# THE UNFUNDED MANDATES REFORM ACT OF 1995: ONE YEAR LATER

## HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

MARCH 22, 1996

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# THE UNFUNDED MANDATES REFORM ACT OF 1995: ONE YEAR LATER

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**FRIDAY, MARCH 22, 1996**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2247, Rayburn House Office Building, Hon. Christopher Shays (chairman of the subcommittee) presiding.

Present: Representatives Shays, Morella, Davis, Chrysler, Souder, Towns, Green, and Fattah.

Ex officio present: Representative Clinger.

Also present: Representative Payne.

Staff present: Lawrence J. Halloran, staff director and counsel; Doris F. Jacobs, associate counsel; Thomas M. Costa, clerk; Kristine Simmons, professional staff member, full Committee on Government Reform and Oversight; and Cherri Branson, Cheryl Phelps, and Matt Pinkus, minority professional staff members.

Mr. SHAYS. I would like to call the hearing to order and welcome one of our first witnesses. I have a statement to make before I ask him to address this committee. I also thank our guests, as well.

On March 4, 1801, in his first inaugural address, Thomas Jefferson called for "the support of the State governments in all their rights, as the most competent administrators for our domestic concerns." On March 22, 1995, President Clinton joined this Congress in our commitment to respect the rights and the competence of our sovereign State partners by signing the Unfunded Mandates Reform Act. I might say, I read his entire statement, and it was a very gracious statement, when he signed the bill. Today, exactly 1 year later, we examine the extent to which implementation of the Mandates Act has answered Jefferson's call.

The debate over unfunded mandates involves both constitutional principles and fiscal realities. It is a debate about ends justifying means and the need to acknowledge and respect whose means are spent to reach national ends.

In the past, it was enough to declare a problem national and mandate a solution. The fiscal implications of Federal laws and regulations on State and local governments were seldom an explicit part of the debate.

As the Advisory Commission on Intergovernmental Relations (ACIR), observes in their preliminary report on existing mandates, "the Washington tendency has been to treat as a national issue any

problem that is emotional, hot, and highly visible. Often this has meant passing a Federal law that imposes costs and requirements on State and local governments without their consent and without regard for their ability to comply."

That is no longer the case. Congress now has to identify, quantify, and explicitly acknowledge the impact of new laws on intergovernmental partners. Three of our colleagues will testify today on the impact of the Mandates Act on specific legislation. Their perseverance helped pass the Mandates Act, and their vigilance is helping to ensure it works. We welcome their participation.

[The prepared statement of Hon. Christopher Shays follows:]

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## House of Representatives

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## Statement of Rep. Christopher Shays
## March 22, 1996

On March 4, 1801, in his first inaugural address, Thomas Jefferson called for "the support of the State governments in all their rights, as the most competent administrators for our domestic concerns." On March 22, 1995, President Clinton joined this Congress in our commitment to respect the rights and the competence of our sovereign state partners by signing the Unfunded Mandates Reform Act ("Mandates Act" or "Act"). Today, exactly one year later, we examine the extent to which implementation of the Mandates Act has answered Jefferson's call.

The debate over unfunded mandates involves both constitutional principles and fiscal realities. It is a debate about ends justifying means, and the need to acknowledge and respect whose means are spent to reach national ends.

In the past, it was enough to declare a problem national and mandate a solution. The fiscal implications of federal laws and regulations on state and local governments were seldom an explicit part of the debate. As the Advisory Commission on Intergovernmental Relations (ACIR) observes in their preliminary report on existing mandates, "the Washington tendency has been to treat as a national issue any problem that is emotional, hot and highly visible. Often this has meant passing a federal law that imposes costs and requirements on state and local government without their consent and without regard for the ability to comply."

That is no longer the case. Congress now has to identify, quantify and explicitly acknowledge the impact of new laws on our intergovernmental partners. Three of our colleagues will testify today on the impact of the Mandates Act on specific legislation. Their perseverance helped pass the Mandates Act and their vigilance is helping to ensure it works. We welcome their participation. I particularly want to thank the co-authors of this legislation, Mr. Portman and Mr. Condit, for their bi-partisan work on mandate reform. And we all owe a debt of gratitude to Chairman Clinger for his outstanding work in marshaling this bill through the legislative process.

Under Title II of the Mandates Act, the executive branch too must conduct an explicit analysis of proposed and final rules to quantify the costs and benefits of mandates and identify the most cost-effective, least burdensome regulatory approach. Departments and agencies are required to consult with state and local governments, and the Office of Management and Budget is directed to collect those regulatory statements and forward them "periodically" to the Congressional Budget Office (CBO). OMB is also required to submit a written report detailing compliance by each agency during the preceding year.

That report is being released today. It details efforts by the executive departments to establish intergovernmental consultation procedures and review proposed rules for mandates. According to the report, only 16 rules met the Act's threshold for a detailed cost/benefit analysis and review. That's just 16 out of more than 3,000 proposed or final rules published in the Federal Register since March 22, 1995. I hope that means the Act has resulted in less costly regulatory mandates, not less realistic cost/benefit estimates in order to avoid the $100 million threshold.

Moreover, I am concerned that OMB compliance with the requirement to share these analyses with Congress appears minimal. That reporting is required "periodically." In the first year of the Mandates Act, that period was one full year. Before Tuesday, not one of the required statements had been forwarded to CBO. Then all 16 arrived at once, just in time to be included in the report. I hope future compliance will be more periodic, and less episodic.

The report also discloses that "agencies have begun considering, but have not yet developed" the pilot programs to reduce reporting and compliance requirements on small governments, as required by Section 207 of the Act. This requirement "remains a priority during the coming year," according to the report. I would prefer a firm commitment that next year's report will not say the same thing, but will reflect actual compliance with this important aspect of the law.

We also asked today's witnesses to comment on the preliminary ACIR report on the role of existing mandates; a report also required by the Act. The findings and recommendations in that report have already drawn considerable comment, and criticism, from those who evaluate the benefits and burdens of mandates differently. We welcome that diversity of views because, having mandated the report, this Congress will have to decide what action to take on the final ACIR recommendations. That process can only be enhanced by the contributions of all our witnesses today, and we welcome them.

Mr. SHAYS. I want to thank our colleague here now, Mr. Talent, and I also want to particularly thank the coauthors of this legislation, Mr. Portman and Mr. Condit, for their bipartisan work on mandate reform. And we all owe an obvious debt of gratitude to Chairman Clinger for his outstanding work.

I will say that again.

Mr. CLINGER. What an entrance.

Mr. SHAYS. And we all owe an obvious debt of gratitude to Chairman Clinger for his outstanding work in marshaling this bill through the legislative process.

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With that, I would like to call on the ranking member of this committee, Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman. I would be prepared to yield to the chairman of the full committee.

Mr. SHAYS. I appreciate that. Thank you.

Mr. CLINGER. Thank you very much, Mr. Towns. It's not necessary, but I'm appreciative.

Mr. SHAYS. You know, he hasn't finished his statement. Every time he likes to point out that he's ranking member now, but next year.

Mr. TOWNS. That's right.

Mr. SHAYS. So he wants to give us our chance while we have it.

Mr. TOWNS. And I want the protocol to be followed.

Mr. CLINGER. The precedent is being established; right.

Well, thank you very much, Mr. Chairman. As you said, 1 year ago today, I do remember standing in the Rose Garden for the signing of the Unfunded Mandates Reform Act, a bill with very broad bipartisan support and a very key piece of the Contract with America. It was, for me, a very proud day. And despite the dire predictions of those opposed to the legislation, the sky has not fallen; indeed, I think Americans are better off, and Congress is better informed, as a result of this law.

Testifying before us this morning are a number of our colleagues, without whom the Unfunded Mandates Reform Act would never have been a reality. Certainly, Representative Rob Portman of Ohio and Representative Gary Condit of California were very instrumental in that. We are also going to be pleased to have Congressman Talent from Missouri testifying before us this morning. All have been interested in this legislation and have been as instrumental in the act's implementation as they were in its passage. And I am very eager to hear their thoughts, suggestions, and criticisms this morning.

I can tell you, from my perspective, the law works. The few test cases we have had since Title I took effect in January bear that out. Congress is more sensitive than ever before to the impact of legislation on State and local governments and the private sector. I think it has had an influence across the board. We see much closer attention being paid to the drafting of legislation, to ensure that unfunded mandates are not included.

While some have used the point of order, or a threat of it, for rhetorical purposes, I don't feel it has been abused at this stage of the game. I believe the point of order has gotten State and localities a seat at the table and made all of us in Congress think twice before passing costly new mandates on to our State and local partners and on to the private sector.

I also want to recognize the fine work of the Congressional Budget Office in fulfilling their critical responsibilities under the act. CBO has done an outstanding job turning complex cost estimates around in short order, which has been key to the successfully implementation of the law.

So, Mr. Chairman, while I am very pleased with the implementation of Title I, I have to say I am less than enthusiastic about the effectiveness of Title II, which applies to Federal agencies. For rules estimated to cost State and local governments or the private

sector $100 million or more per year, agencies must prepare a written statement identifying the costs and benefits of the mandates in the rule.

A report from the Office of Management and Budget to be released today indicates that 16 of these statements have been written to date, not an especially high number. That means one of two things: Either agencies are not promulgating many costly new rules—that would be our hope—or they are ignoring the law. I certainly hope that it is the former. OMB is also directed by law to share these statements periodically with the Congressional Budget Office, and they finally did so just 2 days ago.

My hope is that the administration will comply with the Unfunded Mandates Reform Act in letter and in spirit. I look forward to Administrator Katzen's testimony on Title II this morning.

The Advisory Commission on Intergovernmental Relations is working to finalize its recommendations with regard to existing mandates, which is required under Title III of the Unfunded Mandates Reform Act, and a title in which I have a particular interest. I know the preliminary report met with some controversy. This is probably unavoidable when one considers that most of the mandates addressed in the preliminary report have very sizable constituencies and laudable goals.

The fact remains, however, that these same mandates are the most expensive for State and local governments to implement. Therefore, I think it is appropriate to explore alternatives, and I hope that can be discussed during our hearing this morning.

I would like to note for the record that the final ACIR report, which we expect next month, must include some discussion of how ACIR's recommendations would affect mandates on the private sector. This is a requirement of the law but is lacking from the preliminary report and I hope it will be addressed in the final report.

I have new hope for the final report, however, because ACIR's two newest members are you, Mr. Chairman, and Mr. Portman. ACIR I know will benefit greatly from your expertise and your commitment to relieving the burden of mandates on States and localities.

So, Mr. Chairman, I want to thank you for your continued excellent and outstanding leadership on the mandates issues, and I look forward to the testimony. Thank you again for holding this hearing. I thank Mr. Towns again for yielding to me.

[The prepared statement of Hon. William F. Clinger, Jr., follows:]

**OPENING STATEMENT OF**
**THE HONORABLE WILLIAM F. CLINGER, Jr. (R-PA)**
**CHAIRMAN**
**COMMITTEE ON GOVERNMENT REFORM & OVERSIGHT**
**Hearing on**
**"The Unfunded Mandates Reform Act of 1995:**
**A One Year Review"**
**Human Resources & Intergovernmental Relations Subcommittee**
**March 22, 1996**

Mr. Chairman, one year ago today I remember standing in the Rose Garden for the signing of the Unfunded Mandates Reform Act, a bill with bipartisan support and a key piece of the "Contract with America." It was a proud day. And despite the dire predictions of those opposed to the legislation, the sky has not fallen. Indeed, Americans are better off and Congress is better informed as a result of this law.

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I can tell you that from my perspective, the law works. The few test cases we have had since Title I took effect in January bear that out. Congress is more sensitive than ever before to the impact of legislation on State and

local governments and the private sector. And while some have used the point of order, or threat of it, for rhetorical purposes, I do not feel it has been abused. I believe the point of order has gotten States and localities a seat at the table, and made all of us in Congress think twice before passing costly new mandates on to our State and local partners and the private sector.

I also want to recognize the fine work of the Congressional Budget Office in fulfilling their critical responsibilities under the Act. CBO has done an outstanding job turning complex cost estimates around in short order, which has been key to the successful implementation of the law.

While I am very pleased with the implementation of Title I, I am less enthusiastic about the effectiveness of Title II, which applies to federal agencies. For rules estimated to cost State and local governments or the private sector 100 million dollars or more per year, agencies must prepare a written statement identifying the costs and benefits of mandates in the rule.

A report from the Office of Management and Budget, to be released today, indicates that 16 of these statements have been written to date - not an especially high number. That means one of two things: either agencies are not promulgating many costly new rules, or they are ignoring the law. I sincerely hope it is the former. OMB is also directed by the law to share these statements periodically with the Congressional Budget Office, and they finally

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I would like to note for the record that the final ACIR report, which we expect next month, must include some discussion of how ACIR's recommendations would affect mandates on the private sector. This is a requirement of the law, but is lacking from the preliminary report. I have new hope for the final report, however, because ACIR's two newest members are you, Mr. Chairman, and Mr. Portman. ACIR will benefit greatly from your expertise and your commitment to relieving the burden of mandates on States and localities.

Mr. Chairman, I want to thank you for your continued leadership on the mandates issue. I look forward to the testimony and I thank you again for holding this hearing.

Mr. SHAYS. I thank the gentleman for his fine statement and his gracious words. I thank, also, Mr. Towns for yielding to him.

Mr. Towns, you have the floor.

Mr. TOWNS. Thank you very much, Mr. Chairman.

I would like to commend you for calling this hearing and for your leadership, because this issue is very important to our friends in State and local government. The Unfunded Mandates Reform Act is an important piece of legislation which enjoys wide bipartisan support, and rightfully so.

Its primary goal is to change the way we often do business in the House and Senate, by requiring a full discussion and even a vote whenever legislation is being considered by either body contains an unfunded Federal mandate. Its intent is full disclosure. Members must be made aware of unfunded mandates included in bills and given an opportunity to debate and object to the mandate by raising a newly created point of order.

The Unfunded Mandates Reform Act took effect in the House on January 1, and we now have a little bit of experience to see how it is working. Unfortunately, the House leadership has ignored the act when its requirements have been inconvenient. Let me give you a few examples of that.

Mr. SHAYS. Not too many.

Mr. TOWNS. I don't want to be accused of rhetoric. I want to just sort of give you some specific examples. Just a few, Mr. Chairman.

Mr. SHAYS. Just a few.

Mr. TOWNS. When the House considered the telecommunications conference report, the rule waived all points of order, even though the bill included a number of unfunded mandates on local governments. When the House debated the farm bill, the rule blocked any motions to strike unfunded mandates. When the House considered the conference report on the Foreign Relations Authorization Act, the rule waived all points of order, including those against unfunded Federal mandates.

The purpose of the Unfunded Mandates Reform Act is to allow all Members an opportunity to challenge a provision in any bill. That includes an unfunded mandate. That is why the act specifically says that "It shall not be in order to consider any rule that waives these points of order."

My colleagues on the other side may respond that any Member can always challenge the rule itself.

Mr. SHAYS. Would we have said it like that?

Mr. TOWNS. Almost. But as we all know, a procedural challenge is very difficult for the minority to win. Instead, what the House should insist on is that all Members' rights be preserved to challenge unfunded mandates on every bill, when they exist.

Let me quickly return to the report by the Advisory Commission on Intergovernmental Relations, which was required by the act. The report targets 14 Federal mandates for repeal, modification, or revision, including the Family Medical Leave Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act.

We should be very, very cautious before rushing to implement these recommendations. These statutes address important public policy concerns. Ending the application to State and local govern-

ments is not something that should be done without serious examination and much debate.

Let me thank you again, Mr. Chairman, for having this hearing. I would also like to thank my friend, Bob Portman, of course, and Representatives Condit and Talent for coming to testify, and to say that without the work and help of Bob Portman, of course, and Gary Condit, we would not have gotten this far. So I would like to say to you, Mr. Portman, and of course Mr. Condit, and now Mr. Talent, that I really appreciate your work and your efforts. Let us not slip back. Let us continue to move forward in an open, democratic way.

I yield back, Mr. Chairman.

Mr. SHAYS. I thank the gentleman. Mrs. Morella, welcome.

Mrs. MORELLA. Thank you, Mr. Chairman. I want to thank you for holding this hearing to examine the implementation of the Unfunded Mandates Reform Act of 1995.

The President signed the bill into law exactly 1 year ago today, and it is important that we ensure that it is working as we intended it to work. Today's witnesses will provide us with additional insight into how many of the agencies are implementing the Unfunded Mandates Reform Act and how State and local governments and community organizations have been impacted.

The legislation, as we know, was passed with overwhelming bipartisan support, because we recognized that State and local governments have long been asked to assume an overwhelming burden of Federal mandates. Although the Congress and the administration have failed to agree on how to balance the budget, that legislation aims to end the practice of asking States and localities to pick up the increasing cost of Federal programs.

I do, however, have some concerns with how the Unfunded Mandates Reform Act is being implemented. Title III of the act requires the Advisory Commission on Intergovernmental Relations, ACIR, to recommend improvements after studying 200 existing mandates. The ACIR report specifically recommends the repeal or modification of 14 mandates, including mandates that have already been in place, to ensure public health, safety, and well-being.

During the debate on the House floor, I pointed out that we must take great care to avoid going too far in the other direction. We must not reverse critical public health and environmental laws in our effort to slow the practice of unfunded mandates. There are, at times, compelling national needs which will require Federal intervention.

Mr. Chairman, I am a strong supporter, as you know, of the Family and Medical Leave Act. The ACIR recommends that provisions in this law be repealed for State and local governments. I would ask today's witnesses to explain why they think this is necessary. After years of work, the Congress passed legislation to allow American families to take care of family emergencies and childbirth without risking their economic self-sufficiency.

Before that Family and Medical Leave Act was passed, we were the only industrialized Nation in the world that didn't have a family and medical leave policy. Workers were forced to choose between their families and their jobs. Employers without family leave

policies also paid a price in terms of lost productivity and expensive retraining costs. Do we really want to go back? I think not.

The ACIR also recommends that provisions of the Fair Labor Standards Act and Occupational Safety and Health Act covering State and local employees be repealed. I would like to better understand what effects this would have on the workplace and on our State employees.

Another recommendation that several mandates be revised includes three important environmental regulations: the Safe Drinking Water Act, the Endangered Species Act, and the Clean Air Act. These environmental laws were enacted to protect the public health. I hope that during today's hearing we will hear more about how they would be revised to ensure that we don't reverse the important progress that we have made in cleaning up our environment.

The legislation that was signed a year ago today struck an important balance between ensuring that States and localities are not unduly burdened with unfunded mandates and that public health and environmental standards are not compromised. I look forward to today's hearing shedding light on exactly how we are striking this balance. I also look forward to our witnesses, and especially our first panel of our colleagues who worked hard on this issue.

Thank you, Mr. Chairman.

[The prepared statement of Constance A. Morella follows:]

Congresswoman Connie Morella

Statement before the Government Reform and Oversight
Subcommittee on Human Resources and Intergovernmental Relations

The Unfunded Mandates Reform Act of 1995: A One Year Review

March 22, 1996

Mr. Chairman. I would like to thank you for holding this hearing to examine the implementation of the Unfunded Mandate Reform Act of 1995. The President signed this bill into law exactly a year ago today, and it is important that we ensure that it is working as we intended it to. Today's witnesses will provide us with additional insight into how many of the agencies are implementing the Unfunded Mandate Reform Act and how state and local governments and community organizations have been impacted.

This legislation was passed with overwhelming bipartisan support because we recognized that state and local governments have long been asked to assume an overwhelming burden of federal mandates. Although the Congress and the Administration have failed to agree how to balance the budget, this legislation aims to end the practice of asking states and localities to pick up the increasing costs of federal programs.

I do, however, have some concerns with how the Unfunded Mandate Reform Act is being implemented. Title III of the Act requires the Advisory Commission on Intergovernmental Relations (ACIR) to recommend improvements after studying 200 existing mandates. The ACIR report specifically recommends the repeal or modification of 14 mandates, including mandates that ~~have~~ are already in place to ensure public health, safety and well-being. During the debate on the House Floor, I pointed out that we must take great care to avoid going too far in the other direction. We must not reverse critical public health and environmental laws in our effort to slow the practice of unfunded mandates. There are, at times, compelling national needs which will require federal intervention.

Mr. Chairman, I am a strong supporter of the Family and Medical Leave Act. The ACIR recommends that provisions in this law be **repealed** for state and local governments, and I would ask today's witnesses to explain why they think this is necessary. After years of work, the Congress passed legislation to allow American families to take care of family emergencies and childbirth without risking their

economic self-sufficiency. Before the Family and Medical Leave Act was passed, we were the only industrialized nation without a family and medical leave policy. Workers were forced to choose between their families and their jobs. Employers without family leave policies also paid a price in terms of lost productivity and expensive retraining costs. Do we really want to go back?

The ACIR also recommends that provisions of the Fair Labor Standards Act and the Occupational Safety and Health Act covering state and local employees ~~are~~ be repealed, and I would like to better understand the effects this would have on the workplace and on our state employees.

The ACIR also recommends that several mandates be revised, including three important environmental regulations: The Safe Drinking Water Act, the Endangered Species Act, and The Clean Air Act. These environmental laws were enacted to protect the public health; I hope that during today's hearing we will hear more about how they would be revised to ensure that we don't reverse the important progress that we have made in cleaning up our environment.

The legislation that was signed a year ago today struck an important balance between ensuring that states and localities are not unduly burdened with unfunded mandates and that public health and environmental standards are not compromised. I hope that today's hearing sheds light on exactly how we are striking this balance.

Mr. SHAYS. Thank you, Mrs. Morella. At this time I would call on Mr. Fattah.

Mr. FATTAH. Thank you, Mr. Chairman. I am anxious to hear the testimony, so I will be brief in my opening remarks.

I am fascinated by the notions that have come forward in this report, that we would create a second class of citizenship, in terms of protections provided by the Federal Government for workers at the State and local level, that we would repeal a whole host of protections that the National Government has put in place.

Nonetheless, I will retreat from any longer statement and look forward to the testimony that will come forward. Thank you.

Mr. SHAYS. I thank the gentleman. With this in mind, I would ask unanimous consent that all members of the subcommittee be permitted to place an opening statement in the record and that the record remain open for 3 days for that purpose. Without objection, so ordered.

I would also ask unanimous consent that our witnesses be permitted to include their written statements in the record. Without objection, so ordered.

Before I call on you, Mr. Talent, I am just going to read the paragraph written by President Clinton when he signed the mandates bill. I think it is quite a significant statement. He said, "Today we are making history. We are working to find the right balance for the 21st century. We are recognizing that the pendulum had swung too far and that we have had to rely on the initiative, the creativity, the determination, and the decisionmaking of the people at the State and local level to carry out much of the load for America as we move into the 21st century.

"This bill will help keep the American dream alive and help to keep our country strong. Every Member of Congress here who voted for it, and everyone who is not here, deserves the thanks of the American people." And then he said, "I am honored to sign this bill." I think that says a lot.

With that, Mr. Talent, I welcome you. You are the first to come to this hearing, and I welcome your testimony.

Mr. TALENT. I thank you Mr. Chairman, and I thank the members of the subcommittee. Thank you especially, Mr. Chairman, for allowing me to appear here on short notice.

Mr. SHAYS. Mr. Talent, I regret to say that I have forgotten to do something very important—we swear in all our witnesses. We have Cabinet officials who come in, and we swear them in. I need to swear both of our witnesses in.

Mr. TALENT. No problem whatsoever.

Mr. SHAYS. If you don't mind, if you would both stand and raise your right hands.

[Witnesses sworn.]

Mr. SHAYS. Thank you. For the record, both have acknowledged in the affirmative, and I thank you for that. Sorry to have interrupted you.

Mr. TALENT. No problem, Mr. Chairman.

## STATEMENTS OF HON. JAMES M. TALENT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI; AND HON. ROB PORTMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. TALENT. Again, I want to thank you for letting me be here on relatively short notice, and all the subcommittee members for including me in the distinguished company with Mr. Portman and Mr. Condit, who have both done such outstanding work in this area.

I also just want to tell you, as a Member, how much I appreciate the fact that this subcommittee is following up on the bill and on the report. I think it's a vastly important area and certainly one in which my local municipalities are very concerned, and an area where I think we can move forward together and maybe capitalize on a consensus, a new kind of governing consensus that we developed last year.

I wanted to flag the subcommittee, really, to a very related area in which I and Mr. Watts have been working, in which the whole question of regulatory flexibility is also very important, and in which municipalities and local governments are involved, but it's not directly that, and that is the whole question of empowerment.

Now, I know some of the members of the subcommittee have been working on this in other contexts, as well, but in many of the distressed neighborhoods, most of them urban, around the country, where we know they are dealing with very, very difficult problems and pathologies, like crime, unemployment, very high welfare dependency, and the rest of it, the good news is that there are hundreds—around the country—there are hundreds of neighborhood groups and associations that are working very hard to rebuild those neighborhoods. They are like embers just beneath the ashes, if you will, of those neighborhoods.

Mr. Watts and I have been visiting with a lot of those neighborhood group leaders, asking them what we can do, on the Federal level, to really help them in bringing renewal, and jobs, and home ownership, and better education, and more secure homes back into their neighborhoods. And one of the things that they consistently mentioned to us was the need to have some kind of flexibility with regard to Government regulations, and indeed at all levels, local, State, and Federal regulations.

They said, often the unintended consequence of these regulations was to inhibit them in what they were trying to do, and in ways that didn't achieve what the goals of the regulations were, as well. And they mentioned a number of them on a Federal level.

I think you are all concerned with the so-called "Brownfields effect" of a number of the environmental regulations, where it has the effect of rendering a whole lot of land in these areas just unusable for economic purposes. So you get neither jobs nor the property cleaned up, environmentally. In fact, it just gets frozen, and that can undermine the ability of neighborhoods to bring in economic development and to start jobs in those neighborhoods.

Another one that has been mentioned to me is Davis-Bacon, which, when you are a neighborhood group that's dealing on a shoestring, and maybe you get some access to some public funds in order to rehab some houses in the neighborhood, the unintended

consequence of this can be to make it much more difficult for you to accomplish that.

Another problem with that is, if you have local minority contractors who are not operating with a lot of capitalization and they have to try and compete on these jobs, they just can't carry the kind of payroll necessary to do that.

A lot of Federal social programs, in the way they are administered, are biased against these neighborhood groups, because they don't have a lot of Ph.D.s, and Masters of Social Work working for them, so they often get credentialized out of the program.

The Fair Labor Standards Act is a problem for nonprofit group homes, for example, that take care of abused kids. The various overtime and recordkeeping provisions can make it very difficult when you have your surrogate parents there, and they have to be there the whole time, then they have to keep track of all the records and try and decide which shift they are working on, and what happens if they get up in the middle of the night because one of the children starts crying.

So the point that they made, over and over again, to us is that we need a mechanism for building some flexibility into how these various mandates and regulations are administered.

We have been discussing, in the context of our bill, Mr. Chairman, something I'm very pleased to note is very similar to your Community Empowerment Board, some kind of an agency where groups or local governments that are doing what we all want them to do can come with a case and make sure that they have it heard, that they are not just sort of tossed off or ignored by the regulators who are pursuing their mission in a very narrow-minded way.

That is what you are trying to do with this legislation. It is what we are trying to do in a different context. And I just wanted to congratulate you, urge you to keep moving forward with it. We are all cognizant of the fact that these goals are very important, that they should not, for any reason, be sacrificed, but that we can also be sensitive to other very important things that we want to happen in these communities.

I would just say, in closing, Mr. Chairman, to me it's a question of respect. In other words, the Federal Government, we can recognize that these goals are vital. Without adopting a mind set that unless State and local governments and neighborhood associations, full of dedicated people, are minutely watched, somehow they are going to conspire all the time to avoid doing what all decent Americans want to have happen.

