⁷

Federal environmental mandates “arise from statutes, constitutional provisions, court decisions, and administrative regulations or orders that demand action from ‘subordinate’ governments under pain of ... sanctions.”⁸ Despite the good intentions of these directives, *unfunded* mandates are crippling the ability of state and local officials to confront demanding local priorities within shrinking budgets.⁹ Although there are some national policy issues that fully justify the enactment of a federal mandate, others inappropriately intrude into state and local government affairs through overzealous national involvement.¹⁰ The irony is that the more Washington imposes its will upon “Main Street,” the harder it becomes for state and local governments to accomplish national policy goals.

Today, the challenge facing the federal government is to balance national needs while at the same time honoring state and local rights to govern their own affairs and set their own budget and community priorities.

There are numerous instances of mandates distorting local priorities, impairing procedural flexibility, and above all, imposing costs on municipalities and states that need to be paid from state and local revenues. For example, federal mandates cost the California state government \$8 billion per year—nearly one-fifth of the state’s general expenditures.¹¹ Likewise, environmental regulatory compliance costs for the City of Columbus, Ohio in 1991 were \$62 million, or about 11 percent of the city’s budget.¹² Compliance costs for the years 1996 to 2000 for Columbus are projected to be \$135 million annually, or 23.1 percent of the City’s total budget.¹³ The U.S. Conference of Mayors asserts that environmental regulations cost cities \$2.6 billion a year.¹⁴ Federal environmental mandates are forcing state and local governments to raise taxes and cut basic services.¹⁵ Today, the challenge facing the federal government is to balance national needs while at the same time honoring state and local rights to govern their own affairs and set their own budget and community priorities.

ACIR’s Review of Existing Federal Mandates

In an effort to strike the proper “fiscal federalism” balance, Congress enacted the Unfunded Mandates Reform Act of 1995 (UMRA)¹⁶ to provide regulatory relief for state, local and tribal governments.¹⁷ The legislative debate preceding the Act’s passage resulted in a compromise between Congress and various public interest groups regarding the law’s prospective applicability.¹⁸ Under this compromise, the statute established mechanisms to provide relief from *future* mandates, but it provided no such relief from *existing* federal mandates.¹⁹ For the multitude of existing rules, the statute directed the Advisory Commission on Intergovernmental Relations (ACIR),²⁰ an independent federal agency, to review the impact of federal requirements on state, local, and tribal governments²¹ and to submit a report to Congress and the President with its recommendations.²²

ACIR analyzed existing mandates by compiling information from the National Governors' Association,²³ the National Rural Development Partnership, and several state and local associations and officials. The ACIR's preliminary report on federal mandates, issued in January 1996, contained general observations on the Commission's findings and formulated recommendations on ways to provide state and

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local governments relief from current environmental, labor, disability rights, and transportation mandates.²⁴ The preliminary report also awakened the passions and lobbying powers of various public interest groups, immediately adding substantive debate to the findings in the report.²⁵

ACIR sponsored a two-day National Conference on Federal Mandates in Washington, D.C. to provide a forum for debating and discussing the wide

range of mandate and regulatory issues raised in the report.²⁶ In addition, the Commission held a public hearing on March 26, 1996 to accept testimony on specific issues in ACIR's preliminary report.²⁷ Following the completion of the public comment period, ACIR developed a final report for submission to the President and the Congress. Unfortunately, a combination of drastically reduced funding by Congress²⁸ and election-year political maneuvering by the White House²⁹ squelched much-needed discussion. The Commission reviewed the final report in July 1996, but it could not broker bipartisan support. ACIR's study died before it was born! Interest group pressure swept the legitimate grievances of state and local governments under the rug once again.³⁰

Although elected officials could not agree on a final version of the ACIR study, that does not change the incredible impact federal environmental mandates have upon state and local governmental entities. The remainder of this paper focuses on two key statutes (Endangered Species Act and the Safe Drinking Water Act) in order to illustrate some problems, and perhaps more importantly, offer some solutions to the tensions inherent in our underfunded federal environmental framework.

Past Problems, Present Concerns, and Future Solutions of the Safe Drinking Water Act and the Endangered Species Act

The wide diversity of environmental regulations makes it difficult to establish a uniform method of determining whether a mandate is proper or improper from an intergovernmental perspective. ACIR, during its study, focused on "the role of federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, . . ."³¹ In light of this directive, the Commission considered the fundamental intergovernmental issues associated with

each mandate selected for review as separate and distinct from that mandate's national policy goals, general purposes, or implementation procedures.³²

ACIR concentrated on intergovernmental issues because state and local concerns usually revolve solely around issues of comity, not around the national policy goal itself; state and local governments recognize that most federal laws are worthy of broad public support.³³ Mandate issues, however, involve more than disagreements about which government has the right to make a decision or to take an action. Instead, mandate issues relate to the "nuts and bolts" of government operations, such as policy-making and service delivery.³⁴ This is the reason that many of the current proposed legislative changes and regulatory reforms are specifically aimed at improving relations between the federal government and its state, local, and tribal counterparts.

As part of determining the proper federal role in existing environmental statutes, ACIR structured its analysis around these key questions:

- Does the national purpose justify federal involvement in state or local affairs?
- Are the costs of implementing the mandate appropriately shared among governments?
- Is maximum flexibility given to state and local governments in implementing the mandate?
- Are there changes that can be made in the mandate to relieve intergovernmental tensions while maintaining a commitment to national goals?³⁵

What follows is a brief survey of ACIR's application of this analytical framework on two very different environmental mandates: the Endangered Species Act and the Safe Drinking Water Act.

A. Endangered Species Act

Federal involvement in conserving endangered species began in 1966 with legislation that called for saving U.S. wildlife, but provided the federal government little power to take specific actions.³⁶ Three years later, an international convention on endangered species looked at the problem of preventing extinction worldwide.³⁷ During the early 1970s, public concern over environmental issues swept the country and prompted Congress to pass the Endangered Species Act of 1973 (ESA).³⁸

ESA requires every federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed threatened and endangered species or the destruction or adverse modification of critical habitat.³⁹ The protective features of this law are activated by the "listing" of a species as endangered

based on the best commercial and scientific information available.⁴⁰ In addition, "critical habitat" for a listed species is to be designated in those areas "essential for the conservation of the species,"⁴¹ a designation that protects the habitat as well as the species.⁴² Under ESA, state, local, and tribal governments may not obtain a federal permit, license, or grant if a project does not comply with the statutory standards for conserving endangered species.⁴³

ESA also directs the heads of federal agencies to cooperate with the states in conserving protected species; if the state endangered species programs meet certain federal standards, federal agencies must enter into cooperative agreements to help states implement their programs.⁴⁴ Although states may receive federal funds after signing such agreements, they must normally provide a minimum matching amount.⁴⁵

In 1978, the Supreme Court in *Tennessee Valley Authority v. Hill* held that the provisions and restrictions in ESA concerning protection of species were absolute.⁴⁶ The Court found an "explicit congressional decision" to afford "first priority" to saving endangered species and a "conscious decision" by the Congress to give endangered species priority over the "primary missions" of federal agencies.⁴⁷ Since its inception, ESA has been credited with helping preserve such nationally symbolic animals as the bald eagle and the grizzly bear. The law is also credited with helping the populations of an estimated 500 species to rebound.⁴⁸ However, critics charge that ESA has never recovered a single endangered species, the law depends on bogus science, and it has an ever-mounting toll on individual private property rights, societal interests, and the economy.⁴⁹ The federal government's list of endangered and threatened animal and plant species now numbers approximately 1,500 and another 3,700 species are being considered for listing.⁵⁰

1. Intergovernmental Concerns⁵¹

Intergovernmental tensions arise in relation to ESA issues because state and local governments often feel they have an inadequate share of decision-making authority in the management and planning decisions that affect the listing of threatened and endangered species.⁵² Non-federal jurisdictions perceive the species recovery process to be too rigid and the Act's exemptions to meet local conditions to be quite limited.⁵³

ACIR's preliminary recommendations indicated that ESA should be amended to give state and local governments an official role in the management and planning decisions affecting the recovery process: a role beyond the traditional consultation and full notice and comment requirements currently in effect.

There is also a concern that strict federal regulations impair valuable public and private economic development activities.⁵⁴ Critics argue that such impairment causes widespread economic and social hardship in communities throughout the

nation.⁵⁵ Some state, local, and tribal governments argue that for the law to work effectively and efficiently, they need incentives to provide habitat for endangered species and the freedom to administer and enforce standards to achieve this goal.⁵⁶ State and local governments are pleading for a compromise between economic activity interests and species conservation needs.⁵⁷

2. Intergovernmental Solutions⁵⁸

Substantial reform efforts are currently underway in both the White House and Congress to resolve some of the intergovernmental problems inherent to ESA. The Department of Interior (DOI) is building partnerships with states participating in endangered species candidate conservation and recovery programs.⁵⁹ DOI is also implementing uniform "peer review" procedures to ensure that every listing and recovery program is reviewed by independent scientific experts.⁶⁰ These provisions may also include regulatory relief for small landowners.⁶¹