I think your legislation and what you are working on here is a recognition that we should not adopt that mind set. I am grateful to be here to testify and to just, again, flag the subcommittee on what we are trying to do in a related context.

Thank you, Mr. Chairman.

Mr. SHAYS. I thank the gentleman. I understand you need to get on your way.

Mr. TALENT. Yes, I do.

Mr. SHAYS. Does any member of the committee have a question of Mr. Talent, or should we proceed with Mr. Portman? Mr. Towns.

Mr. TOWNS. Thank you for coming.

Mr. TALENT. I thank you.

Mr. SHAYS. Thank you very much for coming. Mr. Portman.

Mr. PAYNE. I do have a quick question.

Mr. SHAYS. That's fine. Definitely. Mr. Payne, let me first welcome you to this committee. I understand you are, obviously, a Member of Congress, and a very distinguished one, also on ACIR. Also, I welcome Mr. Chrysler and Mr. Davis, as well.

Mr. PAYNE. I just have a quick question. I am a member of the ACIR, and I do have some concerns about the procedural issues surrounding the report. For example, there was not a quorum present when this report was approved. It has been said that ACIR members were not sure what it was they were voting on, the actual recommendations or the publishing of some ideas in the Federal Register for comment, and that ACIR had not released the actual votes of the commission.

In other words, how official was the meeting where this report was finalized?

Mr. TALENT. Well, Mr. Portman may want to address that.

Mr. TOWNS. Will the gentleman yield?

Mr. PAYNE. Yes.

Mr. TOWNS. We are not dismissing the panel; Mr. Talent is just leaving. Mr. Portman has not testified, and Mr. Condit has not testified. So maybe we could just hold it.

Mr. SHAYS. With all due respect to both, neither, at the time, were on—Mr. Talent was not on the committee, and Mr. Portman, after 6 months trying to get on, finally got on after they put the report through.

Mr. TALENT. I will say this, Mr. Chairman.

Mr. SHAYS. Is this out of knowledge or with knowledge?

Mr. TALENT. Well, just from the context of the people we've been talking to who are trying to build homes and take care of kids and get jobs in the neighborhoods, this is a problem, and they need to have something done about it. We have to observe the process and make sure everybody gets a hearing, but I'm just very glad you're moving forward with it, because we have a very practical problem that everybody recognizes, and we need to hammer out everybody's problems, which are all legitimate, and then move forward.

I thank you for the opportunity.

Mr. SHAYS. I thank you.

Mr. Payne, we're going to have to get an answer to some very important questions. Your question is extremely important, and this committee, during the course of the day, will get an answer on that question.

Mr. Portman, you have the burden of being bipartisan, holding up Mr. Condit, who evidently is at the White House on a budget meeting. So we welcome your testimony and appreciate very much your work. You are one of the fathers of this legislation, working on a bipartisan basis, and it's great to have you here.

Mr. PORTMAN. Thank you, Mr. Chairman. I am happy to take on that burden, although I do think Mr. Condit is on his way.

I want to thank you for holding this hearing and say it's great to be back in my subcommittee room. This was the first subcommittee on which I served in the U.S. Congress, and this subcommittee and this room really was the genesis of the Unfunded Mandates Reform Act of 1995. I am pleased to be now serving with

the chairman on ACIR; however, as Mr. Payne was just told, we were not part of ACIR until a couple of weeks ago, so we're not part of that report.

Just looking at the witness list, perhaps there will be others along the way who will be more qualified to respond to some of the questions.

Mr. Chairman, I do want to acknowledge a couple of the people in the room, if I might. First, of course, would be Ed Towns. Then Chairman Towns held hearings on the Unfunded Mandates Reform Act; in fact, a markup, at a time when it was not as popular as it is now. I want to acknowledge that and thank him again for his willingness to move the legislation forward in the last Congress.

Tom Davis I see has now left, but another sponsor of the legislation who added a lot last year.

Finally, Bill Clinger. A lot of people are perhaps fathers and mothers and other relatives to this legislation, but it wouldn't have happened without Chairman Clinger's active involvement. As ranking member last year, as Ed Towns will remember, Bill Clinger came to the subcommittee hearings and focused on the issue in an unprecedented way, perhaps, for a ranking member in an ex officio status, and then gave a lot of us younger Members opportunities, which we appreciate, to move this forward. Finally, as chairman of the committee, he managed to put this bill through and managed it on the floor.

So we will miss you very much, and we have appreciated all the work you have put into this. We are going to continue to seek your counsel even after your departure from this Congress and this committee.

This is a very important process, I think. Again, I want to thank the chairman for doing this, because this is an opportunity for us not only to talk about the bill but how it is being implemented. And it is, as Mrs. Morella said, the anniversary of the act, which makes it all the more important that we see how we are doing.

As Chairman Clinger has mentioned, Title I of the act was designed to ensure that Congress would not impose any future mandates without three things happening: one, a Congressional Budget Office estimate of the cost of intergovernmental and private sector mandates; two, information on how and whether to fund intergovernmental mandates; and three, a recorded vote on whether to impose an unfunded or a partially funded mandate at all.

In order to ensure that these requirements were met, just to clarify, we did include points of order, not only against consideration of bills with unfunded intergovernmental mandates, but we also took the extraordinary step of allowing a point of order against any rule waiving such point of order, as Mr. Towns has mentioned earlier.

A working group which includes members of this subcommittee and full committee, Mr. Condit and myself, have been working diligently over the past year with the Congressional Budget Office, with representatives of State and local governments, and more recently with committee staff and the Rules Committee to ensure compliance with the unfunded mandates law.

I would agree with Chairman Clinger that in the test cases so far—and I would list three of them: the Teleco bill, the farm bill,

and the immigration bill—I think the law has passed the test. Let me elaborate.

A number of provisions in the Telecommunications Act conference report interfered with the ability of local governments to control what historically have been locally controlled public rights-of-way. Working with the Conference of Mayors, the National League of Cities, and others, we learned that language in the original conference report, for example, arguably precluded the ability of local jurisdictions to control the use of public property by cable companies and receive appropriate compensation, even though the intended use exceeded the original terms of the original franchise agreement.

We were prepared to raise a point of order on the floor of the House, an intergovernmental mandate point of order, and to garner the necessary support against these mandates. With that leverage that the Unfunded Mandates law gave us, we were able to work with the Commerce Committee and leadership so that these mandates were removed before the bill reached the floor.

This, I think, is exactly how we hoped the law would be carried out. And I hope it will be carried out in the future that committees will work cooperatively with State and local governments and proponents of mandate reform ahead of time to address mandate issues. So I think it did work.

Let me say that although there was no obligation, technically, to get a CBO estimate on the conference report, there is hortatory language in the bill that expressly addresses the unusual case, which was the case in the Teleco bill, where the House and Senate passed bills without mandates, but where the conference report includes new mandates.

In such a case, we hope and expect that the conference committees will continue to make every effort to work with the CBO, in advance, to obtain an estimate. It is in the interest of the committees to do this, frankly, since they do run the risk of a Member raising a point of order or a motion to strike on the floor with respect to any mandates in a conference report.

In the second test case, the farm bill, let me just briefly say that I think the mandates bill worked again. The Agriculture Committee complied with the act by including a CBO cost estimate for both the public and private sector mandates. In this case there were no public sector mandates, at least none that exceeded the thresholds in the mandate law, but there were very significant private sector mandates, including the most costly mandate that would have required higher fluid milk standards.

Among other things, the Solomon-Dooley amendment, in effect, stripped these private sector mandates from the farm bill. As those in this room will remember, the proponents of this amendment, that is, the Solomon-Dooley amendment, used a CBO estimate and, therefore, this act to make their case. As you know, this amendment ultimately passed the House by a significant margin.

Finally, in its most recent test case, which would be the immigration bill which just came up, I think the mandates law worked again. CBO did its analysis of the public and private sector mandates contained in the bill, and the committee report included a preliminary CBO estimate. The committee also had the final CBO

estimate published in the Congressional Record prior to consideration of the bill, as is required under the mandates law. So CBO, under a lot of pressure to do a lot of things, did its job.

There were no intergovernmental mandates that in the aggregate exceeded $50 million, the threshold, and the private sector mandates were fully disclosed. It is also important to note that the rule on the immigration bill expressly indicated that it was not waiving any mandates or points of order against consideration of the bill. I think that's important. As Mr. Towns mentioned, we would perhaps like to see that more, but I think it's important that that happened.

Nor did it explicitly waive the mandates motion to strike, which applies, as you all know, only to intergovernmental mandates. The motion to strike, unlike what has been stated on the floor on occasion, does not apply to the private sector mandates.

Even if the rule had waived the points of order and the committee had failed to do its job where there were public sector mandates in the bill, of course a Member could still get a recorded vote on the mandates issue by raising a point of order against the rule.

So there is a lot of protection for State and local governments in the event that committees fail to do their jobs properly. But the good news is that the committees now do seem to understand the requirements of this new law and, from what we can tell, they are complying with the new law.

Despite these early indications of success, we are continuing to work aggressively with this committee, with the substantive or authorizing committee, CBO, State and local government reps, the Rules Committee, and so on, to ensure the law's proper implementation.

CBO reports, as of this week, that they have provided a total of 26 State and local government estimates since the mandate provisions took effect on January 1 of this year, that five bills contained public sector mandates, and that none of these five had mandates above the $50-million threshold. As I mentioned earlier, the Teleco conference report was fixed before it reached the floor.

CBO also reports that calls from Members and committees indicate that, in many cases, the mandates issues are being addressed before introduction of a bill and before markup in committee. Again, I think this is expressly how we hoped the process would work.

We have also been working with the House Parliamentarian's Office with respect to some of the novel procedures that the mandates law created to achieve our important public policy goals. In my view, no technical corrections are merited now, but we still will continue to monitor how well these provisions are working. It is quite complicated.

With respect to other titles of the Mandates Act, let me just say briefly that I look forward to reviewing the annual statement on agency compliance. As Chairman Clinger has said, it is very important that we continue to focus on the agencies. It is a vital part of the effort to reduce the burden of mandates.

Finally, as a new member of ACIR, I look forward to working with you, Mr. Chairman, now that we are on ACIR, in the important task of reviewing existing mandates. In my view, passage of

this act was the important first step, but I now look forward to continuing to work with the committee and this subcommittee to make good on our commitment, Mr. Chairman, to State and local governments.

Thank you for having me.

[The prepared statement of Hon. Rob Portman follows:]

HONORABLE ROB PORTMAN

SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS

MARCH 22, 1996

THANK YOU MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. IT IS A GREAT PLEASURE FOR ME TO TESTIFY IN FRONT OF A SUBCOMMITTEE ON WHICH I SERVED AND TO DISCUSS AN ISSUE ON WHICH ALL OF US ON THIS SUBCOMMITTEE HAVE WORKED SO CLOSELY TOGETHER. I WANT TO PARTICULARLY THANK YOU, MR. CHAIRMAN, MY COLLEAGUE ON ACIR, FOR YOUR VIGILANCE ON THE MANDATE FRONT.

ON THIS ANNIVERSARY OF THE SIGNING OF THE UNFUNDED MANDATES REFORM ACT OF 1995, I WOULD LIKE TO MAKE A FEW POINTS ABOUT OUR EFFORTS TO IMPLEMENT IT.

AS YOU KNOW, TITLE I OF THE ACT WAS DESIGNED TO ENSURE THAT CONGRESS WOULD NOT IMPOSE ANY FUTURE MANDATE WITHOUT 1) A CBO ESTIMATE OF THE COSTS OF INTERGOVERNMENTAL AND PRIVATE SECTOR MANDATES; 2) INFORMATION ON HOW AND WHETHER TO FUND INTERGOVERNMENTAL MANDATES; AND 3) RECORDED VOTES ON WHETHER TO IMPOSE AN UNFUNDED OR PARTIALLY FUNDED MANDATE AT ALL. IN ORDER TO ENSURE THAT THESE REQUIREMENTS WERE MET, WE INCLUDED POINTS OR ORDER NOT ONLY AGAINST CONSIDERATION OF BILLS WITH UNFUNDED INTERGOVERNMENTAL MANDATES, BUT ALSO AGAINST ANY RULE WAIVING SUCH POINTS OF ORDER.

WE'VE BEEN WORKING OVER THE PAST YEAR WITH THE CONGRESSIONAL BUDGET OFFICE, REPRESENTATIVES OF STATE AND LOCAL GOVERNMENTS AND MORE RECENTLY WITH COMMITTEE STAFF TO ENSURE FULL COMPLIANCE WITH

THE UNFUNDED MANDATES LAW. IN ITS FIRST THREE TEST CASES -- THE TELECO BILL, THE FARM BILL AND THE IMMIGRATION BILL -- THE LAW PASSED THE TEST. LET ME ELABORATE.

A NUMBER OF PROVISIONS IN THE COMMUNICATIONS ACT CONFERENCE REPORT INTERFERED WITH THE ABILITY OF LOCAL GOVERNMENTS TO CONTROL WHAT HAVE BEEN HISTORICALLY LOCALLY CONTROLLED PUBLIC RIGHTS OF WAY. LANGUAGE IN THE ORIGINAL CONFERENCE REPORT, FOR EXAMPLE, ARGUABLY PRECLUDED THE ABILITY OF LOCAL JURISDICTIONS TO CONTROL THE USE OF PUBLIC PROPERTY BY CABLE COMPANIES AND RECEIVE APPROPRIATE COMPENSATION EVEN THOUGH THE INTENDED USE EXCEEDED THE TERMS OF THE ORIGINAL FRANCHISE AGREEMENT.

WE WERE PREPARED TO RAISE THE MANDATES POINT OF ORDER ON THE HOUSE FLOOR AND TO GARNER THE NECESSARY SUPPORT AGAINST THESE PUBLIC SECTOR MANDATES. WITH THE LEVERAGE THAT THE UNFUNDED MANDATES LAW GAVE US, WE WERE ABLE TO WORK WITH THE COMMERCE COMMITTEE AND LEADERSHIP SO THAT THESE MANDATES WERE REMOVED BEFORE THE BILL REACHED THE FLOOR. THIS IS EXACTLY HOW WE HOPE THE LAW WILL BE CARRIED OUT IN THE FUTURE -- THAT COMMITTEES WILL WORK COOPERATIVELY WITH STATE AND LOCAL GOVERNMENTS AND PROPONENTS OF MANDATE REFORM AHEAD OF TIME TO ADDRESS MANDATE ISSUES.

LET ME SAY THAT ALTHOUGH THERE WAS NO OBLIGATION TECHNICALLY TO GET A CBO ESTIMATE ON THE CONFERENCE REPORT, THERE IS HORTATORY LANGUAGE IN THE BILL THAT EXPRESSLY ADDRESSES THE UNUSUAL CASE WHERE THE HOUSE AND SENATE PASS BILLS WITHOUT MANDATES BUT THE CONFERENCE REPORT INCLUDES NEW MANDATES. IN

SUCH A CASE, WE HOPE AND EXPECT THAT THE CONFERENCE COMMITTEES WILL MAKE EVERY EFFORT TO WORK WITH CBO IN ADVANCE TO OBTAIN AN ESTIMATE. IT'S IN THE INTEREST OF THE COMMITTEES TO DO THIS, SINCE THEY RUN THE RISK OF A MEMBER RAISING A POINT OF ORDER OR A MOTION TO STRIKE ON THE FLOOR WITH RESPECT TO THE MANDATES IN THE CONFERENCE REPORT.

IN ITS SECOND TEST CASE -- THE FARM BILL -- THE MANDATES BILL WORKED AGAIN. THE AGRICULTURE COMMITTEE COMPLIED WITH THE ACT BY INCLUDING THE CBO COST ESTIMATES FOR BOTH THE PUBLIC AND PRIVATE SECTOR MANDATES. IN THIS CASE, THERE WERE NO PUBLIC SECTOR MANDATES THAT EXCEEDED THE THRESHOLDS IN THE MANDATES LAW, BUT THERE WERE VERY SIGNIFICANT PRIVATE SECTOR MANDATES, INCLUDING THE MOST COSTLY MANDATE THAT WOULD HAVE REQUIRED HIGHER FLUID MILK STANDARDS. THE SOLOMON-DOOLEY AMENDMENT STRIPPED THESE MANDATES FROM THE FARM BILL. THE PROPONENTS OF THIS AMENDMENT USED THE CBO ESTIMATE TO MAKE THEIR CASE. AS YOU KNOW, THIS AMENDMENT ULTIMATELY PASSED THE HOUSE.

FINALLY, IN ITS MOST RECENT TEST CASE -- THE IMMIGRATION BILL -- THE MANDATES LAW WORKED AGAIN. CBO DID ITS ANALYSIS OF THE PUBLIC AND PRIVATE SECTOR MANDATES CONTAINED IN THE BILL AND THE COMMITTEE REPORT INCLUDED THE PRELIMINARY CBO ESTIMATE. THE COMMITTEE ALSO HAD THE FINAL CBO ESTIMATE PUBLISHED IN THE CONGRESSIONAL RECORD PRIOR TO CONSIDERATION OF THE BILL AS IS REQUIRED UNDER THE MANDATES LAW. THERE WERE NO INTERGOVERNMENTAL MANDATES THAT IN THE AGGREGATE EXCEEDED THE $50 MILLION THRESHOLD AND PRIVATE SECTOR MANDATES WERE FULLY DISCLOSED. IT IS ALSO

IMPORTANT TO NOTE THAT THE RULE ON THE IMMIGRATION BILL EXPRESSLY INDICATED THAT IT WAS NOT WAIVING ANY MANDATES POINTS OF ORDER AGAINST CONSIDERATION OF THE BILL. NOR DID IT EXPLICITLY WAIVE THE MANDATES MOTION TO STRIKE, WHICH APPLIES ONLY TO INTERGOVERNMENTAL MANDATES. EVEN IF THE RULE HAD WAIVED THE POINTS OF ORDER AND THE COMMITTEE HAD FAILED TO DO ITS JOB OR THERE WERE PUBLIC SECTOR UNFUNDED MANDATES IN THE BILL, A MEMBER COULD STILL GET A RECORDED VOTE ON THE MANDATES ISSUE BY RAISING A POINT OF ORDER AGAINST THE RULE. SO THERE IS A LOT OF PROTECTION FOR STATE AND LOCAL GOVERNMENT IN THE EVENT THAT COMMITTEES FAIL TO DO THEIR JOBS PROPERLY. BUT THE GOOD NEWS IS THAT COMMITTEES UNDERSTAND THE REQUIREMENTS OF THIS NEW LAW AND ARE COMPLYING WITH THEM.

DESPITE THESE EARLY SUCCESSES, WE ARE CONTINUING TO WORK AGGRESSIVELY WITH COMMITTEES, CBO AND STATE AND LOCAL GOVERNMENT REPRESENTATIVES TO ENSURE THE LAW'S PROPER IMPLEMENTATION. CBO REPORTS THAT THEY HAVE PROVIDED A TOTAL OF 26 STATE AND LOCAL GOVERNMENT ESTIMATES SINCE THE MANDATE PROVISIONS TOOK EFFECT ON JANUARY 1, 1996, THAT 5 BILLS CONTAINED PUBLIC SECTOR MANDATES, AND THAT NONE OF THESE 5 HAD MANDATES ABOVE THE $50 MILLION THRESHOLD. CBO ALSO REPORTS THAT CALLS FROM MEMBERS AND COMMITTEES INDICATE THAT, IN MANY CASES, THE MANDATES ISSUES ARE BEING ADDRESSED BEFORE INTRODUCTION OF A BILL AND BEFORE MARK UP IN COMMITTEE. THIS IS EXPRESSLY HOW WE HOPED THE PROCESS WOULD WORK.

WE HAVE ALSO BEEN WORKING WITH THE HOUSE PARLIAMENTARIAN'S

OFFICE WITH RESPECT TO SOME OF THE NOVEL PROCEDURES THAT THE MANDATES LAW CREATED TO ACHIEVE OUR PUBLIC POLICY GOALS. IN OUR VIEW, NO TECHNICAL CORRECTIONS ARE MERITED NOW, BUT WE WILL CONTINUE TO MONITOR HOW WELL THESE PROVISIONS ARE WORKING.

WITH RESPECT TO THE OTHER TITLES OF THE MANDATES ACT, LET ME JUST SAY THAT I LOOK FORWARD TO REVIEWING THE ANNUAL STATEMENT ON AGENCY COMPLIANCE WITH THE MANDATE REQUIREMENTS -- THIS IS A VITAL PART OF THE EFFORT TO REDUCE THE BURDEN OF MANDATES. AND, FINALLY, AS A NEW MEMBER OF ACIR, I LOOK FORWARD TO WORKING WITH YOU, MR. CHAIRMAN, ON THE IMPORTANT TASK OF REVIEWING EXISTING MANDATES.

Mr. SHAYS. Mr. Portman, I really appreciate having you.

I would like to be able to move fairly quickly to our next panel, but I would welcome any question that any Member has of the witness. Mr. Towns.

Mr. TOWNS. I yield to Mr. Fattah.

Mr. SHAYS. Mr. Fattah.

Mr. FATTAH. Thank you, Mr. Chairman. Congressman, are you familiar with this report, ACIR?

Mr. PORTMAN. Is that the preliminary report from ACIR?

Mr. FATTAH. Yes.

Mr. PORTMAN. I have it in my office; I haven't read it.

Mr. FATTAH. OK. This report suggests that—and this was called for in the act—that we repeal, for instance, the Family and Medical Leave Act for State and local government. Would you like to comment on that?

Mr. PORTMAN. I really would prefer not to.

Mr. FATTAH. The Fair Labor Standards Act.

Mr. PORTMAN. I was really asked to come this morning to talk about implementation of the act, which I've done. I am glad I'm on ACIR. I haven't been on it—for 2 weeks, I guess, and I will be looking at all of this.

Mr. FATTAH. I understand.

Mr. PORTMAN. I'm just not prepared yet to give you an answer to it, but I am going to look at all of it.

I hope, perhaps, Mr. Chairman, we will have an opportunity to do that together and then report back.

Mr. FATTAH. Thank you very much.

Mr. PORTMAN. Yes.

Mr. SHAYS. Thank you, Mr. Fattah.

Mr. Payne had wanted to get answers to certain questions in that report. What might make sense, while you are still here, Mr. Payne, is just to ask the questions that you want answered from those of us who are now members of this committee, for the record, and then we will get answers to them. If you want to just put those questions on the record.

Mr. PAYNE. Yes. I would just like to have some clarification on, first of all, from what I understand—and I was there—there was not a quorum present for approving the report. It has been said that ACIR members were not sure exactly what they were voting on, whether this was to approve this report or not, or whether it was a preliminary report. What does a "preliminary report" mean? Is that a final report? There was some confusion, it seems.

There was some question about whether these were the actual recommendations or the publishing of some ideas in the Federal Register for comment. ACIR has not released the actual votes of the commissioners. In other words, since there were so few commissioners there, they said they just voted by mail, and it all happened—and I'm sure that the chairman is honest—but it happened that, overwhelmingly, this report was approved, although many of the members were not present.

I know I was present. I voted no. There was a conference that was supposed to be held instead of a public hearing. The registration fee for the conference was $400, and therefore I'm sure that would exclude a lot of people who would normally like to come. And

in order to participate you had to pay the $400 in order to ask a question.

There just seems to be some unclear questions. For example, also, the information is inaccurate.

Mr. SHAYS. Mr. Payne, I'm wondering if you would ask the questions that you want us to get answered. They are very valid questions, but we're not really getting into that report today, though we will, ultimately.

Mr. PAYNE. All right. Well, just one other one, the cost of the Family and Medical Leave Act. You know, there was an assumption that this is a very costly unfunded mandate. From what we understand, it practically costs nothing to employers to move into a family and medical leave, because they did nothing other than, after 3 months, call the employee back, and all of the benefits just continued on. So the Commission said that the Family and Medical Leave Act was a very costly unfunded mandate, and therefore, local governments and State governments should be exempted from it. I question the validity of that.

So I think that this report is full of inaccuracies. I know the gentleman has to leave, but I'll just stop at that point. And I appreciate the opportunity, not being a member of the committee.

Mr. SHAYS. You honor our committee by your presence, and you raise some valid points. One of the reasons why the committee decided not to deal with this report first was, one, that it was a preliminary report. And we felt that they would wait until the final report is made. At that time, I can promise you that this committee will be looking at whatever final recommendation is made in depth.

Given the controversy, I have some concern about being on this committee. So I'm thinking of recommending Mr. Towns to take my place.

Mr. TOWNS. That's a great idea.

Mr. PAYNE. Well, if it had to be someone other than Mr. Towns, on the other side, I'm glad it's you.

Mr. SHAYS. I appreciate your saying that. Mr. Portman, we appreciate your being here.

Mr. PORTMAN. Thank you, Mr. Chairman.

Mr. SHAYS. You have provided a nice balance to some other comments that were made.

Mr. PORTMAN. May I just make one quick comment?

Mr. SHAYS. Yes.

Mr. PORTMAN. Since my colleague, Mr. Condit, has not returned from downtown, just to say that he indeed is part of a team here working with me. We've been partners in this from the start; we will continue to be. I know he reviewed my testimony. I can't say that I spoke for him, but I think that he, too, would agree that the act is being implemented properly but that we need to keep being vigilant.

Mr. SHAYS. I understand how it works. When you're in the majority, it's the Portman-Condit Bill; and when he's in the majority, it's the Condit-Portman Bill.

Mr. PORTMAN. Right. Thank you.

Mr. TOWNS. Mr. Chairman, let me just also add that, first of all, I really want to thank you for the work that you've done. I'm happy to know you are now on ACIR. I look forward to working with you

to continue to improve, in terms of the understanding of the legislation, because I think that the meat is actually there. So I look forward to working with you.

Mr. FATTAH. Mr. Chairman.

Mr. SHAYS. Yes. Mr. Fattah.

Mr. FATTAH. Just to clarify the record.

Mr. SHAYS. Sure.

Mr. FATTAH. And I understand. I think we're headed in a slightly different direction. But in the hearing memorandum for today's hearing, which emanated from the majority, it indicated that we were going to be looking at this report, and particularly examining—on page 2 of that memo—what the impact of the findings and recommendations were of this report. So that's why my question was about the report.

Mr. SHAYS. Very valid.

Mr. FATTAH. At this point, I don't see anyone on the schedule.

Mr. SHAYS. Let me just say that panel three will focus more on that issue, but we don't have a specific representative from ACIR on it.

Mr. FATTAH. And I appreciate that. I just didn't want to be misunderstood. There's page after page of this memorandum about this hearing that says that we're going to be dealing with this report.

Mr. SHAYS. Very valid. Very valid. Mr. Fattah, that's a very valid point.

Mr. FATTAH. Thank you.

Mr. SHAYS. And the mistake is mine. But I just want, first, to acknowledge, one, that the memorandum did say that; and, second, to say that we will have ample opportunity to go through that report in depth once it is finalized.

Mr. FATTAH. I didn't want my question to seem out of context.

Mr. SHAYS. It was definitely in context.

Mr. FATTAH. I was following the written words of the chairman.

Mr. SHAYS. OK. Well said.

Mr. TOWNS. And we also knew you were on ACIR.

Mr. SHAYS. For 2 weeks.

I do need to say we have got to get moving with our next panel here, and I apologize to the panels that have been waiting.

I would like to come to the front desk our second panel—and remain standing because we will be swearing you in—Sally Katzen, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget; Shelley Metzenbaum, Associate Administrator, Office of Regional Operations and State and Local Relations, Environmental Protection Agency; Bernard Anderson, Assistant Secretary, Employment Standards, Department of Labor; and Jamienne Studley, Deputy General Counsel, Department of Education.

I welcome all of you there. If you would raise your right hands.

[Witnesses sworn.]

Mr. SHAYS. For the record, all four have acknowledged in the affirmative.

Mr. PAYNE. Mr. Chairman.

Mr. SHAYS. Yes, sir.

Mr. PAYNE. I just would like to submit for the record—I'm not sure I will be here at the end.

Mr. SHAYS. I understand.

Mr. PAYNE. A letter to Chairman Winter expressing my concerns about the report, with Congressman Moran, and also an opening statement. If I could have that put into the record?

Mr. SHAYS. They will be put in the record. I appreciate, Mr. Payne, your coming and voicing your concerns.

[The prepared statement of Hon. Donald M. Payne and the letter referred to follow:]

DONALD M. PAYNE
10TH DISTRICT, NEW JERSEY

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SUBCOMMITTEE ON EARLY CHILDHOOD, YOUTH AND FAMILIES

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS

COMMITTEE ON INTERNATIONAL RELATIONS

SUBCOMMITTEE ON AFRICA

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--Statement--
The Honorable Donald M. Payne

Hearing
Government Oversight and Reform Subcommittee on
Human Resources and Intergovernmental Relations

Friday, March 22, 1996

Mr. Chairman, I want to begin by commending you on your leadership in holding this very important hearing this morning. Moreover, I appreciate this opportunity to offer my input on the Unfunded Mandates Report given by the Advisory Commission on Intergovernmental Relations.

I wish to express why I did not approve the ACIR preliminary report, entitled "The Role of Federal Mandates in Intergovernmental Relations". To begin with, this document recommended drastic reductions in state and local governments' responsibilities with respect to many of our nation's most important environmental, workplace, health, and civil rights laws.

The role of the Commission is to smooth bumps in the intergovernmental system, identify the problems and build a consensus on appropriate remedies. Although this report is presented as the balanced recommendations of a bipartisan, nonpolitical panel, the ACIR report is the representation of one perspective, for which the goals are to scale back or eliminate many of our most significant public protections.

I have problems with several of the recommendations that are outlined in the preliminary report, both procedurally and substantively. **First, the report is based on an extreme ideological agenda to dismantle federal protections.** The recommendations mirror many of the ideas in the "Contract with America". The same proposals were rejected by the Congress and the American people last year.

**The recommendations lack or ignore empirical data to support its conclusions.** For example, the ACIR report ignore scientific research from the Family Leave Commission about costs of implementing the Family and Medical Leave Act (FMLA). Such research showed, among other things, that 89% of employers experienced only a small increase or no increase at all in administrative costs to comply with the law. The ACIR offers no other facts or statistics to support its recommendation that state and local government be exempted form the FMLA. Virtually every recommendation has the same problems as the one on FMLA.

**The report's recommendations would create a patchwork infrastructure, erecting and retaining current protections for some, while dismantling them for others.** Just when Congress subjected itself to the same federal laws that apply to other Americans, the ACIR would now exempt state and local governments from critically important laws. One very telling example would be the ACIR recommendation to exempt state and local governments from the Fair Labor Standards Act. If this recommendation were adopted, workers in publicly owned and operated hospitals could be denied the same workplace protections, including minimum wage and overtime restrictions, enjoyed by similar workers in private hospitals.

**The report does not present responsible alternatives that gives state and local governments flexibility in implementing federal standards.** In fact, the report does not acknowledge the enormous flexibility already granted state and local governments. For example, under the Clean Air Act, the EPA has already relaxed a number of requirements, such as installing new methods for testing automobile exhaust systems in the most polluted cities and requiring car pooling. Under the Americans With Disabilities Act, state and local authorities are not required to take certain actions if they would produce undue financial or administrative burdens -- and courts have enforced such flexibility.

**Even when the report's recommendations do not call for outright repeal of the law, its proposed modifications would have a devastating impact.** The report recommends dropping key enforcement provisions of the Clean Air Act, important testing and treatment requirements in the Safe Drinking Water Act, and unhindered federal authority to designate new species under the Endangered Species Act. These are just examples of a broader, and damaging, deregulatory agenda.

The Commission examined 14 out of more than 200 laws and regulations called to its attention, and recommended that seven be repealed and seven be retained "with modifications". The report calls for exempting state and local governments from having to comply with the Fair Labor Standards Act, the Family and Medical Leave Act, Occupational Safety and Health Act, Drug and Alcohol Testing of Commercial Drivers, Metric Conversion for Plans and Specifications, Boren Amendment to Medicaid, Required Use of Recycled Rubber (which has already been repealed).

Additionally, the report recommends that the following laws should be changed: the Clean Water Act, Individuals with Disabilities Education Act, Americans with Disabilities Act, Safe Drinking Water Act, Endangered Species Act, Clean Air Act, Davis Bacon Related Acts. Many of these laws, targeted by the preliminary report, provide some of the most fundamental protections from discrimination and unsafe working conditions for millions of Americans. Furthermore, they ensure that all members of our society are afforded the same opportunities to life, liberty, and the pursuit of happiness.

I don't believe that anyone here wants to dismantle or eliminate needed public protections that look out for our environment, our health, and our safety. I do believe that we all want the same thing -- an effective government, that is responsive to the needs of all those it represents. Our governments -- federal, state, and local -- were erected to provide representation and public accountability for all citizens. When we assume the role of representative leadership, granted to us by the electorate, we have a fiduciary responsibility to preserve and defend the basic freedoms that are the foundation of this great nation.

However, when I look at the preliminary recommendations, outlined in the report, I see the totality of the impact of disintegrating these critical protections for the American people. As one of the authors during the construction of the Americans with Disabilities Act, I can attest to the importance of expanding elemental civil rights protections to every American. As a participant in the Civil Rights movement, I know from personal experience that by containing the liberties of or barring access for the one or the few, we restrict the infinite possibilities of the human spirit for everyone, and that we, as a nation, cannot survive, as much as one cannot survive without breathing clean air and drinking uncontaminated water.

In that spirit, I cannot support the recommendations of the report, "The Role of Federal Mandates in Intergovernmental Relations". Thank you Mr. Chairman for allowing me to express my views on this very important issue.

COMMITTEE ON
GOVERNMENT REFORM AND OVERSIGHT
SUBCOMMITTEE ON CIVIL SERVICE
RANKING MINORITY MEMBER
COMMITTEE ON
INTERNATIONAL RELATIONS
SUBCOMMITTEE ON INTERNATIONAL OPERATIONS AND HUMAN RIGHTS

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February 12, 1996

The Honorable William F. Winter
Chairman
Advisory Commission on Intergovernmental Relations
800 K Street, N.W.
Suite 450
Washington, D.C. 20575

Dear Chairman Winter:

We are writing to express our concern with the decision of a majority of ACIR members to endorse a specific set of recommendations on the "The Role of Federal Mandates in Intergovernmental Relations."

We voted against the recommendations because of the limited opportunity of the full body of members to meet, review the draft recommendations, air disagreements and discuss different perspectives. Obviously, the federal furlough and the government shut down prevented many of the federal members from attending the December 19 meeting. If we are unable to convene a meeting where a full quorum is present, we would prefer to have the final report present the full set of recommendations described in the December 1, 1995 draft.

ACIR's proper role is to smooth bumps in the intergovernmental system, identify the problems and build a consensus on appropriate remedies. ACIR compromises this role and invites controversy when it endorses specific legislative remedies without a fairly high degree of consensus among its members. Where a near consensus exists, a preferred recommendation may be endorsed.

We look forward to an opportunity to raise our concerns at the next meeting.

Sincerely,

Jim Moran
James P. Moran

Donald M. Payne
Donald M. Payne

PRINTED ON RECYCLED PAPER

Mr. PAYNE. Thank you very much.

Mr. SHAYS. We thank you, again, panel, for your patience. We will go in the order in which I called you.

So Ms. Katzen, welcome. You can summarize your testimony; you can read it. We're going to try to stay within the 5-minute testimony time for each witness. Your summary is welcome. However, if you want to proceed, feel free.

**STATEMENTS OF SALLY KATZEN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET; SHELLEY H. METZENBAUM, ASSOCIATE ADMINISTRATOR, OFFICE OF REGIONAL OPERATIONS AND STATE/LOCAL RELATIONS, ENVIRONMENTAL PROTECTION AGENCY; BERNARD E. ANDERSON, ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS, DEPARTMENT OF LABOR; AND JAMIENNE S. STUDLEY, DEPUTY GENERAL COUNSEL, DEPARTMENT OF EDUCATION, ACCOMPANIED BY JUDITH HEUMANN, ASSISTANT SECRETARY FOR SPECIAL EDUCATION AND REHABILITATIVE SERVICES**

Ms. KATZEN. Thank you very much. Good morning, Mr. Chairman and members of the subcommittee.

The Office of Information and Regulatory Affairs at OMB, which I head, is charged, under various Executive orders, with the task of coordinating and reviewing executive branch regulatory policy matters. I therefore thank you for extending us an opportunity to testify this morning on this issue.

I also want to join those before me who have commended you for holding this hearing. The Unfunded Mandates Act is one which President Clinton has enthusiastically supported. It addresses a real issue: the ability of State, local, and tribal governments to shoulder increasing Federal mandates with static or diminishing revenues and resources. And it attacks this problem, I think, in an enlightened and effective way.

Today, the first anniversary of the signing of the Unfunded Mandates Act—and it was indeed a sunny and somewhat warmer day last year at this time in the Rose Garden—is a most appropriate occasion to review the record and events to date. There are two I would like to address.

As you mentioned, today is the day specified in the statute for production of the OMB report on agency compliance with Title II of the legislation. We met the due date. We submitted copies of that report to all addressees this morning, with advance copies to the committee staff, and I attached a copy to my written testimony that was submitted for this morning.

Our report shows that executive branch agencies have given very serious thought to and established real processes for consultation with their intergovernmental partners. The processes that are established for such consultation are varied, depending on the different missions of the agencies and their different constituents.

Some agencies, like the Department of Defense and the Department of State, do not generally issue regulations with intergovernmental effects, and their processes are fairly simple and straightforward. Other agencies, including the Environmental Protection Agency and the Departments of Labor and Education, representa-

tives of which are with me today, do issue many rules that affect State, local, and tribal governments, and they have done, in my opinion, a superb job of setting up avenues of communication with their representatives and intergovernmental partners. These are set forth in detail in chapter 1.

What I want to emphasize this morning is that all agencies are committed to consultations, not just on rules and regulations they adopt, but on all programs and policies; all of the agency activities. We should not be limiting our consultations to those things that are required by law, the rules and regulations, but all of our activities. And that is what the agencies have done. There is a myriad of examples in our report that speak to this issue.

It also shows that our processes are not simply paper-driven exercises. There were two rules in the last year that imposed State, local, or tribal expenditures of $100 million or more. That's the threshold under Title II. Both were promulgated by the Environmental Protection Agency. Chapter 2 of our report sets forth, in loving detail, all the consultative processes that EPA engaged in.

Most significantly, it shows that the agency ascertained the concerns and made changes to their proposals to accommodate those concerns. That's what the bill is all about. That's what the act was intended to do, and that's what the agencies have been doing.

I would like to address two comments that were made in the opening statement, although you may have questions on that, and that is the reason for the delay in sending the materials to CBO. The first such intergovernmental regulation was promulgated on December 19, 1995. Regrettably, it was during one of the periods of furlough. And there were a number of other reasons causing delays in January and February. The second one has not yet issued. It was cleared by OMB and was signed by the administrator. It is due to be in the Federal Register sometime this week.

So I don't think there has been an inordinate delay in sending those to CBO. We were advised that they wanted the State, local, and tribal government regulatory impact analyses less than the private sector ones, and that was the reason for the delay. But we take your words seriously, and we will make sure that we are nonepisodic but more regular in the future.

Mr. SHAYS. Quite a word, isn't it?

Ms. KATZEN. I thought it was good.

There is one other report that was called for by the statute, and that is Title III's asking ACIR to consider a number of serious questions. Now, as somebody who was involved tangentially in the development of the legislation, it was clear to me that the task assigned to ACIR was a formidable one, indeed. They asked tough questions, questions for which the answers were neither readily apparent nor easily ascertainable.

Compounding this problem was the fact that Congress decided to terminate ACIR and allocated $450,000 for the study and shutdown costs, during which we had periods of various Government furloughs, et cetera. So we were not wholly surprised, but we were, frankly, disappointed when we saw the staff draft, because we felt that there were serious gaps in what was attempted to be done.

And we sent a letter, which, again, I have attached to my testimony, setting forth the administration's position on the staff re-

port. We noted that it did not address the legislative request in a number of ways, including providing a conceptual framework for consideration of unfunded mandates. It did not address how State mandates affect local governments.

It did not address how we should measure the costs and benefits of mandates. Cost-benefit analysis is a wonderful thing, but how you go about doing it is very complicated, and we were looking for guidance, as well. It failed to consider the positive impact on working men and women of Federal mandates.

Mr. Clinger has mentioned the failure to identify the competitive balance between the private sector and the State and local. This was a serious concern during the debates on the statute as to whether, if the State or local government is doing an entrepreneurial type or commercial type activity and it were relieved of a mandate, how that would impact the competitive balance. That is wholly missing from the report, as well.

We understand that a number of people have made such constructive critical comments on the staff report. The administration is committed to working with the ACIR staff as it incorporates these comments, revises its draft, so that what is presented to the commission will, I hope, reflect, the legitimate comments and concerns that have been expressed.

Let me then just, in closing, say that I think, 1 year after passage of the act, we've done very well. I think that the act has had a very positive effect. There is a highly constructive change in attitude and approach of the Federal agencies in promulgating regulations and in their other programs and activities.

President Clinton believes strongly that Government cannot serve people unless there is cooperation, a real partnership, among all levels of Government. With that objective, we will continue to work with all of you as we try to develop and implement what we think was a significant statute.

Thank you very much for the opportunity to appear.

[The prepared statement of Ms. Katzen follows:]

**STATEMENT OF SALLY KATZEN**
**ADMINISTRATOR**
**OFFICE OF INFORMATION AND REGULATORY AFFAIRS**
**OFFICE OF MANAGEMENT AND BUDGET**
**BEFORE THE**
**SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL AFFAIRS**
**COMMITTEE ON GOVERNMENTAL REFORM AND OVERSIGHT**
**UNITED STATES HOUSE OF REPRESENTATIVES**

**March 22, 1996**

Good morning Mr. Chairman and Members of the Committee.

I am Sally Katzen, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget. OIRA has specified statutory responsibilities and is charged under various Executive Orders with the task of coordinating and reviewing Executive Branch regulatory policy matters.

I appreciate the opportunity to testify on unfunded Federal mandates on this, the first anniversary of the signing of the Unfunded Mandates Reform Act of 1995. This is a very important piece of legislation for the Administration, and one which President Clinton has enthusiastically supported. The Unfunded Mandates Reform Act was a milestone that addressed deep-felt legitimate concerns of State, local, and tribal governments about the difficulty of complying with Federal unfunded mandates.

## Background

From the inception of this Administration, the President has worked hard on issues involving the relationship between the Federal government and State, local, and tribal governments. He believes strongly that government cannot serve people unless there is cooperation -- a real partnership -- among all the levels of government. The difficulty of complying with Federal mandates without additional Federal resources is something that the President experienced first hand as Governor of Arkansas, and it is an issue that he sought to address in one of the first Executive Orders that he signed. Specifically, on October 26, 1993, the President signed Executive Order No. 12875, instructing Federal agencies to:

- refrain from imposing nonstatutory mandates unless 1) funds are provided by the Federal Government, or 2) the agency demonstrates to the Office of Management and Budget (OMB) that it has consulted with State, local, and tribal representatives, heard their concerns, accommodated them to the extent possible, and explained why they could not accommodate any remaining concerns; and

- develop an effective process of meaningful and timely communication with State, local, and tribal officials when developing regulatory proposals that contain significant nonstatutory unfunded mandates.

While Agency compliance with Executive Order 12875 led to significant improvements in how agencies developed regulations having an intergovernmental impact, it could only affect non-statutory unfunded mandates. Yet, a number of -- indeed most -- mandates result from laws under which the agencies have little, if any, discretion. This led to the strong bipartisan support for the Unfunded Mandates Reform Act.

Title I of this Act addresses the legislative branch, and the processes that it should follow before enactment of any statutory unfunded mandates. Title I went into effect this past October, and it is

too early to evaluate its effectiveness. On the other hand, Title II, which addresses the Executive Branch, went into effect upon enactment, March 22, 1995. Title II built on Executive Order 12875, by establishing consultative and analytical requirements for agencies in developing rules. It also includes a requirement that OMB report to Congress on agency compliance with Title II; OMB filed its report today and I am submitting a copy along with my testimony.

Finally, Title III of the Act called for a detailed study on issues by the Advisory Commission on Intergovernmental Relations (ACIR). Many witnesses today are addressing this issue, and therefore let me start there and then speak to agency compliance with Title II.

## ACIR Study

Title III asked ACIR to report on a variety of issues, including:

- What is the role of Federal mandates in intergovernmental relations?
- What is the impact of unfunded mandates on the competitive balance between State, local, and tribal governments and the private sector?
- How do unfunded State mandates affect local governments?
- How can the Federal government best provide flexibility to its intergovernmental partners?
- How can the Federal government best reconcile existing and inconsistent mandates?
- How do we properly define and measure the costs and benefits of Federal mandates?

The reason for addressing these critical questions was a felt need to provide a context -- specifically, an informed analysis -- for this debate. As someone who was involved in the development of the legislation, it was clear to me that the answers to these questions are neither readily apparent nor easily attainable. Congress set a formidable research task for ACIR -- to take a conceptual as well as practical look at the scope and size of unfunded mandates in this country.

ACIR issued a preliminary staff draft for public review and comment on January 5, 1996. We raised serious concerns with ACIR's staff draft report in a March 1 letter from Marcia Hale, Assistant to the President for Intergovernmental Affairs to Governor Winter, the Commission's Chairman (I am attaching a copy of this letter to my testimony). Given Congress' decision to terminate the Commission this year, as well as the limited amount of funding to carry out the study and proceed to shut down, it is not surprising that ACIR's staff draft report did not meet the ambitious Congressional charge.

In the Administration's letter, we noted that the staff draft did not address the legislative request in a number of ways, including:

- it does not develop a sufficient conceptual framework for consideration of unfunded mandates;
- it does not address how State mandates affect local governments;
- it does not address how we should measure the costs and benefits of mandates, and
- it fails to consider the positive impact on working men and women of federal mandates.

In addition, we noted it provides only cursory and often misleading analyses of 14 Federal health, safety, environmental, and labor laws. Several Federal agencies that implement those laws submitted letters directly to ACIR. My colleagues on the panel will discuss the specific statutes within their jurisdiction.

We understand that ACIR received other critical constructive comments, and will likely receive more at a public hearing next week. The Administration looks forward to working with ACIR staff to produce a revised report for Commission consideration, which we expect will reflect these important comments and concerns.

OMB Report

Today is not only the first anniversary of the Act. Not coincidentally, it is the date specified in the legislation for our report to Congress on agency compliance with Title II of the Act, called for by Section 208.

This report has given us the opportunity to review Administration activities since passage of the Act. As the report sets forth, agencies have given serious thought to, and established real processes for, intergovernmental consultation involving both unfunded mandates as defined by the Act and issues affecting State, local, and tribal governments generally. These consultation processes built on Director Rivlin's September 21, 1995, guidance to agencies called for by Section 204 of Title II, which discussed several general themes that agencies should consider as they engage in discussions with their intergovernmental partners.

- intergovernmental consultations should take place as early as possible, beginning before issuance of a proposed rule and continuing through the final rule stage, and should be integrated explicitly into the rulemaking process;

- agencies should consult with a wide variety of State, local, and tribal officials.

- the scope of consultation will necessarily vary with the cost and significance of the mandate being considered -- effective consultation, however, requires significant and sustained attention from all who participate, as well as a degree of trust to allow for frank discussion, focus on key priorities, and clear and unambiguous communication; and

- agencies should seek out State, local, and tribal views on costs, benefits, risks, and alternative methods of compliance, as well as whether the Federal rule will harmonize with and not duplicate similar laws in other levels of government.

The consultation processes that have been established in light of these general lessons are quite varied. As our report discusses, some agencies -- like the Departments of Defense and State -- do not generally issue regulations with intergovernmental effects. Even these agencies, however, have committed to consultations when developing rules or considering policies or programs that involve other levels of government.

Several other agencies -- notably, the Environmental Protection Agency and the Departments of Education and Labor -- issue many rules with intergovernmental effects and have done a superb job in setting up effective avenues of communication with State, local, and tribal governments. These are outlined in detail in Chapter 1 of our report.

The report demonstrates that the Administration's commitment to involve State, local, and tribal governments as early as possible goes beyond rules covered by the Act. We take seriously our responsibility to consult with other levels of government on all rules and significant policy or program decisions that may affect them. Our report includes a myriad of examples where agency activities benefitted from hearing the views of their intergovernmental partners, and incorporating those views into their decision making.

The report also shows that these processes are not just paper-driven exercises. Two rules in the last year met Title II's $100 million expenditure threshold for State, local, and tribal governments. Both were promulgated by the Environmental Protection Agency. Chapter 2 of the report contains a lengthy description of the consultative processes undertaken by the agency for these rules, and, most importantly, demonstrates agency ascertainment of concerns and the many changes made to accommodate those concerns.

The EPA experiences discussed in our report illustrate what the Unfunded Mandates Reform Act is all about. Everyone should recognize that regulations have provided important benefits for health, safety and the environment. At the same time, we must hear the concerns of our intergovernmental partners, react to those concerns, and incorporate them into the analyses that

inform our decision making so that costs to all those affected by the rule -- and especially to State, local, and tribal governments -- are minimized while the benefits to all are maximized.

I appreciate the opportunity to appear here today before you, and to unveil our report. I look forward to any comments you may have, and am happy to answer any questions at this time.

THE WHITE HOUSE

WASHINGTON

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. As a member of the Commission, I oppose many of the specific recommendations in the report, and would like to work with you and other members of ACIR to develop a more balanced report of the Commission's work.

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) "review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;" (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of Federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents cursory and often misleading analyses of 14 Federal health, safety, environmental,

worker protection, and civil rights laws. These analyses fail to consider the views of or effects on working men and women as directed by Congress.

For example, the preliminary staff draft recommends that Congress repeal the Family and Medical Leave Act's (FMLA) applicability to state and local governments. The Clinton Administration opposes this recommendation. The draft report asserts that the FMLA has "created unfunded costs related to extending medical insurance coverage to employees while on leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities..." The report cites no supporting evidence for this claim, however. Further, the report does not acknowledge the substantial benefits to employers, families, and individuals of implementing FMLA requirements. In addition, the Administration strongly opposes the recommendations that would weaken other labor protections including proposed changes to OSHA, the Fair Labor Standards Act and Davis-Bacon-related acts

The preliminary staff draft also recommends several generic modifications to Federal laws without carefully considering the consequences of such changes. For example, the draft report proposes eliminating citizens' rights to sue state and local governments to enforce Federal mandates. The Administration strongly opposes this broad-sweeping change. Again, the recommendation is based on a consideration of costs but not of benefits. The draft report simply asserts that citizen suits create "budgetary uncertainties and substantial legal costs" for state and local governments. The draft report does not document or quantify these costs, or discuss the constructive role citizen suits have played in strengthening enforcement of civil rights, environmental, and other Federal statutes.

The draft report's proposed changes to specific environmental laws are similarly disconcerting. The preliminary staff draft recommends -- again without adequate justification -- substantially weakening Federal environmental statutes. For example, the draft report recommends eliminating financial aid penalties for states that fail to meet Federal air quality standards where such states are making a good faith efforts to comply. The Administration opposes this proposal. As the draft report itself notes, most states did not adequately control air pollution until strong Federal standards and enforcement mechanisms were put in place. Now that sanctions are mandatory, states, with a few exceptions, are meeting compliance deadlines, although sanctions have almost never been applied.

Another particular concern is the report's recommendations with respect to civil rights laws for people with disabilities -- specifically, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). The Administration opposes the draft report's recommendations with respect to these laws. Since the Unfunded Mandates Reform Act does not apply to civil rights statutes, it is inappropriate for ACIR to recommend changes to these laws. The draft report's recommendations to eliminate a private right of action and to reduce state and local governments' compliance obligations under these statutes would set back our efforts to guarantee equal rights for citizens with disabilities. I would note that both of these laws allow Federal agencies to emphasize education and voluntary compliance as much as possible, and that this Administration has taken a cooperative and flexible approach in implementing the ADA and IDEA.

I am also concerned about the process for seeking public comment on the staff draft. I urge you to ensure full public participation in the Commission's deliberations. I understand the ACIR is sponsoring a March 6-7 Conference on Federal mandates and is charging an admission fee. In my opinion, charging a fee in this context is inappropriate since it creates a barrier to full public participation. I strongly endorse an accessible public meeting to seek comment on ACIR's activities.

As you know, the Clinton Administration has worked hard to strengthen the intergovernmental partnership and to address state and local government concerns about unfunded mandates. The President signed Executive Order 12875 during his first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, he signed the Unfunded Mandates Reform Act. In addition, the Administration has proposed or supported modifying a number of Federal laws to ease the public sector's compliance burden. Further, in implementing Federal laws, the Administration has sought to provide state and local governments with enhanced technical assistance and to help them take full advantage of the flexibility that already exists in many Federal statutes.

I have additional serious concerns about many of the draft report's recommendations not mentioned in this letter. Attached are comments prepared by Federal agencies and departments on the draft report. Federal agencies will also be forwarding comments to you and the Commission directly. I urge you to give their comments full consideration as the Commission redrafts the report.

Sincerely,

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:

Office of the Attorney General
Washington, D. C. 20530

February 8, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission
on Intergovernmental Relations
800 K Street, N.W.
Suite 450, South Building
Washington, D.C. 20575

Dear Governor Winter:

I am writing to respond to the recommendations with respect to the Americans with Disabilities Act of 1990 (ADA) that were recently published for public comment by the U.S. Advisory Commission on Intergovernmental Relations (ACIR). These recommendations are apparently based on the significant misperception that the ADA imposes expensive requirements on state and local governments under inflexible deadlines.

The ACIR preliminary report was issued pursuant to title III of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48, which requires ACIR to conduct a study on the effect of Federal mandates on state and local governments, and to report to the President and to the Congress. However, the Unfunded Mandates Act expressly provides that "the Act shall not apply to any Federal regulation that establishes or enforces any statutory rights that prohibit discrimination on the basis of . . . disability." Despite this statutory restriction, the ACIR report recommends significant changes in the ADA and its implementing regulations as they apply to state and local governments.

The ACIR commendably recognizes the ADA's vital role in meeting this nation's obligation to ensure that citizens with disabilities are not excluded from the mainstream of American life. However, ACIR's preliminary report recommends significant changes in ADA implementation. I am concerned that these recommendations, if implemented, would seriously undermine the nation's effort to meet its obligations to people with disabilities.

Unfortunately, as noted, the ACIR report relies on the significant misperception that the ADA imposes expensive requirements on state and local governments under inflexible deadlines. In fact, the ADA is both flexible and reasonable. The statute was carefully crafted to protect the right of people with disabilities to participate in community activities while, at the same time, avoiding the imposition of undue burdens on

The Honorable William F. Winter
Page 2

public entities. Following precedent developed under section 504 of the Rehabilitation Act of 1973 (section 504) which prohibits discrimination on the basis of disability by recipients of Federal funds, the ADA generally permits state and local governments to exercise substantial discretion in determining how to make their programs accessible. In addition, cost is appropriately considered in determining what the ADA requires and whether compliance deadlines apply.