In addition to DOI's efforts, Congress recently proposed legislation to amend ESA extensively by, for example, tightening standards for listing petitions and increasing state involvement at various stages of the process.⁶² Other legislative proposals provide for review of various scientific issues under the Act, greater authority to agency heads in reconciling conflicts between ESA and other laws, and requirements of agencies to minimize adverse impacts on private property.⁶³

ACIR's preliminary recommendations indicated that ESA should be amended to give state and local governments an official role in the management and planning decisions affecting the recovery process: a role beyond the traditional consultation and full notice and comment requirements currently in effect.⁶⁴ The law should recognize state and local governments as co-authors of national policy on endangered species protection efforts, and authority for species protection should be a shared responsibility between the federal government and state and local jurisdictions.⁶⁵ Broader participation by state, local, and tribal governments will improve the data collection process and allow biological science, economic constraints, and available management resources to be taken into account on a regional basis.⁶⁶

B. The Safe Drinking Water Act

The federal government's direct involvement⁶⁷ in drinking water issues began after a 1969 Public Health Service study found that many of its drinking water standards were based on insufficient data and did not cover many known contaminants.⁶⁸ In addition, a subsequent Environmental Protection Agency (EPA) nationwide study of community water systems revealed widespread water quality and health risk problems resulting from poor operating procedures, inadequate facilities, and substandard management of public water supplies in communities of all sizes.⁶⁹ Later reports by the Environmental Defense Fund and the EPA linked certain pollutants found in drinking water with cancer.⁷⁰

Congress enacted the Safe Drinking Water Act of 1974 (SDWA) to require local and state governments to comply with federal standards regulating drinking water.⁷¹ These standards establish maximum levels for chemical, radiological, and microbiological contaminants in community water systems.⁷² SDWA also institutes wellhead protection programs,⁷³ certifies and specifies appropriate analytical and treatment techniques,⁷⁴ and establishes enforcement and public notification procedures.⁷⁵ It requires local drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.⁷⁶ In 1986, Congress amended the law to identify 83 specific contaminants for which EPA was to set standards, and required that 25 additional new contaminants be regulated every three years.⁷⁷ Congress strengthened and expanded SDWA's monitoring, compliance, and enforcement requirements and imposed substantial new requirements on EPA, states, and local public water suppliers.⁷⁸

1. Intergovernmental Concerns⁷⁹

Because the safety of drinking water has long been a state or local government responsibility, these jurisdictions generally do not object to assuming the costs of providing safe drinking water.⁸⁰ Rather, their concerns over SDWA stem from *what* constitutes safe drinking water and *how* to achieve it in the most cost-effective way.⁸¹

The high cost associated with SDWA compliance leads some state and local officials to suggest that municipalities should have flexibility to select the contaminants they regulate and to set their own water quality standards.⁸² Other officials argue that the requirements of SDWA should focus efforts on the highest priority threats to public health and should encourage cost-effective measures to gain the greatest risk reduction for drinking water dollars invested.⁸³ The Congressional Budget Office reports that "\$1.4 billion to \$2.3 billion per year should be viewed as a range of estimates of the total cost that water systems will bear to comply with SDWA regulations that went beyond pre-SDWA standards."⁸⁴

Intergovernmental tensions also surface when federal financial support fails to keep up with the increasing cost of SDWA compliance.⁸⁵ The lack of federal assistance for these expenses is particularly troublesome for small community systems, as is the lack of adequate implementation flexibility.⁸⁶ State and local officials allege that in defining what level of drinking water protection is affordable, SDWA unfairly looks only to the capabilities of larger systems.⁸⁷ According to EPA estimates of the 200,000 public water systems in the nation, approximately 60,000 are community water systems that serve a residential population of roughly 232 million year-round (about 92% of the population).⁸⁸ Eighty-seven percent of these community water systems are small systems serving between 501 and 3,300 individuals or very small systems serving fewer than 500 individuals.⁸⁹

Therefore, tests which have nominal costs per customer for large systems would, in some instances, be extremely costly per customer for small or very small systems and may be beyond a system's technical capacity to comply.⁹⁰ According to EPA esti-

mates, small systems will require investments of nearly \$3 billion through the end of the century to comply with all regulations and an additional \$20 billion to repair, replace, and expand the basic infrastructure to deliver drinking water.⁹¹ While variances and exemptions are permitted in some circumstances, the procedures required to obtain such variances or exemptions may be difficult for some communities to meet.⁹²

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2. Intergovernmental Solutions

The Safe Drinking Water Amendments of 1996⁹³ go a long way towards removing the “regulatory straitjacket” from the thousands of water systems regulated under the Act.⁹⁴ These amendments will alleviate the SDWA provisions that cause most of the intergovernmental tensions. For example, the amendments should reduce the number of mandatory tests for contaminants, eliminate test requirements for contaminants that are not a threat in certain local areas, and ease provisions for treatment and monitoring of surface and ground water supplies.⁹⁵ In addition, the amendments authorize billions of dollars for the state-administered loan and grant funds to help financially strapped localities with their compliance efforts.⁹⁶