One example of the inherent flexibility in the ADA is the implementation of the requirement for the installation of curb ramps. The ADA requires public entities to install curb ramps to provide access to existing sidewalks if it is necessary to provide program access and if it can be accomplished without incurring undue financial and administrative burdens. This requirement is not new; it has applied to public entities subject to section 504 since 1977. In 1991 the Department of Justice's ADA regulation extended this requirement to public entities not subject to section 504. The regulation established January 1995 as the compliance deadline for the installation of required curb ramps, but provided that if necessary modifications could not be achieved without incurring undue financial burdens, those modifications would not be required to be completed within this time period. Since that time, in response to concerns expressed by members of Congress and others, the Department has proposed further extensions of time for compliance. The proposed extension of the compliance deadlines for the installation of curb ramps demonstrates that the ADA, in its present form, is being implemented in a way that permits state and local governments to consider local economic realities in making ADA determinations.

The Administration shares the ACIR's commitment to achieving effective implementation of the law without imposing excessive costs on state and local taxpayers. We believe, however, that the specific recommendations ACIR has made with respect to the ADA will not be effective in ensuring that the rights of people with disabilities are protected. To assist you in refining the ACIR recommendations, the Administration will provide more detailed comments on the ACIR report during the public comment period. I look forward to working with you in the future on this important issue.

Sincerely,

Janet Reno

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

**The Role
of
Federal Mandates
in Intergovernmental Relations
A Preliminary ACIR Report
January, 1996**

**AMERICANS WITH DISABILITIES ACT (ADA)**

The U.S. Advisory Committee on Intergovernmental Relations (ACIR) has published a preliminary report pursuant to title III of the Unfunded Mandates Reform Act of 1995, which requires ACIR to study the effect of Federal mandates on state and local governments and to recommend changes. Although the Unfunded Mandates Act expressly provides that "the Act shall not apply to any Federal regulation that establishes or enforces any statutory rights that prohibit discrimination on the basis of . . . disability," the Americans with Disabilities Act (ADA) and its implementing regulations are addressed in this report.

**Summary: DOJ Response to ACIR Report**

The report expressly recognizes that the ADA mandate is necessary because national policy goals justify its use; however, it recommends significant modifications in the implementation and enforcement of the Act. Those recommendations are based on some significant misperceptions of the ADA requirements. The law and its implementing regulations and this Administration's enforcement policies already address ACIR's concerns.

The ACIR's assertion that the ADA is "one size fits all" legislation" replete with "rigid requirements" simply misses the mark. The ACIR report fails to recognize the inherent flexibility of the ADA and its implementing regulations. For example, states and localities are only required to provide "program access" rather than total retrofit of all facilities; states and localities may use the law's "undue financial or administrative burden" defense in complying with the program access and effective communications requirements. This defense also provides states and localities additional flexibility in meeting compliance deadlines.

The ACIR's misperceptions and specific recommendations are discussed below.

**1) ACIR concern: The ADA creates problems for state and local governments because of expensive retrofitting and service delivery requirements.**

The ADA does not require expensive retrofitting or impose expensive service delivery requirements. As a result of the extensive negotiations that accompanied the passage of the ADA, the Act includes a number of provisions designed to ensure a fair and balanced approach to the implementation of the Act, including the cost of implementation. The statute includes specific limitations that recognize the need to strike a balance between the right of individuals with disabilities to participate in public activities and the legitimate financial and operational concerns of state and local governments.

The ADA does not require "expensive retrofitting." Title II of the ADA prohibits discrimination on the basis of disability by state and local governments, but it does not prescribe rigid requirements to achieve that objective. The ADA requires state and local governments to provide "program access." This means that they are required to make their programs and activities, not every existing building, accessible to qualified individuals with disabilities.

Program access provides state and local governments with the opportunity to be creative and flexible in their response to the Act. For example, a service customarily provided in an inaccessible location can be moved to an accessible space when a person with a mobility impairment needs access to that service. For existing facilities, physical changes are only required when it is not possible to provide program access in any other way.

In addition, the ADA does not impose expensive service delivery requirements. Although states and localities will undoubtedly incur costs in implementing the ADA, state and local governments are never required to take any action that would result in a "fundamental alteration in the nature of a program, service, or activity" or in "undue financial and administrative burdens."

The ADA requires that new buildings and facilities, and alterations to existing buildings and facilities, be built to be accessible. This sensible requirement recognizes that it is easiest and least expensive to build in access from the start.

**2) ACIR Concern: The ADA statutory language is confusing and ambiguous.**

The ADA is based on the familiar language and requirements of Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits disability-based discrimination by recipients of

Federal financial assistance, including state and local governments. Title II merely extends this prohibition to state and local programs that do not receive Federal funds.

Therefore, state and local governments have had over twenty years to become familiar with terms such as "reasonable accommodation" and "undue hardship" and courts have had a similarly long period to develop case law under the Act. The only "novel" term used in the ADA is "readily achievable" and that term applies only to certain private entities covered by title III of the ADA. It does not apply to state and local governments (which are covered by title II).

The purpose of using these familiar terms was to ensure that state and local governments retained the flexibility required to enable each entity to develop its own method of complying with the ADA, in light of its unique circumstances in a changing environment.

ACIR correctly notes that state and local governments have a better understanding of their specific accessibility problems and how to address them. It recommends modifying the ADA to change its orientation from "rigid requirements toward a focus on goals and goal attainment schedules."

The ADA appropriately focuses on the broad goal of eliminating disability-based discrimination. And, by employing some of the concepts criticized by ACIR, it does precisely that. For example, the purpose of the "undue burden" defense is to allow each government to decide what actions to take in light of the resources available for use in the funding and operation of a service, program, or activity.

However, there is an inconsistency between ACIR's recommendation that the ADA be modified to prohibit the imposition of strict and rigid requirements and its criticism of the provisions of the ADA that already give state and local governments the flexibility to adapt to changing local conditions. ACIR should look again at the terms it previously found objectionable in light of the rich history of state and local governmental practices, agency interpretations, and judicial decisions.

**3) ACIR Recommendation: Federal funding for ADA compliance should be increased or the ADA should be modified to allow state and local governments to meet ADA substantive requirements and compliance deadlines in a manner that recognizes their technical and budget constraints.**

The ADA is a civil rights statute. As such, it has been expressly exempted by Congress from this "unfunded mandates" review because it is simply not acceptable to condition the civil

rights of citizens with disabilities on the availability of Federal grants to state and local governments.

The ADA is emphatically not "one size fits all" legislation. As noted above, the ADA regulations provide considerable flexibility to state and local governments in determining how to best implement the law. Rather than imposing inflexible substantive requirements, the title II regulation requires state and local governments to conduct a self-evaluation (to identify problems and facilitate the process of establishing compliance goals) and to develop a transition plan that establishes a schedule for attaining these goals. Every item in the transition plan, including its completion date, is subject to the caveat that it is not required if it constitutes a fundamental alteration or results in an undue burden. Therefore, the compliance deadlines are inherently flexible. In addition, the Department of Justice is now proposing to amend the title II regulation to clarify the compliance deadlines applicable to the installation of curb ramps.

These requirements empower state and local governments and make it possible for each community to create a plan and a schedule for reaching the goals of the ADA that take into account the specific needs of that community and the resources available to meet those needs.

**4) ACIR Recommendation: A single Federal enforcement and assistance agency should be designated to coordinate enforcement and technical assistance.**

This recommendation is apparently based on the misplaced concern that Federal enforcement of the ADA is uncoordinated and divided among too many departments and agencies of the government. The development and implementation of the ADA enforcement policies applicable to most units of state and local government is, in fact, limited to two Federal agencies: the Equal Employment Opportunity Commission (EEOC), which is responsible for implementing the ADA's prohibition on employment discrimination, and the Department of Justice, which is already responsible for coordinating the implementation and enforcement of all title II requirements except for the requirements that apply only to public transportation providers, which fall within the jurisdiction of the Department of Transportation. ADA lawsuits filed by the Federal government that involve state or local governments will be filed only by the Department of Justice.

The preliminary report correctly notes that eight Federal agencies have been assigned an enforcement role under title II of the ADA. However, the report fails to note that the enforcement authority of these agencies under title II is limited to the ability to investigate complaints of discrimination and to

attempt to negotiate resolutions. All eight agencies are required to follow DOJ's regulation and enforcement policies. As a result, state and local governments are not subject to conflicting or inconsistent standards.

The agencies designated to investigate title II complaints were selected because of their expertise in the regulated subject matter. These agencies have well-established programs to investigate Section 504 complaints against recipients of Federal financial assistance. Because title II complaints frequently allege violations of Section 504 as well, the designated agency system reduces the burden on state and local agencies by allowing a single agency to investigate both violations at the same time.

This system also assures state and local governments that investigations will be carried out by an agency familiar with the nature of their programs and the constraints they operate under. For example, complaints about schools are investigated by the Department of Education; complaints about access to parks are investigated by the Department of the Interior. If all investigations were consolidated in one agency, a great deal of expertise would be lost.

To date, the system has worked well. There is no evidence that consolidating all responsibility for technical assistance and investigations in a single bureaucracy would benefit state and local governments.

**5) ACIR Recommendation: Lawsuits against state and local governments should be limited to actions brought by the Federal government.**

This recommendation apparently stems from ACIR's concern that the ability of individuals to sue may create enormous litigation costs and administrative uncertainty for state and local governments. As applied to the ADA, this recommendation is unacceptable because it would mean that Americans with disabilities would be singled out as the only people unable to seek the assistance of the courts to enforce statutorily protected civil rights.

It is preferable to implement the ADA through voluntary compliance or, when disputes arise, through alternative means of dispute resolution. However, alternative dispute resolution, to be successful, must be accompanied by a strong enforcement policy. If private individuals are unable to sue to enforce their own rights, public entities will have no incentive to comply with the law.

**6) ACIR Concern: The Federal government has not provided sufficient technical assistance to help entities comply with the ADA.**

The Federal government has mounted an unprecedented effort to provide technical assistance about the ADA and is actively pursuing opportunities to expand this effort. Each of the Federal agencies that has an ADA policy-making role has established an extensive technical assistance program to provide covered entities with information about how to comply with the ADA.

Technical assistance is developed through Federal grant programs under which private entities develop specialized materials targeted to specific audiences. Through a Department of Justice grant, selected ADA Technical Assistance materials have been distributed to 15,000 libraries nationwide. The Department of Education has funded a regional network of ten Disability and Business Technical Assistance Centers that provide ADA information and guidance to covered entities. In addition, the Department of Justice is considering a proposal to establish an ADA clearinghouse of technical assistance materials.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

MAR 1 1996

The Honorable William F. Winter
Advisory Commission on Intergovernmental
Relations
800 K Street, N.W.
Suite 450
Washington, D.C. 20575

Dear Governor Winter:

The purpose of this letter is to express the Department of Labor's deep concern over the recommendations set forth in The Role of Federal Mandates in Intergovernmental Relations, the preliminary draft report of the Advisory Commission on Intergovernmental Relations (ACIR). Our comments on the draft's specific legislative proposals are contained in the enclosed memorandum. Two issues are of particular concern to the Department.

As stated, the purpose of this preliminary draft report was to propose "...changes in federal policies to improve intergovernmental relations while maintaining a commitment to national interests" (emphasis added). The report does not achieve that purpose. In fact, the report's recommendations on labor standards would seriously erode intergovernmental relations and irrevocably harm this country's commitment to American workers by endangering their right to a safe and healthful workplace, to minimum wage and overtime pay, and to family and medical leave in case of a serious family illness or birth of a child. If the recommendations in the report were implemented, state and local government workers would become second class citizens -- deemed unworthy of the same basic protections as their neighbors, friends, and family who work in the private sector or for Federal agencies.

DOL is equally concerned that the ACIR has not taken into account Congress's instruction upon adoption of the Unfunded Mandates Reform Act that the Commission actively consider the impact of its recommendations on American workers, and that the Commission formulate its recommended changes in Federal policies to enhance intergovernmental relations with a view toward maintaining a commitment to vital national interests. We strongly urge the Commission to specifically review its draft recommendations with those dedicated public servants whose employment would undergo profound changes by virtue of the report's recommendation.

Thank you for your consideration of our views. I hope that the comments and concerns raised here will assist the ACIR in completing its work.

Sincerely,

Robert B. Reich

Enclosure

## DEPARTMENT OF LABOR CONCERNS RELATIVE TO THE DRAFT REPORT OF THE ACIR

The Department of Labor(DOL) objects not only to the specific findings of this report but also to the method, the criteria and the assumptions the Commission used in making its recommend-dations. The following is a summary of major concerns:

1. The ACIR frequently ignored its own Criteria for Review, which direct the Commission to take into account the positive attributes of mandates, the rationale for their adoption, and the impact of each on working men and women. The report contains no discussion of Congressional intent in covering state and local workers under these statutes and little consideration is given to how workers might be affected if these protections were taken away from them.

There is also very little recognition of the benefits these laws accord state and local government employees – or their employers. In many cases, the report analyzes these basic labor standards as though the only factor to be considered was their effect on state and local government budgets. The rights and protections of workers are treated as though they are merely another yearly "expense."

2. The ACIR's Criteria ignores the directive of the Unfunded Mandates Act to recommend "terminating Federal mandates" only where they are "duplicative, obsolete or lacking in practical utility." Under the Act, "concern" by state and local governments was not to be the basis for recommending termination of a mandate. The Federal Labor Standards Act (FLSA), Federal and Medical Leave Act (FMLA), Davis Bacon Related Acts (DBRA) and the Occupational Safety and Health Act(OSH Act) are certainly not obsolete – the mere fact that DOL continues finding violations proves their continued relevance and utility. Nor are these statutes duplicative – there are no comparable Federal laws and where corresponding state laws do exist, they are often weaker or less inclusive.

3. Many of the concerns used as justification for examining DOL's programs have no bearing on the unique characteristics of state, local, or tribal governments – in fact, they are the same type of concerns attributed to some employers in the private sector.

4. The ACIR's assumption that collective bargaining agreements can substitute for Federal standards is undermined by the fact that only 40 percent of state and local government workers are represented by a labor union and guaranteed collective bargaining rights.

5. Finally, the special role of public employers is ignored – one would expect these governmental entities to be model employers setting examples for their private sector counterparts. In fact, the Congressional Accountability Act recently applied the FLSA, FMLA and other labor laws to Congress to provide those workers the same protections as the private sector counterparts.

Fair Labor Standards Act (FLSA)

*The ACIR report recommends repeal of FLSA's coverage of state and local government workers.*

By guaranteeing a minimum wage and premium pay when an individual works more than 40 hours week, the FLSA establishes minimum labor standards below which no one should be required to work. There is no reason to deny public servants these fundamental protections and thereby make them second class citizens. In recent years, the provision of public services such as nursing care, transportation, sanitation, water and sewer service, has increasingly been done by both public and private entities, and in these instances, the Act simply ensures that every employee, regardless of his or her employer, is entitled to minimum protections. Allowing state and local governments to pay less than the minimum wage and to avoid paying premium pay for overtime is unfair to the public workers and could place private employers that observe fair labor standards at a competitive disadvantage.

Congress amended the FLSA in 1985 and gave special accomodations to state and local governments by providing for compensatory time off in lieu of overtime pay, special rules for the use of volunteers, and delay in implementing compliance obligations to allow for a transition period. The report notes that the Department of Labor has provided assistance to state and local governments with respect to their FLSA obligations, and acknowledges that DOL has worked with state and local governments to recognize the unique issues that arise in the enforcement context. Despite DOL's efforts, it clear that concern with FLSA can be traced to an inability to adequately monitor compliance and a persistent misunderstanding of the requirements of the Act. These are not reasons for denying workers basic minimum rights, but arguments for strengthening the Department's ability to work with state and local governments, rather than dismantling it. While the report decries the rights of workers to seek judicial redress under the statute, rolling back those rights suggests far more than a restructuring of Federal/State relations. It would deny basic rights to public servants to be paid the minimumwage and overtime pay when they are forced to work excessively long hours.

In several instances, the report levels criticism against application of the FLSA to the public sector that has no foundation in fact. For example, there is no basis for the suggestion made in the report that Federal agencies have been able to manipulate FLSA regulations in order to meet budgetary restrictions.

Family and Medical Leave Act (FMLA)

*The report recommends repeal of FMLA's coverage of statue and local government employees.*

Like the FLSA, the FMLA provides a fundamental safeguard to American workers. It guarantees that workers can take job protected unpaid leave for specified family and medical reasons. The report provides no substantive justification for repealing that safeguard with respect to public workers. The report not only the overstates the costs of compliance, but also ignores the substantial benefits achieved by the FMLA, including improved worker productivity and morale, reduced employee turnover, and greater labor-management stability. In fact, available data show that the costs of hiring and training new employees far outstrip the costs of granting temporary leave for family or medical reasons. In addition, the bipartisan Commission on Leave created under the FMLA released two studies in October 1995. The study of employers in the private sector revealed that over an 18-month period, 90 % of participating firms reported little or no costs associated with administration, hiring, and training, and continuation of benefits required under the statute, and 85% reported no noticeable effect on employee turnover, absence or productivity. There is no evidence to suggest that the results are any different in the public sector.

Occupational Safety and Health Act (OSH Act)

*The report recommends repeal of all state coverage.*

As a preliminary matter, the Department cannot accept the Commission's assertion that a voluntary program constitutes a mandate. It is not a mandate because the only state and local government workplaces covered by OSH are located in states where the state legislature has voluntarily agreed to participate.

In any event, we believe–and many states agree– that repeal of the OSH Act with respect to public workers could endanger the health and safety of thousands of workers who perform some of the Nation's most dangerous jobs – firefighting, hazardous waste cleanup, maintenance and sanitation work. Indeed, according to the American Federation of State, County and Municipal Employees, almost 200 of their members were killed on the job between 1983 and 1993. Public workers deserve the same protections accorded to America's private sector employees.

As with other DOL-related recommendations, the report fails to acknowledge the substantial benefits that accrue from the Act. These benefits are not limited to the health and safety protections for the affected worker; but include public employers, who experience reduced worker compensation costs, higher employee productivity, and reduced liability and insurance costs; and the general public who benefit from a reduction in the exposure to dangerous conditions in public buildings and other facilities.

The ACIR report acknowledges that several of the concerns with the OSH Act rest on misperceptions or a lack of information. For example, the report notes that even in some states that have not volunteered to participate in the Federal Occupational and Safety Administration's program, there is a belief that OSH Act requirements are mandatory. It is difficult to imagine how this makes the case for repeal of the Act. Similarly, the report charges that the credibility of safety and health programs under the Act is seriously compromised by the "perceived" rigidity, complexity and burdensomeness of the regulations, and a focus on punishment rather than compliance assistance. On the contrary, in recognition of the unique characteristics of public employers, OSHA has encouraged flexibility in State plans by 1) encouraging states to develop alternate standards that provide equivalent protection when circumstances differ from the private sector; 2) allowing States to use administrative actions instead of monetary penalties to compel compliance; 3) permitting agency self-inspection under certain conditions. In addition, OSHA provides a great deal of assistance to states that volunteer to participate, and contrary to the ACIR report, punishment is not a focal point of enforcement, since OSHA has no jurisdiction over public workplaces. In fact, an atmosphere of cooperation pervades the Federal/State relationship under the OSH Act, as typified by a Memorandum of Understanding between OSHA and various state regulators to address areas of mutual interest.

Finally, the report suggests that Federal agencies are free from meeting OSH Act requirements, and state and local governments should have the same options. Once again, this premise is incorrect. All Federal agencies must comply with OSHA standards, as the recent debate on extending OSH Act protections to Congressional employees recognized.

<u>Davis-Bacon Related Acts (DBRA)</u>

*The report recommends an exemption for projects below one million dollars or for which the Federal grant or other assistance is less than 50 percent of total funding.*

The Federal government spends substantial funds to assist state and local governments with local public construction projects through grants and other financial assistance. DBRA prevailing wage requirements, attached to this assistance, ensure that the Federal governments's vast purchasing power does not depress local wage levels or disrupt local economies. However, DOL cannot accept the view of the Commission that DBRA requirements impose an unfunded intergovernmental mandate. The provisions apply by virtue of voluntary participation in these Federal assistance programs.

The ACIR report suggests that the DBRA automatically increase public construction costs because certain low-wage construction contractors may pay lower than prevailing wages. This flawed reasoning ignores any comparative differences in productivity from different wage levels and work experience, and that fact that the shoddy construction practices that often accompany substandard wages almost inevitably result in increased repair and

maintenance costs. The report also ignores the fact that the DBRA prevailing wage is based on "measures of central tendency", and there will always be contractors who pay lower then the prevailing wages in a community.

ACIR claims that DBRA wage surveys are "voluntary and sporadic," but fails to acknowledge DOL's significant regulatory reforms undertaken over the past decade to ensure that its wage determinations accurately reflect wages paid in the local community. They also claim a scarcity of data leads to importation of non-local rates When there is a lack of recent construction, DOL looks to the surrounding area for wage data, not to "distant" areas as ACIR charges. The report asserts that DBRA may reduce the hiring of local persons with limited experience. In fact, regulatory provisions also encourage apprenticeship and training of persons with limited experience by allowing for exceptions to the journey-level wage under approved training programs.

The Clinton Administration's Davis-Bacon reform bill last year would have raised the DBRA threshold to $50,000 for alteration and repair projects, and $100,000 for new construction projects, in addition to reducing administrative burdens and costs. DOL cannot concur in the report's proposal to limit DRBA to projects of more than $1 million which receive over 50 per cent of their financing from Federal funds. These proposals would eliminate prevailing wage protections for thousands of workers under the guise of reform, and make the administration of Davis-Bacon requirements more troublesome for states and local governments.

Similarly, we have serious concerns with the report's recommendation to base coverage on the percentage of Federal finance provided to the construction project. DBRA coverage must be established before the competitive bidding process begins. ACIR's proposal would disrupt that process, and impose additional burdens on state and local contracting agencies to determine if DBRA applies.

Mr. SHAYS. I thank you, Ms. Katzen.

At this time, Ms. Metzenbaum.

Ms. METZENBAUM. Thank you, Mr. Chairman. I appreciate the opportunity to appear here today before your committee to discuss how we have implemented the Unfunded Mandates Reform Act.

I would like to talk about three things: First, EPA's effort to aggressively strengthen our partnership with State, local, and tribal governments; second, our implementation of the act; and finally our concerns about the ACIR report. I will try to be brief in my remarks this morning and provide you with the full statement for the record.

Over the past 3 years, the Clinton administration has made a very aggressive effort to work with State, local, and tribal governments to build a strong partnership in which each governmental party works together, doing what it does best to deliver environmental protection to the American people. With flexibility and a partnership approach, we have made a great deal of progress.

Under the Clinton administration, EPA has been undergoing a fundamental shift in the way we do business, away from traditional command-and-control to more flexible, community-based approaches. We are committed to working with people in their communities and in their regions to craft environmental protection solutions from the bottom up, not just from the top down.

We began by engaging our governmental partners to try and understand what their concerns were. We heard that they wanted more flexible approaches to environmental protection, not a one-size-fits-all approach. They wanted better communication and better information. They wanted to be included in the process of designing the rules and the policies they would be asked to implement. And finally, they wanted us to focus on achieving improved environmental results, not on burdensome processes.

In response, we began working with our governmental partners to develop new tools that will allow and encourage flexibility and local innovation while continuing to achieve greater environmental results. One of the best examples of that is our National Environmental Performance Partnership System. At a meeting last May with all the State environmental commissioners, we reached an agreement to pursue this new, common-sense approach for delegating more activity and working with State partners more effectively.

We have included a copy of that agreement, for your information, with my testimony.

Today, not even a year later, five States have signed environmental performance partnership agreements, and about two dozen more are working with our regional offices on their fiscal year 1997 agreements.

EPA's new philosophy is also reflected in our Project XL–Communities. The "X" stands for "excellence," and the "L" for "leadership." Project XL embraces our new way of doing business, focusing on results, but allowing and encouraging flexible approaches to achieve them. Project XL offers communities a flexible approach in return for a pledge to go beyond compliance with environmental laws to achieve better environmental results.

Small towns also face difficulties due to their limited resources in implementing environmental regulations within the timeframe

set forth in statutes. We have responded to that by adopting a new policy that allows jurisdictions with populations under 2,500 to negotiate alternative, enforceable compliance agreements with their States to adjust the schedules for compliance without worrying about EPA sanctions.

If you would like any additional information about these and some of our other partnership projects, we would be glad to provide it.

Sally has just described some of our efforts to implement the Unfunded Mandates Reform Act, so I will not go into much additional detail. I will say we are very proud of the progress we have made in implementing the President's Executive order on strengthening intergovernmental partnership as well as the act. We have worked to implement not only the letter, but, as Congressman Clinger said, the spirit of the law. We are firmly committed to that.

Finally, let me turn my attention to the ACIR report. EPA has serious concerns about the content and recommendations of the preliminary report. A fundamental problem with the report is that it fails to examine why Federal laws and specific provisions of those laws were enacted, to really look at the role of Federal mandates in the intergovernmental process.

Another problem with the report is its failure to consider the beneficial aspects of Federal laws. If only costs are presented and a minimum description of the benefits of a mandate are described, any debate will inevitably be skewed.

The report also fails to acknowledge the progress that EPA and other Federal agencies have made in the past few years to bring common-sense reinvention to the way we run our programs. Title III of the Unfunded Mandates Reform Act charges ACIR to make recommendations for allowing flexibility, but the report makes no attempt to look at our models that we have been developing over the last 2 years to see whether or not there are some lessons there.

Finally, we have specific concerns about specific environmental issues and proposals in the report; specifically, the proposals to withdraw citizen rights, to relax water pollution control standards, to eliminate Federal authority for drinking water, and to limit Federal tools for air pollution compliance.

We support the role of the ACIR. We look forward to working with you, Mr. Chairman, on the Commission to try and revise this report and come up with a much more balanced, informative product.

Thank you.

[The prepared statement of Ms. Metzenbaum follows:]

**Statement of**
**Dr. Shelley H. Metzenbaum**
**Associate Administrator for Regional Operations, State and Local Relations**
**U.S. Environmental Protection Agency**
**before the**
**Subcommittee on Human Resources and Intergovernmental Relations**
**of the**
**Committee on Government Reform and Oversight**
**U.S. House of Representatives**
**March 22, 1996**

Mr. Chairman, I appreciate the opportunity to appear before you here today to discuss the efforts of the U.S. Environmental Protection Agency (EPA) to implement Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, the preliminary draft report of the Advisory Committee on Intergovernmental Relations (ACIR), and more generally, EPA's work to build partnerships and reinvent regulations with state, local, and tribal governments.

Over the past three years, the Clinton Administration has made an aggressive effort to work closely with state, local, and tribal governments. At EPA, this effort is guided by the unprecedented number of the Agency's top leadership who have experience as state and/or local officials -- including the Administrator and Deputy Administrator. We recognize that each level of government has a vital role to play in protecting public health and the environment, and our success depends upon each governmental entity doing what it does best in carrying out this shared responsibility.

Because of our commitment, EPA has worked very hard to implement both the letter and spirit of the President's Executive Order on Strengthening Intergovernmental Partnerships and on Regulatory Planning and Review, as well as the implementation of Title II of the Unfunded Mandates Reform Act, the one-year anniversary of which we are marking today. At the same time, we have been undergoing a fundamental shift in approach designed to take better advantage of the collective talents and abilities of both the public and private sectors in providing

environmental and public health protection. Our strategy of building more effective partnerships, streamlining excess requirements, and fostering creative solutions to environmental problems is reflected in our legislative proposals and regulatory reinvention efforts.