The 1996 Amendments reflect a bipartisan effort to reduce regulations imposed on states and public water systems, to increase state authority and flexibility, and to provide federal financial assistance for unfunded mandates within SDWA.⁹⁷ In addition to directing EPA to consider costs and benefits when setting drinking water standards, this legislation gives the agency increased flexibility to target contaminants of particular concern and provide funds to advance environmental concerns.⁹⁸

Conclusion: A Common Thread⁹⁹

State and local governments identified over 200 separate mandates (including environmental laws and regulations) during the ACIR study period. In addition, another Commission study, *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994*, revealed that in 1994 alone, over 3,500 federal court cases required state, local, or tribal governments to “undertake responsibilities or activities, beyond those such government would otherwise have undertaken, to comply with federal statutes and regulations.”¹⁰⁰ The results of these two studies provide a dramatic picture of the complex relationship between the federal government and state and local jurisdictions. These reports clearly show the cumulative burden that federal mandates place on state and local entities.

The alternative is to risk losing the environmental forest by focusing on the regulatory trees.

Several issues common to the body of federal environmental law work to complicate intergovernmental relations. First, state and local governments often are required to follow detailed procedural requirements without the flexibility necessary to blend national goals into a local setting.¹⁰¹ Second, the federal government sometimes imposes mandates without considering the full magnitude of costs and without providing adequate funding to share the mandate costs.¹⁰² Third, federal policies tend not to recognize state and local governments as separate entities subject to public accountability through the policy processes of their own elected officials.¹⁰³ Fourth, some federal laws allow federal agencies to rely on private rights-of-action rather than their own monitoring and oversight efforts to achieve state and local compliance.¹⁰⁴ Fifth, many federal mandates overlook the inability of very small local governments to meet standards and timetables that larger jurisdictions often can meet.¹⁰⁵ Finally, insufficient communications and ineffective coordination of federal policies sometimes cause confusion, uncertainty, and frustration among state and local governments when they try to comply with certain mandates.¹⁰⁶

ACIR received over 550 comments from individuals, private industries, public interest organizations, and federal, state, and local officials on ACIR's preliminary report on *The Role of Federal Mandates in Intergovernmental Relations*. Those respondents clearly supported enhanced federal technical assistance and education regarding the provision of environmental regulations. Likewise, comments regarding reviewed environmental mandates (Clean Water Act; Safe Drinking Water Act; Clean Air Act; and Endangered Species Act) generally supported (1) changes in process to assure state and local governments more involvement in decision-making; (2) clarification of expectations that the federal government will grant waivers when necessary to assist compliance with federal standards; and (3) increased financial assistance, particularly for communities in fiscal stress.¹⁰⁷ While there was substantial, but not unanimous, opposition to limiting private rights-of-action, this issue must still be reevaluated in a thorough and thoughtful way.¹⁰⁸

For the Unfunded Mandates Reform Act to be truly successful, a multitude of environmental federal mandates are in need of thorough review.¹⁰⁹ For example, requirements for identification, management, and disposal of solid and hazardous waste materials under the Resource Conservation and Recovery Act (RCRA)¹¹⁰ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹¹¹ are consistently cited by state and local governments as needing review. The Clean Air Act,¹¹² Clean Water Act,¹¹³ and components of the National Environmental Policy Act¹¹⁴ are significant sources of concern for state and local governments. UMRA should be seen as the beginning, not the end, of Washington's efforts to live up to forgotten notions of "our federalism." At the very least, the federal government should establish a

coordination mechanism to assist state and local governments through the policy maze it has created.

At times, it seems that the federal officials forget that state and local officials are also representatives of the citizens that are being asked to pay for these programs. It is the environmental values of those citizens that should drive the environmental programs, consistent with federally set goals and objectives. Given the appropriate climate of mutual respect among the various levels of government, which respect can be premised on both constitutional and practical considerations, it would become possible to achieve environmental progress on a cooperative, cost effective, and priority basis. *The alternative is to risk losing the environmental forest by focusing on the regulatory trees.* [Emphasis added]

City of Colorado Springs, Colorado

Testimony before ACIR¹¹⁵

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Notes

1 Special thanks to Philip M. Dearborn and Jane Wallace McNeil for their extensive work on the "mandates study."

2 THE FEDERALIST NO. 51 (James Madison).

3 *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

4 *Id.*, at 547. A sharply divided Supreme Court suggested that "if there are to be limits on the Federal Government's power to interfere with state functions — as undoubtedly there are — we must look elsewhere to find them." According to Justice Harry A.

Blackmun, that "elsewhere" was to be found in the national political process of federal

regulation of state functions, not in any specific constitutional limitations such as the Tenth Amendment.

5 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

6 See, e.g., Rueth v. EPA, 13 F.3d 227 (7th Cir. 1993) (holding that the Clean Water Act is a valid exercise of Congressional commerce clause power).

7 U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF FEDERAL MANDATES IN INTERGOVERNMENTAL RELATIONS: A PRELIMINARY ACIR REPORT FOR PUBLIC REVIEW AND COMMENT 5 (January 1996) [hereinafter ACIR, THE ROLE OF FEDERAL MANDATES: PRELIMINARY] (commenting that the Commission did not take issue with the goals of these mandates, but believing that achievement of the goals can be better left to elected state and local officials).

8 U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, MANDATES: CASES IN STATE-LOCAL RELATIONS 2 (1990).

9 See generally U.S. GENERAL ACCOUNTING OFFICE, STATE AND LOCAL FINANCES: SOME JURISDICTIONS CONFRONTED BY SHORT AND LONG-TERM PROBLEMS, GAO/HRD-94-1 (1993) (presenting major fiscal concerns of state and local governments).

10 U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF FEDERAL MANDATES IN INTERGOVERNMENTAL RELATIONS (July 1996) [hereinafter ACIR, THE ROLE OF FEDERAL MANDATES] (unpublished report, on file with the American Council on Intergovernmental Relations).

11 WENDELL COX & SAMUEL A. BRUNELLI, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, 21 ISSUE ANALYSIS No. 2, FEDERAL MANDATES: THE CASE FOR COMPREHENSIVE RELIEF 2 (1995).

12 Philip M. Dearborn, *Assessing Mandate Effects on State and Local Governments*, 20 INTERGOVERNMENTAL PERSP. 22, 24 (1994).

13 Richard C. Hicks, *Environmental Legislation and the Costs of Compliance*, 8 Gov't FIN. REV. 7 (1992).

14 Kenneth Silverstein, *Unfunded Mandates Continue to Chafe*, AM. CITY & COUNTY, at 14 (1993).

15 See generally U.S. GENERAL ACCOUNTING OFFICE, FEDERAL MANDATES, GAO/HEHS-94-110R (1994) (examining federal mandates on state and local governments).

16 Pub.L.No. 104-4, 109 Stat. 48 (1995).

17 Title III of the Unfunded Mandates Reform Act recognized the diverse nature of federal involvement in state and local government activities by broadly defining "mandate" for the purposes of ACIR's studies. Section 305 defines the term "federal mandate" for ACIR's purposes as "any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program." [Emphasis added.] Pub.L.No. 104-4, § 302(f), 109 Stat. 48, 69 (1995).

18 Under Title I of the Act, The Congressional Budget Office (CBO) is to review reported bills and resolutions for intergovernmental mandates with direct costs equal to or exceeding a \$50 million threshold in a fiscal year. Pub.L.No. 104-4, § 434(a)(1), 109 Stat. 48, 55 (1995). Under Title II of the Act, each federal agency must assess the ef-

facts of federal regulatory actions on state, local, and tribal governments for mandates of \$100 million or more in a fiscal year. Pub.L.No. 104-4, § 302(a), 109 Stat. 48, 64 (1995).

19 Richard Nathan, Director, The Nelson A. Rockefeller Institute of Government, The Public Policy Institute of the State University of New York. *Intergovernmental Principles Emerging from ACIR's Review of Federal Mandates*, Presentation to Conference on Federal Mandates (March 6, 1996).

20 ACIR is a permanent, independent, bipartisan federal agency established by federal law in 1959. Its mission is to strengthen the American federal system and improve the ability of federal, state, and local governments to work together cooperatively, efficiently, and effectively. Its 26 members include six members of Congress appointed by the House and Senate leadership; four governors, three state legislators, four mayors, and three county officials appointed by the President; and three private citizens and three representatives of the federal executive branch appointed directly by the President.

21 Pub.L.No. 104-4, § 302(a)(1), 109 Stat. 48, 67 (1995).

22 Pub.L.No. 104-4, § 302(d), 109 Stat. 48, 69 (1995).

23 The National Governors' Association (NGA) conducted a survey of all governors asking them to "identify specific existing federal mandates, including judicial mandates, that impede state and local flexibility in implementing state and national goals." The NGA requested the governors to keep in mind the following questions as they completed the survey:

- a) Is the mandate unfunded or underfunded?
- b) Does the mandate go beyond the basic law?
- c) Are the costs disproportional to the benefits?
- d) Is the mandate an inappropriate "one-size-fits-all" mistake?
- e) Does the mandate hurt market competition (e.g., HMOs, waste disposal)?
- f) Does the mandate create excessive and multi-layered overhead costs?
- g) Does the mandate distort the top priorities of state and local governments?
- h) Does the mandate give an undue preference to a single interest over the public interest?
- i) Does it preempt effective state laws?
- j) Would state or local action be cheaper and more effective?