Today, I would like to begin by highlighting some of the general ways EPA has tried to implement one of the main purposes of the Unfunded Mandates Reform Act of 1995 -- "to strengthen the partnership between the Federal Government and State, local, and tribal governments." Then, I will turn my attention to the steps we have taken to implement Title II of the Act and to address some of the specific concerns we have heard from our intergovernmental partners about existing laws and regulations. Finally, I will address our key concerns with the findings and recommendations in ACIR's preliminary report on *The Role of Federal Mandates in Intergovernmental Relations*.

## I. Building the Intergovernmental Partnership

Over the past several years, EPA has been undergoing a fundamental reinvention in the way we do business -- away from traditional command-and-control to more flexible, community-based approaches. We are committed to working with people in their places, in their communities, and in their regions to craft environmental protection strategies -- from the bottom up, not just from the top down.

We have actively engaged in dialogues with our partners in state, local, and tribal governments so that we can better understand the problems they face as well as the possibilities that exist for more effective and efficient solutions. Some of the key themes we have heard from state, local, and tribal officials are that they want more flexible approaches to environmental protection, not "one size fits all." They want better communication and information exchange among all levels of government so that they know what is expected of them and can learn from the experiences of others. These officials especially want to be included in the process of designing the regulations and policies they must implement. Finally, they want to focus attention

on the work that achieves real environmental results as contrasted with process-oriented activities whose relationship to environmental improvement is less direct.

In response, EPA began working with our governmental partners to create tools to address the problems they identified -- tools that will allow for and encourage flexibility and local innovation while continuing to achieve greater environmental results.

One of the best examples of our new approach is the National Environmental Performance Partnership System (NEPPS). We kicked off this approach last May at a meeting with all fifty state environmental commissioners. The new system is designed to focus resources on the most important environmental problems. The traditional way of negotiating annual state environmental program grants begins with EPA telling the states what the national and regional priorities are for federal funding; states have had limited opportunity to negotiate to use the funds to meet their own priorities. Under the performance partnership approach, we ask each state to start with its own assessment of the environmental challenges and opportunities in the state and to present the state's strategy for meeting its environmental objectives. These assessments and strategies are the basis for negotiating environmental performance agreements with EPA. Other key features of the new system are reductions in unnecessary oversight and reporting, increased use of environmental indicators as a measure of program performance, and improved environmental information to the public. Today, not even a year later, five states have already signed Environmental Performance Partnership Agreements, and about two dozen more are actively pursuing performance partnerships for FY 97.

Our goal through environmental performance partnerships is to focus more resources on improving the environment and less on process-oriented activities. Our goal is also to engage the public more effectively in the environmental decision-making process by providing citizens with better environmental information and understanding. We also want to enhance accountability -- to each other, to Congress, to the citizens we serve.

EPA's new philosophy is also reflected in EPA's Project XL-Communities. Like performance partnerships, Project XL embraces our new way of doing business: focusing on results and using flexible, common-sense approaches to achieve them. The X stands for excellence; the L for Leadership Through EPA's Project XL, communities are being invited to demonstrate excellence and leadership -- to find creative new ways to meet and exceed environmental goals, often for less money.

Administrator Browner recently announced that EPA had selected the very first community to work with EPA to develop a Project XL-Communities reinvention project. The city of Anaheim, California requested regulatory flexibility from an acid rain regulation that would have required installation of upgraded air pollution monitoring equipment at a power plant that was inherently low polluting. In exchange, the city proposes to use the money they save to implement higher priority projects demonstrating technologies for reducing air emissions, facilitate closure of abandoned wells threatening ground water quality, and help manufacturing facilities move away from using chlorinated solvents.

EPA also heard about the difficulties small towns face because they have limited resources to implement environmental regulations within the time frames set forth in the statutes and regulations. EPA responded by adopting a new policy on flexible state enforcement responses to small community violations. Small jurisdictions with populations under 2,500 will be able to use their limited resources to attack their biggest environmental problems first, without fearing state or EPA sanctions for failing to comply with mandates immediately. Under this new policy, states can negotiate enforceable compliance agreements and schedules that allow small jurisdictions to set priorities for coming into compliance based on comparative risk, ultimately leading to correction of all of their environmental violations. The worst problems would be corrected first, and dangerous circumstances corrected immediately. As an incentive to encourage small communities to request compliance assistance, states can also waive part or all of an enforcement penalty.

This policy was developed based on pioneering experiments going on in Oregon, Washington state, Idaho, and Nebraska. EPA has worked closely with these states and their small towns over the past year to develop this new approach, with EPA working locally to address specific needs and nationally to develop a supportive federal policy.

EPA's willingness to try innovative approaches that will help state and local governments address problems is further illustrated by a landmark agreement between EPA, the state of Oklahoma, and the city of Tulsa. Under this agreement, Tulsa, an attainment area, has been deemed the first flexible air attainment region (FAR). As a FAR, Tulsa is allowed to tailor an ozone reduction plan which reflects the local economy, weather conditions, and driving habits Through FAR, EPA will give Tulsa time to implement and evaluate its program in the event of a violation of the ozone standard before taking further action. A key component of the city's strategy for addressing ozone problems is the voluntary "Ozone Alert" program, supported by a coalition of business, energy industry, and media representatives as well as elected officials. The program includes such measures as providing incentives for carpooling and vanpooling and providing free bus service on days when ozone levels are predicted to be in the unhealthy range.

In response to the concerns of community leaders about the difficulty of redeveloping urban areas that may have been contaminated, EPA initiated the Brownfields Action Agenda. As part of this effort, we are working to clean up and redevelop the abandoned and contaminated property that lies idle in communities across the country. EPA has removed 27,000 sites from the Superfund master list, which eliminates the federal review level thereby speeding redevelopment. We have removed 12,000 small parties from the threat of liability, and by the end of this year will remove at least another 10,000 parties. We have new policies in effect that make it clear that if you are a municipality that involuntarily acquires contaminated property, or if you are a lender or prospective purchaser who is not responsible for pollution at the site, you will not get caught in the liability net. We have funded Brownfields projects in 40 communities. Recently, President Clinton proposed an additional important element of this effort -- that targeted tax incentives be provided to those, including purchasers, who clean up contaminated sites.

We are also continuing to work hard to strengthen communications with states, localities, and tribes. In addition to the regular interactions all of our Regions have with the states, each Region has also designated a top manager or staff member in the Regional Administrator's office to work with each state. Each of our Regions has established a local government desk to field calls from government officials and keep them from being "bounced" around by helping callers find the right person who can respond to their questions. EPA has also designated a small community coordinator in each Region, and our Regional tribal offices have been significantly strengthened as well.

At the national level, the Agency established a Local Government Advisory Committee and the Small Town Task Force, each chartered under the Federal Advisory Committee Act (FACA), as well as a Tribal Operations Committee. These groups meet periodically with EPA officials to help us understand the environmental challenges facing local governments, anticipate local issues, and devise smarter ways to protect the environment. EPA senior managers also meet regularly with the governors, state legislative leadership, mayors, county officials; state environmental, health and agricultural commissioners; and other state and local elected and appointed officials.

## II. Unfunded Mandates Reform Act -- Implementation of Title II

Title II of the Unfunded Mandates Reform Act of 1995 called on federal agencies to assess the impacts of agency regulatory actions and to establish a process for meaningful consultation with state, local, and tribal governments. EPA is proud of the progress it has made in implementing the President's 1993 Executive Order on Building Intergovernmental Partnerships as well as Title II of the Act.

Even prior to the issuance of the Executive Order, the Agency had begun to take significant steps to strengthen the Agency's long-standing efforts to involve officials from other levels of government in the development of regulations that will affect them. Following the

issuance of the President's Executive Order on Regulatory Planning and Review, EPA revised the Agency's internal process for development of regulations in June 1994. A primary goal of the new process is to ensure adequate participation by key stakeholders in the rule development process, with special emphasis given to involving the state, local, and tribal governments that will ultimately be responsible for implementing the rules. Guidance materials and training courses for EPA rule-writers include sections on educating and involving officials from other levels of government in the development process. EPA has stepped up efforts to disseminate regulatory information to state, local, and tribal officials and is working to ensure that we communicate requirements in language that is understandable to those who are responsible for implementation. The Agency is also working with its various advisory committees as well associations of state, local, and tribal officials to develop the networks and mechanisms needed to foster more effective involvement.

Consultation under the Unfunded Mandates Reform Act -- Title II

During 1995, the Agency published only four proposed or final rules that fell under the written statement requirements of Title II of the Unfunded Mandates Reform Act -- that is, rules "which may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year." For each of these rules, EPA engaged in extensive intergovernmental consultation:

-- Acid Rain Program: NOx Emission Reduction (Direct Final Rule);

-- New Source Performance Standards and Emission Guidelines: Municipal Waste Combusters (Final Rule);

-- Effluent Guidelines, Pretreatment Standards, and New Source Performance Standards: Metal Products and Metal Machinery (Proposed Rule); and

-- Federal Standards and NESHAPs for Marine Tank Vessel Loading Operations (Final Rule).

In all these instances, the Agency made use of a range of consultation mechanisms in obtaining input on rulemakings from state, local and tribal governments. As required by Section 203 of Title II, the Agency has also developed an interim Small Government Agency Plan to supplement

other Agency consultation activities in determining whether regulatory requirements under consideration might significantly or uniquely affect small governments.

Actions Under Development.

EPA is currently carrying out extensive intergovernmental consultation efforts on several other rules and policies that may be of particular interest to state, local, and tribal governments, including some that will not fall within the written statement criteria defined by UMRA.

Among rules of interest to local governments are proposed revisions to the lead and copper drinking water rule that will provide regulatory relief to many communities, as well as the microbial and disinfection by-product monitoring rule that have benefitted from a regulatory negotiation process. State and tribal officials serve on the EPA work group developing an important rule expected to have a large economic impact -- the pulp and paper cluster rule. State, local, and tribal governments are also represented on regulatory negotiation advisory committees and policy dialogue groups such as: Urban Wet Weather Flow (water), wood furniture (air), and hazardous waste manifests (waste). Representatives from a range of interests, including state and local government officials, are working on the Common Sense Initiative to improve environmental regulations and develop comprehensive strategies for environmental improvement in six pilot industries: automobile manufacturing, computers and electronics, iron and steel, metal finishing, petroleum refining, and printing.

EPA continues an active consultation process in developing regulations to implement the 1991 Pesticides and Ground Water Strategy, itself the result of extensive consultations. The process includes representatives of other federal agencies; state agricultural, health, and environmental agencies; tribal organizations; industry; farmers; and ground-water users. As a first step towards establishing a one-stop reporting system for certain environmental data, EPA is working to develop a consolidated reporting system for key facility information. Because this Key Identifiers Initiative raises many issues which may require a joint federal/state resolution, EPA has sought the active participation of several state, local, and tribal governments; EPA is also funding

a cooperative agreement with the National Governors' Association to provide a forum for discussing state issues on this project.

Other Intergovernmental Consultation Highlights

Following are examples of EPA's other intergovernmental consultation efforts. The summary highlights a few actions that respond directly to concerns and issues raised by state, local, and tribal governments.

- EPA established a wet weather advisory committee, with representatives from all levels of government, including small governments, to develop the Phase II stormwater program.
- The information and recommendations resulting from the Ozone Transport Assessment Group (OTAG) are likely to be used by EPA and/or states in future rule development. OTAG was established by the Environmental Council of the States (ECOS), the national organization comprised of the State environmental commissioners, to develop recommendations concerning the need for regional/national control strategies to reduce transported ozone and facilitate attainment of the ozone standard process.
- After extensive consultation and active participation of states, EPA decided to rely on existing performance-based standards and a tailored combination of guidance, education, and outreach to address Class V underground injection wells.
- EPA's final enforcement policy on incentives for self-evaluation was developed through an extensive 18-month public process in which EPA met with and took over 200 comments from state, public interest, and industry stakeholders regarding how the Agency could best increase incentives for self-discovery, self education, and self-disclosure of violations of environmental requirements.
- In response to issues being raised within the Agency, by a wide range of interested parties, and by Congress, EPA has initiated an extensive reassessment of its drinking water program in consultation with program stakeholders, including state, local, and tribal officials. The Agency is committed to a redirection of its drinking water program to focus on the most serious health risks.

**III. Regulatory Reinvention**

As a part of regulatory reinvention, EPA has also engaged state, local, and tribal officials as well as the regulated community and general public in identifying problems and proposing specific changes to existing regulations. Where new authorities are needed to address these concerns, we have also made legislative proposals.

On March 4, 1995, the President charged all federal regulatory agencies with a review of all existing regulations to identify those that were outdated or otherwise in need of reform. EPA was already engaged in revising many regulations last spring when the President issued this directive. These preliminary efforts have already borne fruit. Many of the rules and policy changes described in the preceding section were well underway at that time, as was the Common Sense Initiative (CSI) in which stakeholders are working together to devise more effective strategies for controlling pollution from six industries.

In carrying out this assignment, EPA conducted an extensive outreach effort to solicit suggestions from all stakeholders, including state, local, and tribal officials. More than 50 meetings were held around the country to gather suggestions for changes. Among the groups providing specific recommendations were EPA's Small Town Task Force and the newly-established Environmental Council of the States, comprised of the commissioners of the state environmental agencies.

EPA is working closely with states and localities, industries, and public interest groups to identify ways to modify these existing regulations to reduce the regulatory burden while maintaining progress toward health and environmental goals. The changes will run the gamut from simple clarifications to major program redirection.

As part of the broader reinvention effort, EPA has also committed to several initiatives aimed at streamlining reporting and recordkeeping requirements. First, EPA will reduce existing monitoring, recordkeeping, and reporting requirements. This effort is expected to save the

regulated community 20 million reporting burden hours annually. Second, EPA will create a one-stop reporting system for the collection of routine emissions data. Third, EPA is moving forward aggressively to enable firms to report environmental data electronically rather than with hard copy. Finally, EPA is taking steps to cut in half the reporting frequency of regularly scheduled reports. Many of these changes will reduce the paperwork and reporting burdens of state, local, and tribal governments.

EPA also understands that some of the problems faced by our intergovernmental partners are founded in the underlying legislative authority for our programs and regulations. Therefore, this Administration has also proposed legislative changes when we believe they are necessary to accomplish more effective and common sense environmental protection.

## IV. ACIR's Preliminary Report -- Title III of the Unfunded Mandates Reform Act

Title III of the Unfunded Mandates Reform Act charges the Advisory Committee on Intergovernmental Relations (ACIR) with investigating and reviewing the role of federal mandates on intergovernmental relations. ACIR was also charged with making recommendations to the President and the Congress for improving the operation of mandates -- looking at such issues as flexibility, duplication, obsolescence, and the absence of practical utility.

EPA has serious concerns about the content and recommendations of the preliminary draft ACIR report on *The Role of Federal Mandates on Intergovernmental Relations*. Many of these concerns were expressed by panelists at the recent conference sponsored by the ACIR. As I think you know, the ACIR will also be holding a public hearing on the preliminary report on Tuesday, March 26, where, as the representative of Administrator Carol Browner, I expect to join the other commissioners to hear public comment on the draft report. It is my expectation that EPA will be able to work with ACIR staff and the other Commissioners to revise the report to respond more directly to the charge set forth in the UMRA, and to present a more informed and balanced report of the role of federal mandates in intergovernmental relations.

A fundamental problem with the report is that it fails to examine why federal laws and specific provisions of those laws were enacted. For example, the ACIR preliminary report fails to discuss how the 1990 Amendments to the Clean Air Act were enacted in response to broad public concern that America had not yet achieved the benefits of clean air. The framework for the nation's clean air effort was developed under the 1970 and 1977 versions of the Act. Although considerable progress toward cleaner air had been made under this framework, the 1990 Amendments were enacted because twenty years of efforts and commitments had not brought America clean air. The ACIR's draft write-up on the Clean Air Act (CAA) is correct in stating that some of the Act's requirements have become increasingly detailed and specific over time. However, it fails to note that the Congress was clear that its reason for adding the specific requirements was years of frustration with the lack of progress in cleaning up air on the part of both the federal Environmental Protection Agency and state and local governments. Further, the preliminary report fails to note state and local support for the 1990 CAA Amendments.

Another problem with the report is its failure to consider the beneficial aspects of mandates. In its own criteria for analysis, the Commission agreed to look at the "beneficial effects" of each mandate, although it would not try to "calculate benefits or weight benefits against costs." Unfortunately, this staff draft directs little attention to the beneficial effects of federal mandates. If only costs are presented with a minimum description or assessment of benefits, any debate about what improvements are needed is skewed and biased. The revised report should include a more balanced presentation. That is essential to formulating constructive discussion and "next steps."

The report also fails to acknowledge the progress we at EPA and at other federal agencies have made in the past few years to reform our programs, as I have just described to you. While UMRA Title III charges ACIR to make recommendations for "allowing flexibility," the report does not address agency progress or models to increase flexibility. It does not do credit to the substantial progress that has been made by officials at all levels of government who are working together to reduce the burden of mandates as they previously existed. Problems that have been or

are being fixed are still presented as problems. This leaves the erroneous impression that further "fixes" are needed.

We have major concerns with respect to the preliminary report's recommendations regarding specific environmental statutes or issues. They are:

-- the recommendation to withdraw citizens' rights in the enforcement of environmental laws;

-- the call for significant relaxation of water pollution control by municipalities;

-- the proposed long-term goal of eliminating federal authority to set and enforce standards for drinking water; and

-- the proposal to limit federal authority to assure the effective control of harmful air pollutants.

We elaborated on our concerns about these four specific items in our initial response to the Commission, which is attached to this testimony for the record.

Finally, we are also very concerned about the proposal that health and safety standards applied to state and local government be different from those applied to private industry and the federal government and about the proposed changes to the Endangered Species Act. We also believe the proposal to designate a single federal agency to make binding decisions about each mandate needs careful evaluation; the solution may not fix the real problem.

The ACIR has a long tradition of serving as an honest and open forum for identifying problems in the intergovernmental system, for formulating possible solutions, and for building intergovernmental consensus among its Commissioners in support of the proposed solutions. It has done that by focusing on facts -- by trying to separate the reality from the rhetoric. It is our hope that the ACIR will continue in that tradition, and deliver to the President, Congress, and the American people a far more balanced and informative report.

## V. Conclusion

The Clinton Administration and EPA are committed to building a strong intergovernmental partnership, demonstrated by the progress we have already made. We are reforming our relationship with states, local governments, and tribes to one that is more cooperative and collaborative in nature, reinventing regulations so that they make more common sense, and providing more flexibility to our intergovernmental partners so they can tailor environmental protection efforts to their own needs and conditions.

Our goal is to forge an intergovernmental partnership that focuses on improved environmental results. We want to allow for and encourage flexible and innovative approaches to achieving environmental improvements and protecting public health while still ensuring accountability. Finally, we want to do this in a way that more fully engage our citizens. We look forward to working with Congress as we continue in this important endeavor. Thank you.

Mr. SHAYS. Thank you, Ms. Metzenbaum.

Bernard Anderson, we welcome your testimony.

Mr. ANDERSON. Thank you very much, Mr. Chairman.

I am pleased to appear here this morning, representing the Department of Labor in discussing the preliminary draft report of the ACIR and the Department of Labor's implementation of Title II under the Unfunded Mandates Reform Act. I will briefly summarize the report. We submitted a statement for the record.

Mr. SHAYS. Thank you, sir.

Mr. ANDERSON. Let me say, at the outset, that the Department has made it a policy to consult widely and often with State, local, and tribal officials in discussing any regulations and matters that significantly impact their Government. The Department also includes them in our outreach, our education, our compliance assistance efforts. And our policy and practice, in fact, predate the Unfunded Mandates Reform Act and were based, in part, on President Clinton's Executive Order 12875, on strengthening the intergovernmental relationship.

The Department of Labor has now established a formal process to ensure appropriate consultation and compliance with Title II. That is, if there is a notice of proposed rulemaking that is expected to contain a significant Federal intergovernmental mandate that exceeds the $100-million threshold, a formal consultation process will be followed to be sure that State, local, and tribal officials have an opportunity to make their views known and that we will take into account those views as we move forward with the rulemaking process.

There is a cost-benefit analysis required. The statement of how that cost-benefit analysis will be conducted will be part of the preamble to the NPRM. There are three steps in the process that will be followed. The first, of course, is to solicit comments from interested government officials. And where small government entities are affected, we will include a special emphasis on getting the views of such entities.

The second step in the process is to consider the comments provided to us by State and local officials, to have feedback, to have a discussion on those comments; and, finally, to provide compliance assistance and education on the final rule.

So while the department supports and has made real efforts to reduce regulatory burdens on State, local, and tribal governments, it does not believe these efforts should come at the expense of broad, fundamental, national labor standards protections to which all workers should be entitled.

We have serious concerns about the ACIR preliminary draft recommendations on programs of the Department of Labor because they run counter to a national commitment to protect the wages and working conditions of American workers.

In the preliminary draft report, the ACIR recommended repeal of the coverage of State and local workers under the Fair Labor Standards Act, the Family and Medical Leave Act, and the Occupational Safety and Health Act. ACIR also recommended exempting State and local construction projects below $1 million, or where the Federal assistance is less than half the project's total funding, from the requirements of the Davis-Bacon and related acts.

Because these recommendations call for dismantling vital worker protections that, for the most part, are now national in scope, the administration cannot support such recommendations. Just like the people of this Nation are entitled to be protected from having to drink unsafe water or to breath toxic air, every working man and woman should be entitled to basic minimum protections in the workplace.

ACIR's stated purpose in this preliminary draft report was to propose "changes in Federal policies to improve intergovernmental relations while maintaining a commitment to national interests." We do not believe the ACIR report achieves that stated purpose.

The report's recommendations on labor standards, if adopted, would seriously erode intergovernmental relations and irrevocably harm this Nation's commitment to American workers by endangering their right to a safe and healthy workplace, to minimum wage and overtime pay, and to the job security provided by family and medical leave policies.

The ACIR's criteria for review directed the commission to take into account the positive attributes and effects of these important laws, the rationale for their adoption, and their impact on working men and women if these protections were taken away. Yet the ACIR report does not address these important elements. There is very little recognition of the benefits these laws accord State and local government employees or their employers.

The Unfunded Mandates Reform Act directed ACIR to recommend "terminating Federal mandates only where they are duplicative, obsolete, or lacking in practical utility." So the FLSA, the FMLA, the Davis-Bacon, and the OSHA Act are certainly not obsolete. The ACIR suggestion that collective bargaining agreements can substitute for Federal standards is unrealistic, because fewer than 40 percent of all State and local government employees are covered by collective bargaining agreements.

Finally, the special role of public employers is ignored. These governmental entities should be model employers, setting examples for their private sector counterparts.

Mr. Chairman, my prepared statement includes many details, recommending specific concerns and objections that we have to the recommendations. I would ask that the subcommittee give full consideration to our views.

Let me conclude by reiterating the Department's strong support for the Unfunded Mandates Reform Act and for the value of consulting early and often with State, local, and tribal governments on issues that may affect them. The Department's recent activities demonstrate our commitment to this goal.

At the same time, we oppose the four ACIR preliminary draft proposals on statutes that fall within the purview of the Department of Labor. These proposals, if enacted into law, would undermine essential workplace protections for employees of State and local governments as well as many employees working on federally assisted State and local construction projects. I hope the commission will revise its final report in light of the Department of Labor and other concerns as they affect State and local government workers.

This concludes my statement. I would be happy to answer questions that you might have and other members of the committee.

[The prepared statement of Mr. Anderson follows:]

STATEMENT OF BERNARD E. ANDERSON
ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS
HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

March 22, 1996

Mr. Chairman and Members of the Subcommittee:

I am pleased to have the opportunity to appear today to discuss the recommendations set forth in The Role of Federal Mandates in Intergovernmental Relations, the preliminary draft report of the Advisory Commission on Intergovernmental Relations (ACIR). You have also asked that I discuss the Department of Labor's (DOL) implementation of Title II of the Unfunded Mandates Reform Act in the formulation and adoption of regulations.

Mr. Chairman, from its beginning, this Administration has worked hard to strengthen the intergovernmental partnership and to address state and local government concerns about unfunded mandates. It supported enactment of the Unfunded Mandates Reform Act. And it has taken significant steps to obtain state, local and tribal government views during the development of federal regulations and to ensure that new regulations do not place undue burdens on states and communities. The Department of Labor has been an active player in these efforts and, as I will discuss later, participated with other agencies in the Administration's efforts to implement Title II of the Unfunded Mandates Reform Act.

The Department has made it a policy and practice to consult with state, local and tribal officials in promulgating regulations that would have a significant impact on their governments. And if a final rule covers such government entities, the Department includes them in its education and compliance assistance efforts. Some examples of how DOL agencies involve state, local and tribal governments in rulemaking or in the post-rulemaking education and outreach process include the following:

- The Department's Occupational Safety and Health Administration (OSHA) actively seeks and considers state and local governments' views through its own State Plans' promulgation process.

- OSHA also conducts a number of outreach efforts which include inviting state representatives to participate as members of OSHA taskforces which develop new standards and

regulations and holding regular meetings with its State Plan partners through the Occupational Safety and Health State Plan Association.

- The Mine Safety and Health Administration (MSHA) has ongoing working relationships with state mining agencies, and mining industry and labor representatives. MSHA actively seeks input to proposed standards and regulations from these interests, and involves them in other outreach efforts. For example, MSHA held a conference for all state mining agencies to enhance cooperation and improve Federal and state coordination. The conference was attended by representatives from 40 states and the Navajo Nation.

- The Employment Standards Administration's (ESA) Wage and Hour Division has regular consultations and outreach involving state and local governments in its administration of the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA) as these laws regulate the employment practices of these governmental entities.

Mr. Chairman, while the Department supports and has made real efforts to reduce regulatory burdens on state, local and tribal governments, it does not believe these should come at the expense of broad, fundamental national labor protections to which all workers should be entitled. Having said that, let me turn now to the ACIR's preliminary draft report and its recommendations regarding statutes within the purview of the Department.

**ACIR Report and Preliminary Recommendations**

The ACIR selected fourteen Federal mandates for analysis. Four of the statutes selected for review are under the purview of the Department of Labor -- the FLSA, the FMLA, the Davis-Bacon Related Acts (DBRA) and the Occupational Safety and Health Act (OSH Act). The first three of these are administered and enforced by ESA. The OSH Act is the responsibility of the Department's OSHA.

In its preliminary report, the ACIR recommended repeal of coverage of state and local workers under FLSA, FMLA and the OSH Act. ACIR also recommended an exemption from the requirements of DBRA for state and local construction projects below $1 million or for projects where the Federal assistance constitutes less than half of the project's total funding.

Initially, I would like to emphasize that the basic theme of the ACIR preliminary recommendations affecting programs of the Department of Labor run counter to a national commitment and our mission to protect the wages and working conditions of the working men and women of this country. Because the

recommendations call for dismantling vital worker protections that, for the most part, are now national in scope, the Administration cannot support them. Our elected representatives determined long ago that certain minimum employment standards had to be observed in the working relationship between employers and their employees in order to eliminate conditions detrimental to the health, efficiency, and general well-being of workers and the economy. Just like the people of this Nation are entitled to be protected from having to drink unsafe water or breathe toxic air, every working man and woman should be entitled to basic minimum protections in the workplace -- the right to a safe and healthful working environment; to be paid at least a minimum wage; to not have to work excessively long work hours; to have our children protected from oppressive child labor; to be able to take job-protected, unpaid family and medical leave in times of temporary family and medical crises; and to not have local wages undermined by procurement requirements that favor low bidders when the Federal government invests its vast purchasing power in local economies in the form of Federal assistance to build important local construction projects.

Mr. Chairman, in addition to strongly opposing these recommendations in their current form, we also question the validity of the method, the criteria and many of the assumptions the Commission used in arriving at them. On March 1, Secretary of Labor Reich wrote to the ACIR setting forth our concerns and objections regarding its preliminary report. I ask that a copy of his letter be included in the record of this hearing.