Responses were received by just over half the states and Guam.

24 See ACIR, THE ROLE OF FEDERAL MANDATES: PRELIMINARY, *supra* note 7.

25 During the public comment period on the contents of the preliminary report, ACIR was contacted by federal agencies and other officials in the federal executive branch, state and local government officials, Members of Congress, public interest organizations, and private citizens. ACIR received 538 public comments, 47 testimonies, and several packages of additional mandate information.

26 A special workshop on environmental mandates was moderated by Gregory Lashutka, Mayor of the City of Columbus, Ohio. Panel participants included Blake Early, American Lung Association; Robert Mulready, City of Lewiston, Maine; Erik D.

Olson, Natural Resources Defense Council, and; Robert E. Roberts, Environmental Council of the States.

27 Pursuant to Pub.L.No. 104-4, § 302(c)(2), 109 Stat. 48, 69 (1995).

28 UMRA directs the Advisory Commission on Intergovernmental Relations (ACIR) to conduct four studies: (1) a baseline study to examine the measurement and definition issues involved in calculating total costs and benefits to state, local, and tribal governments of compliance with federal laws [§ 301(a)]; (2) a review of the role of federal mandates in intergovernmental relations [§ 302(a)(1)]; (3) a review of the role of unfunded state mandates imposed on local governments [§ 302(a)(2)]; and, (4) an annual review of federal court cases in which a state, local, or tribal government was required to undertake responsibilities or activities, beyond those such government would otherwise have undertaken, to comply with federal statutes and regulations [§ 304]. ACIR was directed to include in its studies consideration of the competitive balance between state, local, and tribal governments and the private sector [§ 302(a)(1)]. Also, the views of working men and women on mandate issues were to be considered in the studies [§ 302(a)(1)].

The Commission was forced to limit the studies it conducted and to simplify work plans because only one-third of the \$1 million authorized for the studies was appropriated to ACIR. No study funds were appropriated in Fiscal Year 1995 and \$334,000 was appropriated for the studies in Fiscal Year 1996.

It can be said that the studies mandated by Congress to ACIR were the “*ultimate unfunded mandates*.”

29 Considerable pressure by OMB Watch and Citizens for Sensible Safeguards, a coalition of more than 150 national organizations opposing the attack on federal regulatory protections, and other public interest groups contributed to the reluctance of the Clinton Administration to let any report that touched on so many “sensitive” areas “see the light of day” in an election year.

30 At the end of the Federal Fiscal Year 1996, on September 30, 1996, ACIR closed its doors pursuant to termination in the Treasury, Postal, and General Government Appropriations Act of 1997. It is interesting to note that, in a time when the Clinton Administration is proclaiming a passionate commitment to intergovernmental cooperation and the 104th Congress is debating the programmatic and fiscal devolution of responsibilities to the states, the federal government is eliminating the one entity with expertise in the field of intergovernmental management and federalism.

31 Pub.L.No. 104-4, § 302(a)(1), 109 Stat. 48, 67 (1995).

32 See ACIR, THE ROLE OF FEDERAL MANDATES: PRELIMINARY, *supra* note 7, at 4.

33 *Id.* at 2.

34 *Id.* at 4.

35 *Id.* at 2.

36 Douglas H. Chadwick, *Dead or Alive: The Endangered Species Act*, NAT'L GEOGRAPHIC 15 (March 1995).

37 *Id.*

38 16 U.S.C. §§ 1531, et seq. (1988).

39 16 U.S.C. § 1536 (a)(2) (1988).

40 16 U.S.C. § 1533 (b)(1)(A) (1988).

41 16 U.S.C. § 1532 (5)(A)(ii) (1988).

42 Katherine S. Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 22 ENVTL. L., at 811 (1990).

43 U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTAL DECISIONMAKING FOR ENVIRONMENTAL PROTECTION AND PUBLIC WORKS 2 (1992) [hereinafter ACIR, INTERGOVERNMENTAL DECISIONMAKING].

44 16 U.S.C. § 1535 (c)(2) (1988).

45 16 U.S.C. § 1535 (d)(2)(ii) (1988).

46 437 U.S. 153 (1978).

47 *Id.*, at 185 (i.e. over activities such as programs for economic growth and development). Shortly after this decision, Congress amended ESA to authorize the consideration of factors other than endangered species conservation if the federal agency or the state or local government involved in the decision-making process could show that the value of the project jeopardizing an endangered species outweighed the concerns for protection of the species or that modification or dismantling the project would cause undue social and economic hardship. 16 U.S.C. § 1536 (h) (1988). An Endangered Species Committee is charged with reviewing and acting upon such exemption requests, § 1536 (e), but it has rarely been called on to do so.

48 Margaret Kriz, *Caught in the Act*, NAT'L J., Dec. 16, 1995, at 3092.

49 *See generally* Charles C. Mann & Mark Plummer, *Is Endangered Species Act in Danger?* 267 SCI. 1256 (1995).

50 *See* Kriz, *supra* note 48, at 3092.

51 After issuing the criteria for its study of existing federal mandates, ACIR solicited information about mandates from state and local governments, federal agencies, and the public. ACIR also relied on a variety of efforts by others to help in identifying mandates needing attention. Intergovernmental concerns in this section about the Endangered Species Act are based on information received by ACIR in the course of its study.

52 *See* ACIR, THE ROLE OF FEDERAL MANDATES, *supra* note 10, at 24.

53 *Id.*

54 *Id.*

55 *Id.* at 25.

56 *Id.*

57 *Id.*

58 Intergovernmental solutions in this section regarding the ESA are based on information received by ACIR in the course of its study. Comments generally called for an expanded role for state, local, and tribal governments in implementing the ESA, but agreed that continued federal standards, monitoring, involvement, and funding should accompany any increased roles for those governments.

59 Letter from George T. Frampton, Jr., Assistant Secretary for Fish and Wildlife and Parks, United States Department of the Interior, to Governor William F. Winter, Chairman, Advisory Commission on Intergovernmental Relations (March 1, 1996) (on file

with the American Council on Intergovernmental Relations).

60 *Id.*

61 *Id.*

62 M. LYNNE CORN, CONGRESS OF THE UNITED STATES, CONGRESSIONAL RESEARCH SERVICE, ENDANGERED SPECIES: CONTINUING CONTROVERSY, IB95003, at CRS-3 (Jan. 1996).

63 *Id.*

64 See ACIR, THE ROLE OF FEDERAL MANDATES: PRELIMINARY, *supra* note 7, at 14.

65 Letter from Governor George V. Voinovich and Governor E. Benjamin Nelson, to Governor William F. Winter, Chairman, Advisory Commission on Intergovernmental Relations (March 29, 1996) (on file with the American Council on Intergovernmental Relations).

Several other public interest groups representing state and local officials, including the International City/County Management Association; National League of Cities; National Association of Counties; National Conference of State Legislators; United States Conference of Mayors, and; National Association of Towns and Townships, contacted ACIR with letters of support and suggestions for possible solutions to both the Endangered Species Act and Safe Drinking Water Act.

66 See ACIR, THE ROLE OF FEDERAL MANDATES: PRELIMINARY, *supra* note 7, at 13.

67 Federal involvement in the safety of drinking water recognized national policy concerns related to the public health of every jurisdiction. Prior to the 1974 enactment of SDWA, the U.S. Public Health Service was responsible for developing and setting drinking water standards for state and local governments. This situation was analogous to current restaurant inspections and other public health and safety issues which remain primarily a state or local responsibility.

68 CONGRESSIONAL BUDGET OFFICE, THE SAFE DRINKING WATER ACT: A CASE STUDY OF AN UNFUNDED FEDERAL MANDATE, at 4 (Sep. 1995).

69 U.S. ENVIRONMENTAL PROTECTION AGENCY, COMMUNITY WATER SUPPLY STUDY: SIGNIFICANCE OF NATIONAL FINDINGS (1971) *reprinted in* SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE SAFE DRINKING WATER ACT, NO. 97-9, at 1076 (Feb. 1982).

70 See CONGRESSIONAL BUDGET OFFICE, *supra* note 68, at 5.

71 42 U.S.C. §§ 300f, et seq. (1988).

72 42 U.S.C. § 300g-1 (1988).

73 42 U.S.C. § 300h-7 (1988).

74 42 U.S.C. § 300g-4 (1988).

75 42 U.S.C. § 300g-3 (1988).

76 42 U.S.C. § 300j-4 (1988).

77 Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300g-1 (1988).

78 MARY E. TIEMANN, CONGRESSIONAL RESEARCH SERVICE, SAFE DRINKING WATER ACT: IMPLEMENTING THE 1986 AMENDMENTS, IB91041, at CRS-3 (Feb. 1996).

79 As with the discussion of intergovernmental concerns regarding the ESA, *supra* note 51, this section is based on information received by ACIR during its study.