If I may, I would like to proceed by first summarizing our major concerns and objections regarding the ACIR preliminary draft report and its findings. Then I will address each of the ACIR proposals relating to statutes within the purview of the Department.

**MAJOR DOL CONCERNS AND OBJECTIONS**

As stated by the ACIR, the purpose of its preliminary draft report was to propose "...changes in federal policies to improve intergovernmental relations **while maintaining a commitment to national interests**" (emphasis added). This stated purpose reflects the guidance of Congress in adopting the Unfunded Mandates Reform Act. That guidance is that the Commission actively consider the impact of its recommendations on American workers, and on the objectives and responsibilities of the various levels of government (Federal, State, local and tribal). Thus, the Commission was to recommend changes in federal policies in a way that would enhance intergovernmental relations while maintaining a commitment to vital national interests.

In the Department's view, the ACIR draft report does not achieve its stated purpose nor does it follow the Congressional

guidance. In fact, if adopted, the report's recommendations on labor standards would seriously erode intergovernmental relations and irrevocably harm this country's commitment to American workers by endangering their right to a safe and healthful workplace, to minimum wage and overtime pay, and to the job security provided by family and medical leave policies. If the recommendations in the report were implemented, state and local government workers would become second class citizens -- deemed unworthy of the same basic protections as their neighbors, friends, and family who work in the private sector, for Federal agencies, and now for the Congress.

DOL's major concerns with the report as drafted for comment include:

- The ACIR frequently ignored its own Criteria for Review, which direct the Commission to take into account the positive attributes and effects of these important laws, the rationale for their adoption, and their impact on working men and women. The report contains no discussion of Congressional intent in covering state and local government workers under the labor standards statutes, and little consideration is given to how workers might be affected if these protections were taken away from them.

  There is also very little recognition of the benefits these laws accord state and local government employees -- or their employers. Generally, the report analyzes these basic labor standards as though the only factor to be considered was their effect on state and local government budgets. The rights and protections of workers are treated as though they are merely another yearly "expense."

- The ACIR's Criteria ignore the directive of the Unfunded Mandates Reform Act to recommend "terminating Federal mandates" only where they are "duplicative, obsolete or lacking in practical utility." Under the Act, "concern" by state and local governments was not to be the basis for recommending termination of a mandate. The FLSA, FMLA, DBRA and the OSH Act are certainly not obsolete.

  In addition, when a mandate was found to affect a government program that directly competes with a comparable private sector activity, the ACIR was directed to consider the effects of the mandate and recommendations on both the government and private sector. The ACIR did not.

- The ACIR's assumption that collective bargaining agreements can substitute for Federal standards is undermined by the fact that only 40 percent of state and local government workers are represented by a labor union and guaranteed collective bargaining rights. (Some

government employees work for small towns and are unlikely to be represented by a labor union, while others cannot bargain collectively.) [1] Thus, it is a somewhat hollow suggestion to replace universal minimum labor standards protections based on the expectation that other forces will guarantee basic worker rights to employees of state and local governments.

- Finally, the special role of public employers is ignored -- these governmental entities should be model employers setting examples for their private sector counterparts. In fact, the recently enacted Congressional Accountability Act applied the FLSA, FMLA and other labor laws to Congress to provide those workers the same protections as employees of other employers.

I would now like to turn to our specific comments on the ACIR's preliminary draft recommendations relating to statutes within the purview of DOL.

**FOUR DOL-RELATED ACIR PROPOSALS**

**Fair Labor Standards Act**

*The ACIR report recommends repeal of FLSA's coverage of state and local government workers.*

By guaranteeing a minimum wage and overtime premium pay when an individual works more than 40 hours a week, the FLSA establishes minimum labor standards below which no one should be required to work. There is no reason to deny public servants these fundamental protections and thereby make them second class citizens. In recent years, the provision of public services such as nursing care, transportation, sanitation, water and sewer service has increasingly been done by both public and private entities, and in these instances, the Act simply ensures that every employee, regardless of his or her employer, is entitled to minimum protections in the employment relationship. Allowing state and local governments to pay less than the minimum wage and to avoid paying premium pay for overtime is unfair to the public workers and could place private employers that observe fair labor standards at a competitive disadvantage.

While not even mentioned in the draft report, Congress

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1. According to the Public Employees Bargain for Excellence: A Compendium of State Public Sector Labor Relations Laws, (Public Employee Department, AFL-CIO, 1995, p. 1.), more than half (twenty-seven) of the states have failed to pass comprehensive public sector labor relations laws extending collective bargaining to all public employees at state and local levels.

amended the FLSA in 1985 and gave special accommodations to state and local governments by providing for compensatory time off in lieu of overtime pay, special rules for the use of volunteers, and a delay in implementing compliance obligations to allow for a transition period. The ACIR report notes that DOL has provided assistance to state and local governments with respect to their FLSA obligations, and acknowledges that DOL has worked with state and local governments to recognize the unique issues that arise in the public sector context. Despite DOL's efforts, concern with FLSA can be traced to an inability on the part of state and local governments to adequately monitor their compliance obligations and a persistent misunderstanding on their part of the requirements of the Act. These are not reasons for denying workers basic minimum rights, but for strengthening the Department's ability to work with state and local governments, rather than dismantling it by repealing coverage of the public sector.

Family and Medical Leave Act

*The ACIR report recommends repeal of FMLA's coverage of state and local government employees.*

Like the FLSA, the FMLA provides a fundamental safeguard to American workers. It guarantees that workers can take job-protected unpaid leave for specified family and medical reasons. The report provides no substantive justification for repealing that safeguard with respect to public workers.

The draft report not only overstates the costs of compliance, but also ignores the substantial benefits achieved by family and medical leave policies, including improved worker productivity and morale, reduced employee turnover, and greater labor-management stability. In fact, available data show that the costs of hiring and training new employees far outstrip the costs of granting temporary leave for family or medical reasons. These data are documented in GAO and Congressional Committee reports prior to enactment of the FMLA. In addition, in 1995, the bipartisan Commission on Leave conducted a nationally representative random sample survey of private sector worksites. The survey found that the vast majority of covered worksites reported either no or small cost increases incurred in the implementation of the FMLA. We have seen no evidence to suggest that the results are any different in the public sector.

Because some state or local government leave policies that were in effect before FMLA was enacted in 1993 were at variance with FMLA's requirements, ACIR received complaints of inflexibility under Federal law. First, I would note that the FMLA grants some flexibility for state and local governments in that no state or local government family leave provision need be changed if it provides more generous rights than the Federal law

(including provisions in collective bargaining agreements). Some state and local governments asserted that FMLA compromised their collective bargaining negotiations with public employee unions. But the Act provided added flexibility in that it especially recognized employers with collective bargaining agreements by granting an extension of the law's effective date to enable collective bargaining on FMLA-related issues. In addition, the Department prepared and distributed comparisons of state and federal family and medical leave laws in an effort to assist employers, including state and local governments, in states with similar provisions in understanding their compliance obligations. Fact sheets and compliance guides were also made available. Despite the Department's efforts, once again, as with the ACIR's recommendation on the FLSA, an apparent lack of familiarity with the law becomes the basis for suggesting elimination of FMLA's important protections for employees of state and local governments. The available evidence does not support ACIR's preliminary assertions and actually shows that there is little real justification for denying state and local government employees the protections of the FMLA.

*Occupational Safety and Health Act*

*The ACIR report recommends repeal of all state coverage.*

As a preliminary matter, the Department does not agree with the draft report's assertion that a voluntary program constitutes a mandate. We do not consider it a mandate because the only state and local government workplaces covered by the OSH Act are located in the 25 states where the state legislature has voluntarily agreed to participate.

In any event, we believe -- and many states agree -- that repeal of the OSH Act with respect to public workers could endanger the health and safety of thousands of workers who perform some of the Nation's most dangerous jobs -- firefighting, hazardous waste cleanup, maintenance and sanitation work. Indeed, according to the American Federation of State, County and Municipal Employees, almost 200 of their members were killed on the job between 1983 and 1993. Public workers deserve the same protections accorded to America's private sector employees.

As with other DOL-related recommendations, the report fails to acknowledge the substantial benefits that accrue from the Act. These benefits are not limited to the health and safety of the affected workers; but include real benefits to public employers, who experience reduced worker compensation costs, higher employee productivity, and reduced liability and insurance costs, and to the general public who benefit from a reduction in the exposure to dangerous conditions in public buildings and other facilities.

The ACIR report acknowledges that several of the concerns

with the OSH Act rest on misperceptions or a lack of information. For example, the report notes that even in some states that have not volunteered to participate in Federal OSHA's program, there is a belief that OSH Act requirements are mandatory. It is difficult to imagine how this makes the case for repeal of the provisions extending OSH Act coverage to public employees in participating states. Similarly, the report charges that the credibility of safety and health programs under the Act is seriously compromised by the "perceived" rigidity, complexity and burdensomeness of the regulations, and a focus on punishment rather than compliance assistance. On the contrary, in recognition of the unique characteristics of public employers, OSHA has encouraged flexibility in state plans by 1) encouraging states to develop alternate standards that provide equivalent protection when circumstances differ from the private sector; 2) allowing states to use administrative actions instead of monetary penalties to compel compliance; and 3) permitting agency self-inspection under certain conditions. In addition, OSHA provides a great deal of assistance to states that volunteer to participate, and contrary to the ACIR report, punishment is not a focal point of enforcement, since OSHA has no jurisdiction over public workplaces. In fact, an atmosphere of cooperation pervades the Federal/State relationship under the OSH Act, as typified by a Memorandum of Understanding between OSHA and various state regulators to address areas of mutual interest.

Finally, the report suggests that Federal agencies are free from meeting OSH Act requirements, and state and local governments should have the same options. Once again, this premise is incorrect. All Federal agencies must comply with OSHA standards, as the recent debate on extending OSH Act protections to Congressional employees recognized.

Davis-Bacon Related Acts

*The ACIR report recommends an exemption for projects below one million dollars or for which the Federal grant or other assistance is less than 50 percent of total funding.*

The Federal government invests substantial funds to assist state and local governments with local public construction projects through grants and other financial assistance. DBRA prevailing wage requirements, attached to this assistance, ensure that the federal government's vast purchasing power does not depress local wage levels or disadvantage local contractors. However, DOL does not agree that DBRA requirements impose an unfunded intergovernmental mandate. The provisions apply by virtue of a state or local government's voluntary choice to participate in these Federal assistance programs.

The ACIR draft report suggests that the DBRA automatically increase public construction costs because certain low-wage

construction contractors may pay lower than prevailing wages. This flawed reasoning ignores any comparative differences in productivity from different wage levels and work experience, and the fact that the shoddy construction practices that often accompany substandard wages almost inevitably result in increased repair and maintenance costs. The report also ignores the fact that the DBRA prevailing wage is based on "measures of central tendency," and there will always be contractors who pay lower than the prevailing wages in a community. This is no basis for governmental spending to encourage or subsidize such practices.

ACIR claims that DBRA wage surveys are "voluntary and sporadic," but fails to acknowledge significant regulatory reforms undertaken to ensure that its wage determinations accurately reflect wages paid in the local community. They also claim a scarcity of data leads to importation of non-local rates. When there is a lack of recent construction, DOL looks to the surrounding area for wage data, not to "distant" areas as ACIR charges. The report asserts that DBRA may reduce the hiring of local persons with limited experience. In fact, regulatory provisions also encourage apprenticeship and training of persons with limited experience by allowing for exceptions to the journey-level wage under approved training programs.

The Administration's Davis-Bacon reform bill in the last Congress would have raised the DBRA threshold to $50,000 for alteration and repair projects, and $100,000 for new construction projects, in addition to reducing administrative burdens and costs. DOL cannot concur in the report's proposal to limit DBRA to projects of more than $1 million or which receive over 50 per cent of their financing from Federal funds. These proposals would eliminate prevailing wage protections for thousands of workers under the guise of reform.

Similarly, we have serious concerns with the report's recommendation to base coverage on the percentage of federal finance provided to the construction project. DBRA coverage must be established before the competitive bidding process begins. ACIR's proposal would disrupt that process, and impose additional burdens on state and local contracting agencies to determine if DBRA applies. Thus the proposal would make the administration of Davis-Bacon requirements more troublesome for states and local governments.

Let me now move on to discuss DOL implementation of Title II of the Unfunded Mandates Reform Act.

**DOL Implementation of Title II**

The Department has not promulgated any proposed or final rules this fiscal year that have been designated as federal mandates under Title II. However, as I noted at the outset, DOL

has made it a policy and practice to consult with state, local and tribal officials in promulgating regulations that would have a significant impact on their governments. This encompasses those that impose a "Federal intergovernmental mandate." In compliance with Title II, DOL has established a formal process to ensure this result.

When a Notice of Proposed Rulemaking (NPRM) is developed, the responsible program agency will evaluate the potential impact, if any, on state, local and tribal governments. If the NPRM is expected to contain a significant federal intergovernmental mandate (i.e., a mandate that meets the $100 million threshold), a formal consultation process will be followed to ensure that state, local, and tribal government officials are involved in the rulemaking. In addition, the required cost/benefit analysis will be conducted and a summary shared with appropriate State, local or tribal officials. Finally, the cost/benefit analysis, the specific consultation plan used, and the concerns and comments of the government officials will be summarized and made available in the preamble to the NPRM.

DOL's consultation process involves three steps. The first step is notice to and solicitation of comments from interested government officials. DOL maintains an appropriate list of state, local and tribal government contacts that can be used to solicit comments. This list includes the following: lists of towns, cities, counties, states and tribes known to be affected; contacts developed by DOL regional offices; representatives of state, local, and tribal governments; known functional counterparts to DOL agencies at the state and local level; public sector labor unions; and interested parties provided by Congressional sponsors of enabling legislation.

The program agency may use one or more vehicles to solicit comments on the regulations. Among the vehicles that may be used are inquiries and notices in the Federal Register; general interest or specialized publications; the DOL Internet homepage; and structured meetings, roundtables, seminars, workshops, and hearings.

The second step in the process is to analyze comments received and provide feedback. The program agency will analyze comments and provide feedback through written responses in the NPRM preamble. Additional feedback may be provided through such devices as individual correspondence, follow-up meetings and seminars, and the Internet.

The final step in the process involves providing compliance assistance and education on the final rule. The program agency will take one or more of the following steps to help educate and assist state, local and tribal governments: send compliance

materials to the list of commenters and other participants in meetings and workshops; provide notices of availability of materials on the Internet or from program offices and DOL's Office of Public Affairs through mass media, press releases, and the like; and hold seminars or workshops, and send DOL experts to business and labor meetings and conferences.

When the Department promulgates rules that would significantly or uniquely affect small governments, it will use a consultation process similar to that described above, with an emphasis on developing input from small government entities.

**CONCLUSION**

I would like to conclude by reiterating the Department's strong support for the Unfunded Mandates Reform Act, and for the value of consulting early and significantly with State, local, and tribal governments on issues that may affect them. The Department's recent activities demonstrate our commitment in this area. At the same time, we oppose the four ACIR preliminary draft proposals pertaining to statutes within the purview of DOL. These proposals, if enacted into law, would undermine essential workplace protections for employees of state and local governments, as well as many employees working on Federally-assisted state and local construction projects.

Mr. Chairman, in his March 1 letter to the ACIR, Secretary Reich strongly urged the Commission to specifically review its draft recommendations with those dedicated public servants whose employment would undergo profound changes by virtue of the report's recommendations. Hopefully their interests will be represented at next week's ACIR hearing. And I also hope the Commission will revise its final report in light of the concerns expressed there and in other public comments.

This concludes my prepared statement. I would be glad to respond to any questions you or the members of the Subcommittee may have.

Mr. SHAYS. Thank you.

We are probably going to have a vote around 11:30. Jamienne Studley, you have now an opportunity to give your testimony.

Ms. STUDLEY. Thank you, Mr. Chairman, and members of the subcommittee.

I am pleased to be here to highlight the Department of Education's extensive State-local-Federal partnerships and consultation activities, and to comment on the ACIR staff draft report. I am honored, also, to be here with our distinguished Assistant Secretary for Special Education and Rehabilitative Services, Judith Heumann.

American education has always been a partnership. State, local, and tribal governments and community school boards are responsible for almost all education decisionmaking and funding. The Federal Government provides leadership, seed money for innovation and coordination, and critical funding for national priorities in education, including the education of disadvantaged and disabled children, job training, teacher training, technology, and access to higher education. The Federal Government provides assistance and leadership; it does not regulate the Nation's educational system.

Guided by three dedicated education leaders and former Governors, President Clinton, Secretary Riley, and Deputy Secretary Kunin, our commitment to genuine partnership with State and local governments is stronger than ever. And thanks to innovative education reform laws passed with bipartisan support, Goals 2000, the Improving America's Schools Act, and Schools-to-Work Opportunities, the Department has a statutory foundation built around flexibility and partnership with States and localities.

The Clinton administration has focused the Federal role in elementary and secondary education on supporting States' efforts to establish challenging academic standards, with State-designed assessments, and accountability geared to those standards. In 48 States and 10,000 schools, Goals 2000 funds are being used to develop and implement those academic standards. No new regulations were issued to carry out Goals 2000, and the application form for States is only four pages long, to allow maximum flexibility.

As a result of the Improving America's Schools Act, States and schools have more independence and less red tape than ever before to decide how best to use Federal funds. Most dramatically, schools that enroll at least 50 percent low-income students may combine most of their Federal education funds with their own State and local resources to support school-wide improvements without the burden of separate tracking and other recordkeeping requirements.

Finally, in that triumvirate, the School-to-Work Opportunities Act, also implemented without any new regulations, launched a powerful set of partnerships that add business and community organizations to the State-local-Federal team, to improve skills training and promote effective transitions from school to work.

One of the clearest indicators of true partnerships is trust. The President's regulatory reinvention initiative asks all agencies to increase flexibility, reduce regulations and, in general, to base our relationships with our partners and customers on trust. If actions speak louder than words, the Department of Education's actions in this area speak loudly indeed.

The Department has eliminated 79 percent of the regulations affecting its elementary and secondary programs. Where regulations are essential, such as when they are required by Congress or are necessary to promote educational quality or avoid abuses, the department's principles for regulating require us to do so as flexibly and with as little burden as possible.

But even with fewer and more flexible rules, sometimes the best way to advance our partnerships with States and localities is to waive Federal requirements that may make sense, generally, but that interfere with a specific State or district strategy.

Goals 2000, School-to-Work, and the Improving America's Schools Act gave the Secretary of Education unprecedented authority to provide those waivers for many statutory and regulatory requirements, and we are using that authority boldly. Close to 100 waivers have already been granted to State and local partners in the last year.

The most dramatic example of the Department's new flexibility is the Education Flexibility Partnership Demonstration Program, or Ed-Flex, established under Goals 2000. The Secretary has given six State education agencies the authority to waive Federal statutory and regulatory requirements, to remove barriers to effective teaching and learning. Kansas, Massachusetts, Ohio, Oregon, Texas, and Vermont have been appointed as Ed-Flex States, joining us in a unique partnership.

Of course, our partnerships go well beyond the statutory and regulatory and characterize all aspects of the Department's operations. I have provided some examples in my testimony.

With respect to Title II of the Unfunded Mandates Act, we recognize that the partnerships I have been describing depend on early, open, and extensive communication among partners. I am proud that Education has an impressive record of successfully communicating and sharing the development of policy with affected persons, organizations, institutions, and governments, including school system.

For example, we recently convened more than a dozen workshops across the country, with tribal representatives and others, to discuss programs and regulations under the Elementary and Secondary Act that affect American Indians. Most relevant for today's conversation, in developing the administration proposal to reform and reauthorize the Individuals With Disabilities Education Act, IDEA, we consulted with more than 3,000 parents, educators, and administrators, representing a wide spectrum of viewpoints.

We have not created a special new process for intergovernmental consultation because our existing outreach has proven effective and satisfies Title II. With respect to small governments, also mentioned under the act, we have made special efforts to advise them of potential requirements and to solicit their recommendations.

Mr. Chairman, we were disappointed by the ACIR's draft report and, in particular, with its treatment of IDEA. First, it was inappropriate to include IDEA in the draft report, because it enforces the constitutional rights of individuals with disabilities through the establishment of statutory rights that bar discrimination. The Unfunded Mandates Act itself recognizes that such constitutional rights are to be given a preferred status.

IDEA has already helped millions of students with disabilities become fully participating members of our society. Before IDEA, approximately 1 million children with disabilities were totally excluded from the public school system and another 4 million did not receive appropriate services.

Reform of IDEA is a major priority of the Department and is well underway. Yet the draft report did not even refer to our reauthorization proposal or consultation. The proposal was presented to Congress on June 30, 1995, and is moving well along in both houses. Our proposal reduces administrative burden and paperwork for State and localities, and, in particular, goes beyond the report in several critical ways, including calling for impartial mediation services to reduce the severity of disputes and to avoid formal proceedings whenever possible.

We are adamantly opposed to the recommendation that any court challenge be brought by the Federal Government and not by parents themselves. Depriving parents of these rights would be fundamentally inconsistent with the intent of the law to create individual rights.

With your permission, I will attach Secretary Riley's letter to Governor Winter, the chair, to our testimony. I am pleased to report that we, too, are having positive and constructive discussions with the ACIR staff, and look forward to improvements. Thank you.

[The prepared statement of Ms. Studley follows:]

STATEMENT OF JAMIENNE S. STUDLEY
DEPUTY GENERAL COUNSEL FOR REGULATIONS AND LEGISLATION
U.S. DEPARTMENT OF EDUCATION

BEFORE THE
SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 22, 1996

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to highlight the Department of Education's extensive state-local-federal partnerships and consultation, and to comment on the ACIR staff draft report. I am honored to introduce our distinguished Assistant Secretary for Special Education and Rehabilitative Services, Judith Heumann.

**Enhancing the Nation's Education Partnership**

American education has always been a partnership. State, local, and tribal governments and community school boards are responsible for almost all education decisionmaking and funding. The federal government provides leadership, seed money for innovation and coordination, and critical funding for national priorities, including education of disadvantaged and disabled children, job training, teacher training, technology, and access to higher education. The federal government provides assistance and leadership; it does not "regulate" the nation's educational system.

Guided by three dedicated education leaders and former governors, President Clinton, Secretary Riley, and Deputy Secretary Kunin, our commitment to genuine partnership with state and local governments is stronger than ever. And thanks to innovative

education reform laws passed with bipartisan support -- Goals 2000, Improving America's Schools Act, and School-to-Work Opportunities -- the Department has a statutory foundation built around flexibility and partnership with states and localities.

Let me provide some examples of how the Department of Education is working, in the words of the Unfunded Mandates Act, whose anniversary we mark today, "to strengthen the partnership between the Federal Government and State, local and tribal governments."

The Clinton Administration has focused the federal role in elementary and secondary education on supporting state efforts to establish challenging academic standards, with state assessments and accountability geared to those standards. In forty-eight states and 10,000 schools, Goals 2000 funds are being used to develop and implement those academic standards. No new regulations were issued to carry out Goals 2000, to allow maximum flexibility at the state and local levels.

As a result of the Improving America's Schools Act, states and schools have more independence, and less red tape, than ever before to decide how best to use federal funds. Most dramatically, schools that enroll at least 50% low-income students may combine most of their federal education funds with state and local resources to support schoolwide improvements, without the burden of separately tracking federal dollars and other recordkeeping requirements.

The School-to-Work Opportunities Act, also implemented without any new regulations, launched a powerful set of partnerships that add businesses and community organizations to the state-local-federal team to improve skills training and promote effective transitions from school to work. Fifty states have School-to-Work planning grants to develop a comprehensive state plan. Twenty-seven states and 67 local communities are already implementing their partnership programs, consulting with business

and community groups and getting technical assistance from us as the federal partner.

The Administration is also working with states and localities to create successful charter and magnet schools. In 1993 the President proposed to provide start-up funds for public charter schools around the nation; today 11 states are taking advantage of these funds. The Department is using its expertise to evaluate what makes for effective charter schools, so that states and localities can increase their chances of success.

**Increasing Flexibility and Providing Waivers**

One of the clearest indicators of true partnership is trust. The President's Regulatory Reinvention Initiative asks all agencies to increase flexibility, reduce regulations, and in general to base our relationships with our partners and customers on trust. If actions speak louder than words, the Department of Education's actions in this area speak loudly indeed.

The Department has eliminated 79% of the regulations (234 pages) affecting its elementary and secondary programs (Office of Elementary and Secondary Education and Office of Bilingual Education). Where regulations are essential (such as when they are required by Congress or necessary to promote educational quality or avoid abuse), the Department's "Principles for Regulating" require us to do so as flexibly, and with as little burden, as possible.

Even with fewer and more flexible rules, sometimes the best way to advance our partnership with states and localities is to waive federal requirements that make sense generally but that interfere with a specific state or district educational strategy. Goals 2000, School-to-Work, and the Improving America's School Act gave

the Secretary of Education unprecedented authority to provide waivers from many statutory and regulatory requirements, and we are using that authority boldly.

Close to 100 waivers have been granted to states and local partners in the last year. These include waivers that allow the Fort Worth, Texas schools to target extra Title I funds to overhauling four high-poverty, inner city schools, and the Riverview Consortium in Shippensburg, Pennsylvania to use its teacher training funds beyond math and science to focus on needs identified by member districts.

The most dramatic example of the Department's new flexibility is the Education Flexibility Partnership Demonstration Program ("Ed-Flex") established under Goals 2000. Under Ed-Flex, the Secretary has given six state education agencies the authority to waive certain federal statutory and regulatory requirements to remove barriers to effective teaching and learning. Kansas, Massachusetts, Ohio, Oregon, Texas, and Vermont have been approved as Ed-Flex states, joining the federal government in a unique partnership.

Of course, our state-local-federal partnerships go well beyond the statutory and regulatory spheres to characterize all aspects of the Department's operations. For example, we are working to consolidate and make more user-friendly the technical assistance services we provide to state and local school systems. We are also helping states develop consolidated plans for education reform and improvement that promote broader, system-wide planning and eliminate unnecessary paperwork and burden.

**Implementing Title II of the Unfunded Mandates Act**

The partnerships I have been describing depend on early, open, and extensive communication among partners. To that end, Title II of the Act requires agencies to develop effective processes to ensure that State, local, and tribal government officials can provide meaningful and timely input on significant Federal intergovernmental mandates, as well as to educate and provide notice to small governments regarding regulatory requirements that significantly or uniquely affect them.

I am proud to say that the Department has an impressive record of successfully communicating and sharing the development of policy with affected persons, organizations, institutions, and governments--including school systems--regarding the full range of the Department's endeavors. We work with our partners to develop and get comment on legislative proposals, regulatory reforms, research priorities, program administration, non-regulatory guidance, and technical assistance.

For example, the Department recently convened more than a dozen workshops across the country with tribal representatives and others to discuss programs, and their regulations, under the Elementary and Secondary Education Act of 1965 that affect American Indians.

The Department regularly convenes and attends meetings all over the country for student financial aid administrators, many of whom are State officials, to solicit suggestions for reducing burden while increasing accountability. In fact, these discussions have led to a series of recent regulatory reinventions.

Most relevant to today's topic, in developing the Administration proposal to reform and reauthorize the Individuals With Disabilities Education Act (IDEA), we consulted with more than 3,000 parents, educators, and

administrators, representing the widest possible spectrum of views.

The Department has not created a special new process for intergovernmental consultation, because existing outreach has proven effective and satisfies Title II.

With respect to small governments, the Department supplements the regular notice and comment regulatory process with special efforts to advise them of potential requirements and to solicit their recommendations. We do this through meetings across the nation, visits to grantees, technical assistance, and other forms of outreach. In particular, the Department's Office of Intergovernmental and Interagency Affairs works with small governments through regular meetings with such organizations as the National School Boards Association, the National Association of Counties, and the National Association of Towns and Townships.