80 See ACIR, THE ROLE OF FEDERAL MANDATES, *supra* note 10, at 22.

81 *Id.*

82 Memorandum from Shelley H. Metzenbaum, Associate Administrator, United States Environmental Protection Agency, to Marcia Hale, Assistant to the President and Director for Intergovernmental Affairs, White House (April 23, 1996) (on file with the American Council on Intergovernmental Relations). This memorandum was also sent to various officials in the Departments of Education; Health and Human Services; Interior; Justice; Labor; Transportation, and; Office of Management and Budget.

83 Summary of the Nebraska Mandate Management Initiative, prepared for National Governors' Association Meeting, on behalf of Governor E. Benjamin Nelson (February 1996).

84 See CONGRESSIONAL BUDGET OFFICE, *supra* note 68, at 22 [based on data from the Environmental Protection Agency (EPA) and the American Water Works Association (AWWA)].

85 See ACIR, THE ROLE OF FEDERAL MANDATES, *supra* note 10, at 22.

86 *Id.*

87 MARY E. TIEMANN, CONGRESSIONAL RESEARCH SERVICE, SAFE DRINKING WATER ACT REAUTHORIZATION ISSUES, 95-780 ENR, at CRS-6 (Jan. 1996).

88 See TIEMANN, SAFE DRINKING WATER ACT: IMPLEMENTING THE 1986 AMENDMENTS, *supra* note 78, at CRS-3.

89 *Id.*

90 Letter from Carol M. Browner, Administrator, U.S. Environmental Protection Agency, to William F. Winter, Chairman, U.S. Advisory Commission on Intergovernmental Relations (March 5, 1996) (on file with American Council on Intergovernmental Relations).

91 U.S. GENERAL ACCOUNTING OFFICE, DRINKING WATER: STRONGER EFFORTS ESSENTIAL FOR SMALL COMMUNITIES TO COMPLY WITH STANDARDS, GAO/RCED-94-40, at 2 (Mar. 1994).

92 See ACIR, THE ROLE OF FEDERAL MANDATES, *supra* note 10, at 23.

93 Pub.L.No. 104-182, 42 Stat.1996.

94 Allan Freedman, *Safe Drinking Water Act Amendments*, 54 CONG. Q., Sep. 14, 1996, at 2622..

95 See ACIR, THE ROLE OF FEDERAL MANDATES, *supra* note 10, at 23.

96 Freedman, at 2622.

97 ACIR, THE ROLE OF FEDERAL MANDATES, *supra* note 10, at 23.

98 *Id.*

99 This section represents a "pulling together" of common issues that are central to the discussion of the majority of significant federal mandates on state, local, and tribal governments. Whether we are talking about environmental mandates, individual rights laws (e.g., Americans with Disabilities Act; Individuals with Disabilities Education Act), labor laws (e.g., Fair Labor Standards Act; Occupational Safety and Health Act; Family and Medical Leave Act), or transportation regulations (e.g. mandatory drug and alcohol testing; required use of recycled crumb rubber), the issues discussed in this section tend to surface as interests and concerns. Greater examination of these issues will further the goal of improving our federal system of government.

100 U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FEDERAL COURT RULINGS INVOLVING STATE, LOCAL, AND TRIBAL GOVERNMENTS: CALENDAR YEAR 1994, at 1 (1995).

101 ACIR, THE ROLE OF FEDERAL MANDATES, *supra* note 10, at 6.

102 *Id.*

103 *Id.* at 6, 7.

104 *Id.* at 7.

105 *Id.*

106 *Id.* at 8.

107 Based on public comments received by ACIR on its preliminary report on *The Role of Federal Mandates in Intergovernmental Relations*.

108 *Id.*

109 For the Unfunded Mandates Reform Act to be successful, there must be further study to examine the measurement and definition issues involved in calculating the total costs and benefits to state, local, and tribal governments of compliance with federal laws. In addition, it is imperative to include a discussion of the role of state mandates imposed on local governments in any future discussion of mandate reform. We must also evaluate the application of mandates to the private sector or to consider the views of and the impact of these mandates on working men and women. The issues and options related to solutions for private sector mandate relief are significantly different from those related to solutions for public sector relief, and should be examined accordingly.

110 42 U.S.C. §§ 6922 *et seq* (1988).

111 42 U.S.C. §§ 9601 *et seq* (1988).

112 42 U.S.C. §§ 7401 *et seq* (1988).

113 33 U.S.C. §§ 1251 *et seq* (1988).

114 42 U.S.C. §§ 4332 *et seq* (1988).

115 *See* ACIR, INTERGOVERNMENTAL DECISIONMAKING, *supra* note 43, at 79.