**Improving the ACIR Draft Report**

Mr. Chairman, we were very disappointed by the ACIR's draft report for reasons you have already heard discussed, and in particular with its treatment of IDEA. I will summarize briefly the principal causes of our concern.

(1) It was inappropriate to include IDEA in the draft report because it enforces the Constitutional rights of individuals with disabilities through the establishment of statutory rights that bar discrimination against such individuals. The Unfunded Mandates Act itself recognizes that such rights are to be given a preferred status. Through IDEA, millions of students with disabilities have been helped to become fully participating members of our society; before IDEA, approximately one million children with disabilities were totally excluded from the public

school system, and another four million did not receive appropriate educational services.

(2) Reform of IDEA is a major priority of the Department, and well under way. Yet the draft report does not even refer to the Department's wide consultation with parents, educators, and administrators that led up to the reform proposal, which was presented to Congress on June 30, 1995. Our reform proposal would reduce administrative burden and paperwork for State and local school systems, so they can focus their energies on improving educational results for children with disabilities. In some important respects, we anticipated, and indeed went beyond,the recommendations in the draft report. For example, the reform proposal would call for school systems to offer impartial mediation services to parents who are unhappy with the educational services provided to their children, which would significantly reduce the number of disputes that might otherwise lead to costly formal proceedings.

(3) We are adamantly opposed to the recommendation that any court challenge based on IDEA be brought by a State or Federal agency, not by parents themselves. Depriving parents of these rights is fundamentally inconsistent with the intent of the law to create individual rights in parents and students. Denying parents' right of action would substantially undermine IDEA enforcement nation-wide. At the same time, as the ACIR's own statistics demonstrate, IDEA does not generate a disproportionate amount of litigation (on average, slightly more than one reported case in the Federal courts for each State in 1994). Nevertheless, further "Federalizing" enforcement -- requiring intrusive Federal investigations and Federal versus State litigation -- could hardly promote greater intergovernmental harmony and cooperation.

I am attaching to my statement, for the record, Secretary Riley's letter to Governor Winter, Chairman of the ACIR, detailing our

concerns. I am pleased to report, however, that there are grounds for optimism that the ACIR's draft report can be turned into a thoughtful and useful document. We have had promising discussions with ACIR staff and look forward to further conversations.

Mr. Chairman, this concludes my remarks. Assistant Secretary Heumann and I would be happy to answer your questions.

UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

March 6, 1996

Honorable William Winter
Chair
Advisory Council on Intergovernmental Relations
South Building, Suite 450
800 K Street, NW
Washington, DC 20575

Dear Governor Winter:

As a member of the ACIR, I share your commitment to effective local, state, and federal partnerships and to development of a useful, balanced report from ACIR to the Congress on Federal mandates. In addition, as Secretary of Education I have a special responsibility for implementing the Individuals with Disabilities Education Act (IDEA) in a manner that is consistent with the legislative goal of promoting educational opportunities for children with disabilities. I am therefore taking this opportunity to explain to you the grave concerns I have with the IDEA portion of the draft staff report, beyond those noted in Marcia Hale's letter to you of March 1, 1996.

At the outset, I want to underscore my strong belief that inclusion of IDEA in the staff draft report is inappropriate because IDEA enforces the Constitutional rights of disabled individuals under the Equal Protection Clause of the Fourteenth Amendment and establishes statutory rights that prohibit discrimination on the basis of disability. Section 4 of the Unfunded Mandates Act itself indicates clearly that, for the purposes of the Act, such rights are to be given a preferred status. In addition, the rights established under IDEA are not only personal rights, but rights that directly reflect the fundamental obligation of State and local governments to avoid discrimination in carrying out their governmental functions. For these reasons, IDEA should not even be included in the report, and, to my mind, its inclusion makes the report unacceptable.

Turning to the specifics of ACIR's draft recommendations, I have the following serious concerns, each of which supports my view that the discussion of IDEA should be dropped from the report:

(1) "Increase Federal Funding to 40% Level." While not disagreeing in principle that it would be desirable to increase the level of Federal funding, the five-fold increase called for by ACIR is simply not realistic in light of current budget realities. Moreover, as noted above, the obligations imposed on States and local school systems under IDEA are rooted in the Equal Protection Clause of the Fourteenth Amendment; IDEA was

enacted in 1975, and signed by President Ford, to assist the States and school systems to meet their basic Constitutional obligations. Accordingly, it is neither realistic nor appropriate to link, as the draft staff report does, compliance with IDEA requirements to dramatic funding increases.

(2) "Relieve States From Administrative Mandates." As described below, many of the provisions of the Administration's proposal to reform and reauthorize IDEA are designed to reduce burden and paperwork at the school, school district, and State level and redirect those energies into improving educational outcomes for disabled children. These provisions are already the subject of considerable Congressional interest.

(3) "Require Alternative Dispute Resolution Practices." The Administration's proposal would require States to offer impartial mediation to parents as a no-cost optional means of settling disputes between them and the school district regarding services provided to their disabled child. We considered, and rejected as impractical, requiring parents to avail themselves of mediation, based in part on the comments of State administrators with experience in the operation of mediation systems.

(4) "No Private Right of Action." I am strongly opposed to ACIR's fourth recommendation, to require that any court challenge based on IDEA be brought by State or Federal agencies, not parents. My opposition is based on the following considerations:

(A) Depriving parents and students of the ability to vindicate their rights under IDEA in court, if necessary, is fundamentally inconsistent with the intent of the law to create individual rights in those parents and students, and would call into question the nature of the "rights" created.

(B) While one of the objectives of the Administration's proposal is to promote means of settling disputes between parents and school systems without using litigation, the amount of litigation spawned by IDEA is not disproportionate. IDEA serves each year approximately 5.4 million disabled children in approximately 16,000 school districts across the country, and according to ACIR's study, there were 61 reported cases in the Federal courts under IDEA in calendar year 1994--on average, slightly more than one in each State.

(C) Without correspondingly large increases in funding for Federal enforcement staff (e.g., investigators, resolution experts, and litigators)--an unlikely result in today's climate, and not called for by the draft staff report--IDEA enforcement would be substantially undermined. Even if additional Federal resources were available, it is hard to see how further

"Federalizing" the enforcement function, of necessity involving intrusive investigations and Federal versus State litigation, would promote intergovernmental harmony and cooperation.

(D) As a practical matter, because the rights conferred on disabled students and their parents by IDEA are rooted in the non-discriminatory principles of other Federal laws that may be enforced through a private right of action (e.g., section 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause of the Fourteenth Amendment), it is unlikely that such parents and students would be kept out of the Federal courts merely by removing IDEA's cause of action.

Another weakness of the draft staff report is that it does not recognize that reform of IDEA is a major priority of this Department, consistent with our mission of promoting education of high quality for all children, and that reform is well under way. Following extensive consultation with over 3,000 parents, educators, and administrators, representing the widest possible spectrum of views, the Administration presented its legislative proposal for the reform and reauthorization of IDEA to Congress on June 30, 1995. With an overall goal of improving educational results for children with disabilities, that proposal anticipated several concerns raised by ACIR and incorporates numerous suggestions for reducing burden. Among the basic objectives of our reform proposal are reducing administrative burden and paperwork for State and local school systems and promoting the resolution of disagreements between parents and schools through mediation rather than litigation.

In closing, let me point out that the benefits of IDEA to America have been significant. Through IDEA programs, millions of students with disabilities have been helped to become fully participating, working members of our society rather than be dependent on public funds. Before the IDEA, some one million children with disabilities were totally excluded from the public school system, and another four million did not receive appropriate educational services to enable them to have full equality of opportunity. Since 1976, the number of disabled children served has increased by 44 percent.

I appreciate this opportunity to express my deep concerns about the discussion and recommendations pertaining to IDEA in the draft staff report. I regret that, for the reasons described above, I consider the inclusion of IDEA in the report, as well as the draft proposed recommendations, to be unacceptable.

Yours sincerely,

Dick Riley

Richard W. Riley

Mr. SHAYS. I thank you. That's one of the primary benefits of a preliminary report is that it allows people to comment.

Before we have a vote, I would like to give our chairman of the full committee an opportunity to question the panel; also, our ranking member. With that, Mr. Chairman.

Mr. CLINGER. Thank you very much, Mr. Chairman.

I thank all of our panelists for very good testimony. I think it has been very helpful to us on this first anniversary of the passage of this landmark piece of legislation.

Ms. Katzen, you indicated that because of furloughs and so forth—and I can certainly appreciate that—that there was some delay in getting the thing off the ground. Given the fairly brief period now that we've had the act in place, how would you assess agencies' compliance with the requirement that they submit to you their plans and proposals? Is there uniformity in that? Do you find that some are more willing to be cooperative and others are dragged kicking and screaming to comply with the provisions, or have you found it to be pretty uniform?

Ms. KATZEN. I think it's quite varied, but not because of a reticence or hostility on the part of any agencies. I think it's really because of their different mandates and their different missions. And I would break it into two parts.

There are the consultative plans that they were supposed to set up, and we had set much of that in motion with Executive Order 12875. And there it really depends on how many regulations are issued. Some of the departments were quite skeletal, but they also never issue regulations that have an intergovernmental impact, like the Department of Defense or Department of State. Some of the others are quite detailed and elaborate.

On the analysis part, again, it will be more of a function of the expertise within the departments and the agencies and the amount of work they have done. DOT and EPA are among the strongest agencies in doing the kind of analysis that we are looking for, in terms of costs and benefits. Some of theirs are more susceptible to quantification, but then there are a whole variety that are not.

Some of the other agencies are less experienced. Last year—or I guess it was the last Congress—created an Office of Risk Assessment at the Department of Agriculture, in part because there was not the same level of expertise. That is dramatically changing, and we are beginning to see, in many instances, substantially improved analyses.

Whether it's a function of our own Executive Order 12866 on regulation, generally, or the Unfunded Mandates Act, specifically, or the two operating in conjunction, I'm gratified that we are seeing, I think, a substantial improvement in the work the agencies are doing.

Mr. CLINGER. OK. The mandates law requires agencies to select the "least costly, least burdensome, or most cost-effective alternative in the rulemaking process, unless it would be," and the law says, "inconsistent with law." With regard to a number of rules addressed in your report, this "inconsistent with law" exemption was invoked, and a more costly rule was promulgated because of the invoking of the "inconsistent with law" exception.

Can you tell us how you feel the agencies are interpreting the "inconsistent with law" exemption, and might it be interpreted too broadly? In other words, might it be used as sort of an umbrella to avoid having to really do the kind of analysis that you need to do to identify the "least costly, most effective" alternative?

Ms. KATZEN. I think there is generally strong good faith in the interpretation of the legal mandates. One or two of the instances—in fact, I think two of the five involve EPA, RCRA instances. One was a final rule and one was a proposal. And in both instances they said quite clearly, "The law is making us do it."

We also, at the same time, sent up to the Hill what we called the "RCRA rifle shot" to change the provision of the law that was causing this distortion, and it was passed unanimously by the House, through Corrections Day. This was a change of the law, not a change of a regulation. It was passed unanimously by the Senate.

And I think it's on its way to the President where I know that he—well, he has indicated his intention to sign it. So that will change the legal—I hate to say I know something is going to happen. Since I'm under oath, I can only tell you what my knowledge is of this.

But I believe that this is the kind of example where they have identified a legal barrier to doing something that they wanted to do and, at the same time, have provided the recommendations to the Congress to ease that situation.

Mr. CLINGER. Just one quick final question. Do you review the request for a waiver and don't accept it just at face value?

Ms. KATZEN. Oh, yes, we do.

Mr. CLINGER. In other words, that they are really justified in claiming that waiver.

Ms. KATZEN. Yes, sir.

Mr. CLINGER. OK. Thank you.

Mr. Chairman, thank you. I think my time has expired.

Mr. SHAYS. Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Ms. Studley, in April of last year, GAO released a report entitled, "School Facilities: America's Schools Not Designed Or Equipped For The 21st Century." GAO found that schools with 50 percent or more minority population were more likely to have unsatisfactory environmental conditions such as lighting, physical security, less likely to have technology elements, and went on to talk about, even if they got equipment, the wiring would not be sufficient. Basically, what it said was that those that are behind will stay behind and will not have an opportunity to catch up.

Without Federal education mandates, how can we address inequities such as these? Let me just give you a list of things. What are the likely results of eliminating a Federal presence in education altogether? Are we likely to see a greater burden on metropolitan areas? Would there be additional impacts on disadvantaged children?

You can answer in any order you like.

Ms. STUDLEY. Certainly, reduced Federal participation in this partnership would have all of those serious effects. We have calculated, for a number of districts and States, precisely what those

are. I would be happy to provide them for you and the other members of the committee.

Because the Department's role is to serve the particular priorities—and your list, I think, was very similar to ours—disadvantaged children, disabled children, technology, and teacher training, we provide often the glue that lets people make some headway in those areas.

We cannot carry, as the Federal Government, the full burden of facilities reconstruction, and so forth. But we do try, for example, through the President's recent technology initiatives, to right that balance so that those discontinuities don't get any worse than they are, and indeed so that we can try and bring all schools up to a level where children can achieve to high standards.

The budget cuts would have very serious effects, most particularly in districts that are very dependent on Title I support for education of disabled children. Similarly, with some of the other programs that you mentioned, we would slip further behind and those disparities would become greater. I would be happy to provide more specific detail, as the Secretary did recently before this committee.

But thank you for your concern. It's a serious problem.

Mr. TOWNS. Right. Mr. Chairman, I would like to request that that material become a part of the record.

Mr. SHAYS. Without objection, it will definitely be.

Mr. TOWNS. Ms. Metzenbaum, the ACIR recommends modification to the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Endangered Species Act. In your opinion, can these modifications be implemented without undermining the intent of these laws?

Ms. METZENBAUM. Thank you for your question, Congressman. The specific recommendations that are set forth in the ACIR preliminary report give us great trouble. We have serious concerns about being able to achieve the public health and environmental protection goals that we think need to be achieved and that the laws are currently achieving.

We recognize that there are some individual problems with specific provisions of the act, and have been working hard and aggressively with State, local, and tribal governments to identify what those are, to fix them administratively, wherever that is possible, and in some cases where we need legislation, to work with them in Congress to try and fix them legislatively.

However, the specific provisions set forth in the ACIR report are very troubling to us, and we think they would cause serious harm.

Mr. TOWNS. Thank you.

I just have one more question, Mr. Chairman.

Thank you, Ms. Metzenbaum.

Mr. Anderson, how is OSHA a mandate? Isn't it applicable only in State and local workplaces which have agreed to be covered by it? That's my understanding.

Mr. ANDERSON. That's correct. States can enter into agreements with OSHA to cover their workplaces under the regulations and the standards that are established by OSHA. But the OSHA Act does not cover States and local communities. And I think there are 27 States that have entered into such agreements, and they work closely with the national OSHA in monitoring the workplaces and

in applying the various regulations and the standards that OSHA is responsible for.

Mr. TOWNS. Thank you very much.

Mr. Chairman, I see the red light is on. I yield back.

Thank you very much, all of you, for your testimony.

Mr. SHAYS. The gentleman can have more time, if you want. Are you all set?

Mr. TOWNS. No. I'm OK.

Mr. SHAYS. OK. Thank you.

Let me just try to understand. First off, it wouldn't be the policy of this committee and certainly not this chairman, in the first year of an implementation of anything as dramatic as this, to throw stones at either the administration or, in fact, Congress, on how we implement it, and even, candidly, ACIR, until we kind of sort it through.

I make the assumption that all of us are trying to make this system work. I mean, I take the President at his word that he was eager and proud to sign this legislation. What troubles me, and you can help sort it out, is that, in 3,000-plus regulations, there were only 16 that seemed to trigger that $100 million threshold. Maybe you could give me a sense—and I will throw this out, and I can hear both, particularly Department of Education and Department of Labor.

No regulation triggered that $100-million threshold. EPA had nine. My understanding is that 9 of the 16 were EPA, Department of Transportation was 3, HHS was 3. I was surprised, at HHS, there were only three. And one was DOE, Department of Energy, not Department of Education.

So my question is, help me understand how it turned out to only be 16? And then, if the two officials from those departments had none, if you would tell me which regulations came close that didn't quite meet the standard?

Ms. KATZEN. Mr. Chairman, the number of regulations that are issued are often misleading by a long shot, because it covers a whole host of things, from setting the course for the America's Cup, to Med fly quarantines of the peach crop in California, to changing the locks on the St. Lawrence Seaway. So 3,000 proposed and final regulations, most of them are either routine, administrative, or whatever.

We have found that roughly—in 1994, I think shy of 200 regulations hit the threshold for our Executive order review, which defines a significant regulation as a regulation that has an economic effect of $100 million or more, or a serious on-budget effect.

Mr. SHAYS. Is that related to an Executive order or the mandate bill?

Ms. KATZEN. No, that's related to our Executive Order 12866.

Mr. SHAYS. Which it parallels?

Ms. KATZEN. Which is not quite parallel, and that's the reason for the difference. We define a significant regulation as something posing a novel legal issue—it may not have any dollar impact—as being inconsistent. If EPA and OSHA are both promulgating a regulation dealing with asbestos, even if neither one comes close to $100 million, they will nonetheless be reviewed by my office, be-

cause an action taken or proposed by one agency may be inconsistent with another.

Now, we have found—as I say, for 1994, roughly 135 to 150 regulations were viewed as significant.

Mr. SHAYS. Let me interrupt you there and just ask, what doesn't happen in this legislation, it's not like when you modify a building and you decide to get up into the ceilings, and you have asbestos, then you've got to redo the whole thing. If you have a regulation that amends a very comprehensive regulation, you just look at that new regulation. You don't say, "Well, this new regulation deals with a whole host of other topic regulations dealing with"—do you get the drift of my question?

Ms. KATZEN. I do, indeed. The legislation is premised on the incremental expenditures required by the additional regulation.

Mr. SHAYS. OK. Let me then just go, if I could—because my time is running out.

Ms. KATZEN. The other thing that I have to add is, it's not $100 million effect on the economy, or we would have the Persian Gulf war syndrome and other kinds of things where we do have regulations that have that effect. It's $100 million in expenditures by either State, local, and tribal governments or the private sector. That's definitional. That's one of the reasons we had to sort through which were covered and which weren't.

Mr. SHAYS. And that's important. We fully realize that it's one thing for us to pass a law, and it's quite another thing to see how the law is implemented and impacts society.

Why don't we go with you, Ms. Studley.

Ms. STUDLEY. The Department of Education's regulations are virtually all outside the definition of Federal intergovernmental mandates because we provide assistance. So the same goes for the $100 million. First of all, very, very few of our programs require that level of expenditure, and, if they do, the money comes from us.

Mr. SHAYS. You basically are providing the money.

Ms. STUDLEY. If we say, "You need to do something," we usually—we virtually always provide Federal money to make it possible. So we're quite outside.

Mr. SHAYS. OK. Thank you. That's helpful.

Mr. Anderson.

Mr. ANDERSON. Yes, Mr. Chairman. In the Department of Labor, the statutes that would be of greatest interest here would be the FLSA, the FMLA, and OSHA, and in the Fair Labor Standards Act and Family Medical leave, there simply have not been any regulations that would even approach the $100-million threshold.

I was just given information by OSHA. I don't have responsibility for OSHA; I'm in another box in the Department of Labor. But the information that was just presented by one of the OSHA staff members is that there have been two final regulations since the beginning of 1995, a modification to change the handling of a regulation, another one in the logging area, and neither of these regulations even approaches $100 million.

Mr. SHAYS. OK. I think you've answered the question. Thank you very much.

Can I just ask, before recognizing Mr. Fattah, is there any one that—and I don't want a long answer—was there any regulation

that came close to meeting that threshold in either the Department of Education or Labor?

Mr. ANDERSON. We would have to provide that information for OSHA. In the areas of employment standards administration, there have been no regulations that even approach $100 million.

Mr. SHAYS. Thank you. Mr. Fattah, thank you for your patience.

Mr. FATTAH. Thank you, Mr. Chairman.

I do want to make note that, as relates to this report, part of the requirement was also for the ACIR to look at State mandates and their impacts on local governments. Both the chairman and you were helpful in having that amendment added, which I sponsored. The report mentions nothing about what is, at least where I come from, the principal concern of local government, which are State mandates. We had Congressman Talent testify about group homes. I know a little bit about group homes, and 99 percent of the regulations emanate from State government.

So, along with my other criticisms of this report and comments about it, I wanted to mention that.

I have heard all of you testify that the repeals and the recommendations that have been put in this preliminary document raise a great deal of concern to you in your various departments. I'm having a lot of difficulty with the decisions of this study group. They say, for instance, that family and medical leave is not a national priority, yet it passed the Congress with a bipartisan majority, and it was signed by the President. I'm not sure how, in the wisdom of the group here, they determined that this is not a national priority.

Now, Congressman Payne earlier tried to talk about some of the procedural problems, and I want to put in the record, it's my understanding that only 7 of some 30 members of the ACIR were there when this matter was voted on, that there was not a great deal of consultation with people on this report. So it's helpful to hear your views, as it relates to your various departments, about it.

This is an important law, and it is obvious that the magnitude of its impact on the Federal Government is a little less than what may have been touted originally, since there have not been that many regulations that have the threshold impact. It's still an important issue, and we need to deal with it. But this report raises a great deal of concern about the directions of some people involved in the process.

Dr. Anderson, is there any reason, in your view, that people who are employed by State and local government should not be covered by the protections provided by the Fair Labor Standards Act?

Mr. ANDERSON. I can't think of any reason, Mr. Fattah. In fact, you know, when you really look at this carefully, with respect to our national interest in having policies that protect American workers, from the worker's point of view, it makes little difference as to whether they are employed by General Electric or General Shalikashvili. A job is a job, and the working conditions, and the terms and conditions of that work are the same. The identity of the employer really does not make a difference.

In fact, you can go even beyond that and say that State and local government—in fact, even the Federal Government—should be a

model for our society with respect to the terms and conditions and opportunities for working men and women. The public sector should set the standard, in many ways, for positive and helpful and supportive working conditions for people.

Mr. FATTAH. Let me follow this up a little bit, because I'm new to the Congress, but I have taken note of a great deal.

Mr. SHAYS. You can only use that one term, then you're part of the problem.

Mr. FATTAH. There's been a lot of criticism about the fact that, for a long period of time, the Congress exempted itself and its employees from these protections. And we've corrected that through the Accountability Act, so we're all covered now. Now we want to create a situation where State and local governments would be subjected to this type of criticism, where they would, alongside their private sector workers, not be obligated to meet these.

Would it make any sense for us to pass this uneven application of Federal law on to State and local government?

Mr. ANDERSON. No, I can't think of any sense that it would make. In fact, it would diminish the standard of living for many, many workers in this country. It is for that reason that we certainly cannot support that recommendation.

Mr. FATTAH. All right. Well, thank you. I know that, in some quarters, people have wanted to criticize public employees in a great deal of ways. I can just imagine, if this report were to become the law of the land, we would be adding to the kind of cynicism that from some quarters has emanated about the government.

So I'm just concerned about it. I'm sorry, again, that I can't vent my concerns appropriately, since there's no one here who is defending this preliminary report that has been issued.

So thank you.

Mr. SHAYS. Mr. Fattah, I understand why your expectation was what it was to come here. I will just promise the gentleman that we will have a specific hearing on this report. It is a report to Congress, and Congress can put it on the shelf and let it get dust, or we can take action on it. So the gentleman's authority, as a Member of Congress, will be very active in terms of how he responds to that report.

Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. SHAYS. Oh, I'm sorry. I apologize. Mr. Souder.

Mr. GREEN. Mr. Souder. That's right.

Mr. SHAYS. Excuse me. It's Mr. Souder's turn. I was looking to my right.

Mr. GREEN. Well, you found him.

Mr. SOUDER. I'll try to reinforce that judgment.

I have a couple of concerns in looking at the testimony and hearing what you said. I think that I want to give credit where credit is due, even though that's hard sometimes for me to do with the administration, but I believe you have made efforts to reduce regulations, reduce Federal overhead, that that's been going on in most departments. I think we've helped push that, but I think that the President, as a Governor, was committed to a lot of that, too. So I understand that.

But I still have a problem with what I feel was the tone in a number of the comments going through here and a number of the assumptions. It's one thing to say that State and local governments should be model employers. It's another thing for us to say "must." In fact, when we do things that say they have to do certain things, we're not into the realm of encouraging, saying they should be. The question here is, must they be, and do we enforce that?

I also think that, while it's not at a personal level, and it's driven by legitimate concerns for individuals and the issues that you work with, nevertheless, there is a tone of hostility that comes through and, to some degree, arrogance, that the Federal Government is some sort of protector of the environment, of working people, of schools; State and local governments are not.

There's also this implication that the Federal Government somehow is going to do a better job of protecting State and local employees; that, if we, for example, don't enforce these laws, somehow there is going to be this terrible persecution of State and local employees.

The environment is going to go to pieces, we won't have as good an education system, we'll have workers persecuted again, if it wasn't just for this fortunate thing that we have the Federal Government to come down and do this type of thing. And there's a tone there underneath it that says, without us, these other elected officials and these other Americans aren't going to do a very good job.

Now, in fact, when it's clear cut—and I think that where we're going to have agreement on our panel here and there is that there are some things that, at the very least, historically, have been not—I mean, we can look at labor. We can look at how minorities were treated. We can look, in the IDEA, and say the Government stepped in. The question is, how much are we going to back off, how fast? Are the conditions the same? When you have a situation where you try to rectify it and then move it back, where do you go?

But I have a concern that when, for example, in Dr. Anderson's testimony, you said that you favor eliminating mandates only when they are duplicative, or that—and this is really where I want to come—I want to make a statement—come to this question, and that is, I didn't hear any concerns about one group of elected officials telling another group of elected officials what to do, or about how we draw a balance of one government telling another government that they, in effect, need to raise taxes and revenue in order to do certain things that the other branch of government feels.

Specifically, how would you delineate, since the report doesn't appear to, where there is a compelling national interest versus a feeling that one government would like to run the other government?

Ms. KATZEN. If I could start, just as a general overview from the administration, I regret if there is any perception of arrogance. I think what this President has stood for from the very beginning is consultation with, working with, harmonization with our intergovernmental partners.

These are terms which I had not heard in Washington in the last 25 years until we had a former Governor. And I thought Jamienne Studley's comments about the Department of Education, which has two former Governors at its helm, is very telling. So if you perceived that beneath the surface, as I say, I regret that. I think this

administration believes that there are productive, constructive ways to work with State and local governments.

I would point out that, with respect to the ACIR report, they are attacking laws that were passed with bipartisan support by both Democratic and Republican Members of Congress, signed by both Democratic and Republican Presidents over the years.

They reflect, I had thought, a national consensus that certain conditions, certain rights were appropriate at the Federal level. Whether they should be imposed with command-and-control rather than flexibility, whether there is only a one-size-fits-all, or harmonization are very legitimate questions.

But I think what some of the panel members were reacting to—and I'll let them speak for themselves in this regard—was to sort of almost dismissedly say, "These statutes impose mandates. We're not going to look at the benefits. We just see the costs, and we want to walk away from them," was an attitude that we thought was not in keeping with the kind of consultative, harmonizing, intergovernmental partnership that has, I think, characterized this administration.

Ms. METZENBAUM. Mr. Chairman, may I try and answer that?

Mr. SHAYS. Yes. We're going to try to end with your panel, and we have about 11 minutes left. So if you can give a quick response.

Ms. METZENBAUM. I just wanted, Congressman, to respond to your question that we think the Federal Government knows more or knows better, and I don't think that's our view at all. I think that, in our work with State and local governments, the effort has been to figure out which governmental party ought to do what. And the real issue is, there is a role for the Federal Government.

As we look at the history of our laws, for example, the Safe Drinking Water and Clean Air Acts, you will find not only bipartisan support for passage of these laws but also State and local government supporting the passage of the laws. So it's really a recognition that sometimes you need a Federal role. That doesn't mean that the Federal Government knows better, but rather that all of the parties need to work together. The Federal Government needs to do something, and States need to do something, and locals and tribes need to do things.

Mr. SHAYS. Do you want to make a last comment?

Mr. SOUDER. I just want to make a brief comment. I agree that particularly when things cross State lines—environment, in particular, may run into that, others—there are certain interests where the Government has a compelling interest.

But I do not agree with the premise that—and I didn't accuse people of not being friendly in the relations or trying to do that—what I said was that when one side has the power and has the determination of whether a waiver occurs, whether or not, you still have an implied superiority/inferiority relationship that implies the one doesn't.

That's all.

Mr. SHAYS. What we're going to try to do is, Mr. Green, we're going to have you proceed, as a member of the committee, then allow Mr. Payne to finish up.

And I just want to say, at this time, I will miss the third panel. I am taking control of the floor time against repeal of the assault

weapon ban, and I need to be on the floor during the debate on the repeal of the assault weapon ban. So Mr. Towns is going to help out and then Mr. Davis. I apologize to the third panel.

I'm sorry, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. Before we have to run and vote and finish the panel, I would like to just ask one brief question of Mr. Anderson.

Mr. Anderson, I know in your testimony you talked about Davis-Bacon, and in the next panel we will have a member from the School Board Association talk about Davis-Bacon requirements. It's my understanding—and I served 20 years in the legislature, so I understand about mandates that I got tired of from Washington—but under Federal Davis-Bacon laws, a school district wouldn't have to comply with that unless they received Federal funding; is that correct?

Mr. ANDERSON. That's correct.

Mr. GREEN. So a lot of the Davis-Bacon requirements probably go from what we call in Texas "prevailing wage laws" that were passed by the individual legislatures.

Mr. ANDERSON. Yes. By those States, yes.

Mr. GREEN. OK. So the testimony we're going to hear in a few minutes by the School Board Association, or anyone else, is that the Davis-Bacon requirements only flow if that school is being built by some Federal funding.

Mr. ANDERSON. If that school is being constructed with Federal funds or with some contribution of Federal funds, yes.

Mr. GREEN. OK. Thank you, Mr. Chairman. I'm going to run and vote, and I'll be back for the third panel.

Mr. SOUDER [presiding]. I want to thank the panel for putting up with questions, and if we have additional written questions, and working together with us, because it's the start of this type of analyzing; it's not the end.

The committee stands in recess.

Mr. PAYNE. Mr. Chairman.

Mr. SOUDER. May I have your attention. I wasn't paying close enough attention. The committee is reconvened for questions from Mr. Payne. Sorry.

Mr. PAYNE. Well, I'll be very brief, because I have no other choice.

Let me just ask, on the whole question of education, the Individuals With Disabilities Education Act, one of the recommendations is that the individual will be unable to bring a lawsuit, only the State or the Federal agency. What likely impact do you see on the education of children with disabilities and their parents if the individual right of action of the individual is taken away?

Ms. STUDLEY. We are very concerned that this would select out one particular constitutional right in our country and deprive parents and children of that right, selectively, when all other constitutional rights can be pursued in the Federal courts by individuals themselves. But let me introduce, again, Assistant Secretary Judith Heumann, who is certainly the expert in this area.

Mr. SOUDER. We need to do a quick swearing in of all witnesses at the hearing.

[Witness sworn.]

Ms. HEUMANN. Basically, I think it goes without saying that we believe that parents have an individual right to be able to litigate when there are egregious problems. But I would also like to say that, in the reauthorization of the IDEA that the administration proposed last June, which is currently before your committee, we have placed in the proposal mediation. And it's our belief, if mediation were required by all the States, that the issue of litigation would also be substantially reduced.

Mr. PAYNE. Thank you. Also, I was just going to ask, what do you think, with the Clean Water Act, if the Federal Government got out of it and returned it to the States, where do you see clean air and clean water going?

Ms. METZENBAUM. Well, I think there's a track record you can look at here. For years, we had a voluntary approach with drinking water. Prior to 1974, public health standards were voluntary, and we had significant noncompliance. With the passage of the drinking water law, we have significantly upgraded quality of water for people to drink. The same is true with clean water. The States are asking us to help in negotiating cross-boundary issues. The same with clean air.

I think that if some of the recommendations in the preliminary report were passed, not only the Federal Government, but especially the State and local governments would have significant difficulties doing what they need to do to provide environmental protection. They have wanted the Federal role there, and that's why we think we need to take a scalpel to fix what's really broken and not fix problems that don't exist, that are just apocryphal.

Mr. PAYNE. Just mend it; don't end it. Right? Thank you.

Mr. SOUDER. The hearing stands in recess.

[Recess.]

Mr. DAVIS [presiding]. We are ready for our next panel. Before us we have the Hon. Vincent F. Callahan; Michael Resnick, the executive director of the National School Boards Association; and George Balog, chairman of the Urban Forum.

You know it is the policy of this committee to swear in all witnesses. I would ask you to raise your hands.

[Witnesses sworn.]

Mr. DAVIS. Please be seated. I note for the record that the witnesses answered in the affirmative.

This is a real pleasure.

I'm sorry. Mr. Saunders, do you want to stand up and do this?

[Witness sworn.]

Mr. DAVIS. Let me start. The first person I will recognize is Vince Callahan, who is a member of the Appropriations Committee in the Virginia House of Delegates.

And it's great, Vince, to see you here.

As you know, I cut my teeth in politics working on Vince Callahan campaigns in Fairfax County, when I was in high school and later in college. So he has been like a patron saint to those of us who have risen through the Republican ranks in Fairfax. We are very pleased to have you here today.

**STATEMENTS OF HON. VINCENT F. CALLAHAN, JR., MEMBER, VIRGINIA HOUSE OF DELEGATES; MICHAEL A. RESNICK, SENIOR ASSOCIATE EXECUTIVE DIRECTOR, NATIONAL SCHOOL BOARDS ASSOCIATION; GEORGE G. BALOG, CHAIRMAN, URBAN FORUM, AMERICAN PUBLIC WORKS ASSOCIATION; AND LEE SAUNDERS, ASSISTANT TO THE PRESIDENT, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES**

Mr. CALLAHAN. Thank you, Mr. Chairman. As I was talking to you earlier, I'm one of these politicians who actually represents the district within the Beltway, and there's not too many in this country. So I perhaps have a little different view of Washington and my service in Richmond.

I've been a member of the House of Delegates for 28 years and served the past 6 years as chairman of the Virginia Advisory Commission on Intergovernmental Relations, the ACIR. As a matter of fact, it was my legislation that created the Virginia ACIR some 7 years ago. I have witnessed the effects of unfunded Federal mandates on the Commonwealth and its localities, especially the difficulties posed by concurrent increases in Federal statutory and regulatory requirements and decreases in Federal aid.

As an example, Danville, VA, a city of less than 55,000 people, is statistically ranked as one of our localities with above average fiscal stress. In fiscal year 1993, Danville reported spending 13,800 staff hours to comply with the Americans With Disabilities Act. These costs, combined with other ADA-related costs, totaled $176,000 for that single mandate alone. Despite the ADA's laudable goals, the commitment of that level of personnel and financial resources for a locality experiencing fiscal stress seems too much to ask.

In all, $6.3 million, or almost 16 percent of Danville's local source revenue, was spent in 1993 funding 10 of the more than 200 Federal mandates. As you know, all costs are not quantifiable.

I would like to tell you about the unfunded Federal mandates in my State, to assess the progress that has been made, and to propose further improvements. I appreciate the opportunity to be before this body, particularly on the first anniversary of the Unfunded Mandates Reform Act.

The new law has already made a difference. It played a major role recently in averting a proposed mandate in the telecommunications legislation that would have profoundly affected local governments. This was something, particularly in my neighborhood, when we got in this business of monopolies. You might have heard that term. It helped preserve local zoning authority and control of public rights-of-way. This is progress.

The Unfunded Mandates Reform Act was also the catalyst for the new cost estimation unit of the Congressional Budget Office, which has established networks of State and local officials and other experts throughout the country to collect data about the cost of Federal mandates. The Virginia ACIR helped identify 60 such individuals in our State who have agreed to participate in the CBO's networks and are standing by. Getting accurate data about the cost of mandates, including long-term cost, opportunity cost, and hidden cost, is critical for relieving the burdens that mandates impose.

Other signs of progress on the Federal level include a new willingness on the part of Congress to reassess existing mandates. This new attitude was manifested by the recent repeal of two mandates: the 55-mile-per-hour speed limit and the recycled crumb rubber requirements in highway construction.

The EPA's new participatory approach to rulemaking and proposed changes to allow more local flexibility in implementing environmental mandates are also steps in the right direction. And your proposed Local Empowerment and Flexibility Act promises further help. The application of the Fair Labor Standards Act to congressional personnel is also a significant achievement.

However, mandates still cause concern. An onerous new reporting requirement was incorporated into H.R. 3019, the continuing resolution passed earlier this month. The Unfunded Mandates Reform Act does not address such conditional mandates, only direct ones, nor does it apply to discretionary mandates, mandates already in existence, or to those mandates that have been exempted. Though we are optimistic, the full effect of this new law remains to be seen.

The only Federal agency that currently serves as a resource to help States and localities with intergovernmental issues, the highly respected U.S. ACIR, is slated for termination by the end of this year. States and local governments need more relief. In some cases, it can be provided through specific manageable changes.

I do not dispute that important national interests, such as protecting endangered species, ensuring safe drinking water, and controlling air and water pollution, can justify mandatory Federal standards. But our commitment to national goals should not undermine intergovernmental relations. A balanced Federal-State-local approach to these issues, a partnership, will be more effective than imposed, rigid, intrusive, prescriptions.

Because service delivery is local, the benefits of consulting State and local representatives before creating a mandate are apparent. Those directly affected can identify alternative, less costly technologies, multijurisdictional approaches, or other win-win solutions.

Besides more consultation, let me suggest other changes Congress might consider. Mandated Federal programs should emphasize performance goals but should not dictate specific procedures. States and localities should be encouraged to achieve results in the manner they think best. Incentives should be built in. Federal standards should be based not only on benefits but also on cost. From that perspective, a completely risk-free environment may not be feasible. Therefore, the highest priorities, the most serious threats, should be addressed first.

The Federal Government should offer resources such as scientific data and technical support to help strengthen governments at a State and local level. Statutes and regulations should be clearly written to reduce the exposure of States and localities, especially smaller ones, to the risk of litigation. Rules should be simplified to reduce paperwork. New rules should be pilot-tested. Unnecessary complexity and confusion should be eliminated through agency coordination.

States offer many examples of programs that work. Virginia has several that could serve as models. In addition to compiling a cata-

log of mandates, assessing existing mandates, and conducting annual fiscal impact analyses of proposed new State mandates, our State has enacted a relief measure that allows the Governor to declare a 1-year suspension of a State mandate for any locality that demonstrates fiscal stress which can be alleviated by such a moratorium. This is an example of local flexibility which Congress could emulate.

In addition, Virginia's legislature has just designated the Virginia ACIR as a forum for any locality seeking to challenge a mandate assessment or a fiscal note. Congress should consider providing a similar forum, perhaps the U.S. ACIR. Surely, other models abound.

In closing, let me say that States and localities are grateful for the progress that has been made, and we are mindful that much more can be done. As you contemplate intergovernmental options, bear in mind that, as partners, we can work together to make government better for all of us.

Thank you.

[The prepared statement of Mr. Callahan follows:]

## UNFUNDED FEDERAL MANDATES: REPERCUSSIONS AND RECOMMENDATIONS

Remarks made on March 22, 1996 by the Honorable Vincent F. Callahan, Jr., Member of the Virginia House of Delegates and Chairman of the Virginia Advisory Commission on Intergovernmental Relations before the U. S. House of Representatives Subcommittee on Human Resources and Intergovernmental Relations, The Honorable Christopher Shays, Chairman

Mister Chairman, Members of the Subcommittee, my name is Vincent Callahan. I have been a member of the Virginia House of Delegates for twenty-eight years and have served for six years as Chairman of the Virginia Advisory Commission on Intergovernmental Relations. I have witnessed the effects of unfunded federal mandates on the Commonwealth and its localities—especially the difficulties posed by concurrent increases in federal statutory and regulatory requirements and decreases in federal aid.

An example: Danville, Virginia, a city of less than 55,000 people, is statistically ranked as one of our localities with above average fiscal stress. In fiscal year 1993 Danville reported spending 13,800 staff hours to comply with the Americans with Disabilities Act. These costs, combined with other ADA-related costs, totaled $176,600 for that single mandate. Despite the ADA's laudable goals, the commitment of that level of personnel and financial resources for a locality experiencing fiscal stress seems too much to ask. In all, $6.3 million, or almost 16% of Danville's local source revenue, was spent in 1993 funding ten of the more than 200 federal mandates. And, as you know, not all costs are quantifiable.

I would like to tell you about unfunded mandates in my state, to assess the progress that has been made, and to propose further improvements. I appreciate the opportunity to address this body—especially on the first anniversary of the signing of the Unfunded Mandates Reform Act. This new law has already made a difference. As you know, it played a major role recently in averting a proposed mandate in the telecommunications legislation that would have profoundly affected local governments. It helped preserve local zoning authority and local control of public rights-of-way. This is progress.

The Unfunded Mandates Reform Act was also the catalyst for the new Cost Estimation Unit of the CBO, which has established networks of state and local officials and other experts throughout the country to collect data about the costs of federal mandates. The Virginia ACIR helped identify sixty such individuals in our state who have agreed to participate in the CBO's networks and are standing by. Getting accurate data about the costs of mandates—including long-term costs, opportunity costs, and hidden costs—is critical for relieving the burdens that mandates impose.

Other signs of progress at the federal level include a new willingness on the part of Congress to reassess existing mandates. This new attitude was manifested by the recent repeal of two mandates: the 55-mile-an-hour speed limit; and the recycled crumb rubber requirement in highway construction.

The EPA's new participatory approach to rule-making and proposed changes to allow more local flexibility in implementing environmental mandates are also steps in the right direction. And, Congressman Shays, your proposed Local Empowerment and Flexibility Act promises further help. The application of the Fair Labor Standards Act to Congressional personnel is also a significant achievement.

However, mandates still cause concern. An onerous new reporting requirement was incorporated into HR 3019, the continuing resolution passed earlier this month. The Unfunded Mandates Reform Act does not address such conditional mandates, only direct ones. Nor does it apply to discretionary mandates, to mandates already in existence, or to those mandates that have been exempted. Though we are optimistic, the full effect of this new law remains to be seen. The only federal agency that

currently serves as a resource to help states and localities with intergovernmental issues, the highly respected U. S. ACIR, is slated for termination by the end of the year.

States and local governments need more relief. In some cases, it can be provided through specific manageable changes. I do not dispute that important national interests, such as protecting endangered species, ensuring safe drinking water, and controlling air and water pollution can justify mandatory federal standards. But our commitment to national goals should not undermine intergovernmental relations. A balanced federal-state-local approach to these issues—a partnership—will be more effective than imposed, rigid, intrusive prescriptions. Because service delivery is local, the benefits of consulting state and local representatives before creating a mandate are apparent. Those directly affected can identify alternative, less costly technologies, multijurisdictional approaches, or other win-win solutions.

Besides more consultation, let me suggest other changes Congress might consider. Mandated federal programs should emphasize performance goals but should not dictate specific procedures. States and localities should be encouraged to achieve results in the manner they think best. Incentives should be built in. Federal standards should be based not only on benefits but also on costs. From that perspective, a completely risk-free environment may not be feasible. Therefore, the highest priorities, the most serious threats, should be addressed first. The federal government should offer resources, such as scientific data and technical support, to help strengthen governments at the state and local levels. Statutes and regulations should be clearly written to reduce the exposure of states and localities, especially smaller ones, to the risks of litigation. Rules should be

simplified to reduce paperwork. New rules should be pilot tested. Unnecessary complexity and confusion should be eliminated through agency coordination.

States offer many examples of programs that work. Virginia, for example, has several that could serve as models. In addition to compiling a catalog of mandates, assessing existing mandates, and conducting annual fiscal impact analyses of proposed new state mandates, our state has enacted a relief measure that allows the Governor to declare a one-year suspension of a state mandate for any locality that demonstrates fiscal stress which can be alleviated by such a moratorium. This is an example of local flexibility which Congress could emulate. In addition, Virginia's legislature has just designated the Virginia ACIR as a forum for any locality seeking to challenge a mandate assessment or a fiscal note. Congress could consider providing a similar forum, perhaps the U. S. ACIR. Surely, other models abound.

In closing, let me say that states and localities are grateful for the progress that has been made, and we are mindful that much more can be done. As you contemplate intergovernmental options, bear in mind that, as partners, we can work together to make government better for all of us.

Mr. DAVIS. Vince, thank you very much.

We will hear now from Michael Resnick.

Mr. RESNICK. Thank you, Mr. Davis.

My name is Michael Resnick, and I am pleased to testify on behalf of the National School Boards Association on this, the first anniversary of the Unfunded Mandates Reform Act. NSBA was pleased to work with the Congress to secure enactment of this important legislation.

Since then, Congress has not legislated any new unfunded mandates on school systems at the threshold level. Therefore, we cannot report on how well the mechanisms of the law are working, although, unfortunately, we may have that opportunity if a recent Senate committee amendment to extend the mandate of the Occupational Safety and Health Act to State and local government, including school districts, survives the legislative process.

Following the important step that was taken last year to recognize the cost of future mandates, the time now has come for Congress to re-evaluate or modify its existing mandates. Many of these have been set forth in the ACIR report. The Nation's 16,000 local school boards, 96 percent of whom are elected, spend upwards of $300 billion per year to educate over 40 million schoolchildren in 80,000 school buildings, and employ 4.8 million personnel. Therefore, any mandate on an enterprise this large will have a significant impact on the use of public dollars to achieve our primary mission: education.

For school districts, unfunded mandates translate into a preemptive use of scarce and regressive local property tax dollars to fund Federal priorities, many of which are not related to the education of children. As a matter of principle, we recognize that the Federal Government has the right to regulate certain activities in the school setting. Our concern stems largely from the lack of restraint when those mandates substantially interfere with the basic education mission of school districts, either because of the degrees of regulation and/or the costs involved.

Unfunded mandates are especially onerous, not just because of their cost, but because Congress has no financial incentive to set priorities, to engage in proper cost-benefit analyses, to consider the overall impact of all its mandates, and to re-evaluate older mandates to determine whether they have stood the test of changed circumstances or new information.

Contrary to popular belief, with the exception of the Individuals With Disabilities Education Act, school districts' problems with Federal mandates are not tied to activities within the Department of Education but to mandates administered by other agencies, primarily in the labor and environmental areas, such as the Davis-Bacon Act, OSHA, the Fair Labor Standards Act, the Drug and Alcohol Testing Program for commercial drivers, the Clean Air Act, and the Asbestos Hazard Emergency Response Act program.

We urge Congress to review these unfunded mandates to determine if they have stood the test of changed circumstances and new information. For example, the repeal of the Davis-Bacon Act would permit schools to address the multibillion-dollar cost of buildings in ill repair. Today, too much of the work, estimated by the GAO to be $112 billion, is not getting done because costs are unaffordable.

We certainly share the concern that was raised by Mr. Towns earlier regarding the infrastructure needs of school districts. We believe the potential of repealing Davis-Bacon, Mr. Towns, may give school systems more flexibility to have their construction dollars go further.

In some circumstances, of course, having a mandate for construction will result in the inability of school districts to fund their regular program. For example, in the case of California and other States that have assessment caps on them, if they seek to raise more money to fund construction—and have even difficulty passing bond issues—financing the expense may translate out into less money for the rest of their education program.

In the area of asbestos, school districts continue to face enormous abatement costs, even though scientific evidence now suggests that the kinds of asbestos fibers used in school construction do not pose the same risk as the industrial fibers that were identified as the basis for establishing the original mandate. Unfortunately, since Congress is not paying for the abatement cost, it has not shown any interest in determining whether modifying this mandate is justified, despite what may be unnecessary costs for school systems.

Extending OSHA to school systems provides another example of an unfunded mandate that cannot stand up to cost-benefit analyses in the school setting. The vast majority of public school employees are not doing jobs where OSHA could substantially improve their safety; therefore, why mandate the system upon us?

Finally, the Individuals With Disabilities Education Act is a prime example of an underfunded mandate whose costs are somewhat out of control. This mandate costs school systems over $30 billion a year in additional costs. School districts have paid an average of 38 cents of every new school dollar spent, year in and year out, since 1967, for this program. In the face of these costs, the Federal Government only pays about 8 percent of the cost of its mandate, despite its legislative commitment to pay 40 percent.

As indicated in our written testimony, IDEA is laden with administrative costs and rules that cost school systems billions of dollars per year in paperwork, lawyering activity, and opening school systems to costs that should reside with insurance companies and other agencies.

Changes can be made without diminishing the commitment and appropriate services that are needed by children with disabilities. Therefore, NSBA, like the ACIR report, supports continuing the Individuals With Disabilities Education Act, but with modifications. Although Congress, after 20 years, is finally considering making changes, they are only modest, at best.

In conclusion, the time has come for Congress to re-evaluate existing mandates, especially in light of Federal cuts being proposed in the appropriations process. The time is especially ripe for Congress to remove unnecessary and lower priority mandates, as well as to assume greater financial responsibilities for the mandates that are kept.

I appreciate this opportunity to testify and would be happy to answer any questions that you may have.

[The prepared statement of Mr. Resnick follows:]

Michael A. Resnick
Senior Associate Executive Director
National School Boards Association

## I. INTRODUCTION

I am Michael Resnick, Senior Associate Executive Director of the National School Boards Association. NSBA represents the 95,000 local school board members who are responsible for governing the nation's local public school districts. I am pleased to be here with the members of Congress who have worked so hard to bring and sustain congressional focus on the problems created by unfunded federal mandates. NSBA specifically would like to acknowledge the work of Senator Kempthorne and Congressman Portman to achieve passage of the Unfunded Mandates Reform Act. And now, NSBA appreciates the opportunity to testify one year later on an issue of such great importance to every school board across the country.

## II. INTEREST OF LOCAL SCHOOL BOARD MEMBERS

As locally elected and appointed government officials, school board members are uniquely positioned to address federal legislative programs from the standpoint of public education, without consideration to their personal or professional interests. The vast majority of school board members are not paid for their service. Rather, they give their time because they care about the education of their own children and the children in their community. The education, health, and safety of those children is a very real concern for these community leaders. They want to ensure that the children in their community get the very best education that can be provided. Unfortunately, unfunded federal mandates all too often preempt local ingenuity and the fiscal resources those community leaders need for the education of their community's children.

## III. GENERAL PRINCIPLES REGARDING UNFUNDED FEDERAL MANDATES AND THE SCHOOLS

Public education today has a difficult mission—to make sure that the public schools, which educate 90 percent of the nation's children, are ready to meet the challenges of a global economy in the 21st century. School board members, who have the primary responsibility for public education at the local level, must be even more vigilant to stay focused on this mission because of many competing priorities on the schools, including those from the federal government.

In addressing mandates, NSBA fully acknowledges that the federal government does have an interest in regulating certain activities within the public school setting. However at the same time, given our constitutional system of government, the federal government should exercise restraint when it does regulate the public functions of state and local government—including those of local school systems. Further, in areas of legitimate federal interest, Congress must show self restraint in the scope of the mandated costs involved, including the creation of duplicative administrative systems, which for local school districts means time and money that otherwise could be committed to the education of our nation's children. Finally, and perhaps most important to the purpose of today's hearing, if Congress imposes a mandate on local school systems, it should bear the financial cost. That is, if the mandate is truly in the national interest, then Congress should be willing to pay for it.

For public education to succeed, there must be a collaborative partnership among the three levels of government in approaching mandates. By contrast, under the current practice, the federal government simply places unfunded mandates on local school boards without taking into account the real consequences, either in terms of the individual mandate or the sum total of all its mandates.

Because the federal government is disconnected from the financial responsibility of its mandates, we believe that it has little incentive to: 1) set priorities among or within mandates; 2) engage in meaningful cost-benefit analyses; 3) or reevaluate existing mandates once they are put on the books. Meanwhile, school systems across the country are struggling to find the money to pay for the programs the federal government has required. Too often, the consequences of implementing costly, federally mandated programs means school boards face unpalatable trade-offs: larger class sizes, postponing purchases of up-to-date curriculum material, even eliminating educational programs— especially in those communities that do not have the capacity to raise taxes.

The Economic Policy Institute study entitled, *Where's the Money Gone?* released in 1995, estimated that 26 cents of every new dollar spent by schools systems between 1967 and 1991 were invested in the general education program, while 38 cents were spent on mandated special education programs. Of the remaining 36 cents, a substantial portion was spent on other unfunded federal or state mandates. Most taxpayers would be surprised to know how much of their local property taxes, which they thought were being spent for basic education, were being preempted to meet unrelated federal mandates.

Local school boards across America are trying to ensure that our students obtain the education they deserve. But the federal government must understand that every dollar we spend to fulfill an unfunded or under-funded federal mandate either comes at the expense of an increasingly resistant local property taxpayer or at the expense of the educational program. The result is that school districts are increasingly losing the public's confidence that we are meeting our main educational mission, as they see increasing costs and bureaucracy, which all to frequently, as verified in the EPA study, are caused by the implementation of federal mandates.

This Congress needs to review existing mandates and set priorities so school districts can continue to focus on their main mission—the education of our children for the global economy of the 21st century. Congress has made an excellent beginning in passing the Unfunded Mandates Reform Act to stop the flow of future mandates. The Advisory Commission on Intergovernmental Relations (ACIR) also has begun the thoughtful process of examining the impact of existing mandates, and NSBA commends the commissioners for their report.

## IV. EXAMPLES OF MANDATES ON SCHOOLS

At this point, I would like to turn to several of the specific unfunded mandates that school districts face to help define the scope and magnitude of this important issue.

Contrary to popular belief—with the exception of the Individuals with Disabilities Education Act (IDEA)—most federal mandates on school systems are imposed by agencies other than the U.S. Department of Education. Consistent with ACIR's finding regarding local government generally, the Davis-Bacon Act, the Occupational Safety and Health Act, the Fair Labor Standards Act, drug and alcohol testing of commercial drivers, the Clean Air Act, and the Safe Drinking Water Act, are examples.

### A. Davis-Bacon Act

The repeal of the Davis-Bacon Act would permit school districts across the country to repair or replace aging school buildings at a much faster pace than is currently being done because scarce tax dollars would go farther in school construction projects. NSBA found, in a 1995 survey of school board members, that more than 60 percent of those who responded said federal and state Davis-Bacon laws had increased the cost of a recent construction project. More than half of the respondents said the increase was as much as 20 percent. NSBA

advocates the repeal of this outdated federal mandate so that scarce taxpayer dollars can be used to repair or upgrade 20 percent more school facilities.

**B. Occupational Safety and Health Act (OSHA)**

NSBA opposes any effort to extend OSHA coverage to federal, state, and local public employees. Earlier this month, this unfunded federal mandate was added in the Senate Labor and Human Resources Committee mark-up of the OSHA reform act; and this amendment will be the first real test of the Unfunded Mandates Reform Act when the bill reaches the Senate floor. In 1992, the Texas Association of School Boards estimated that it would cost more than $10 million to implement only selected OSHA regulations in Texas public school districts. This is just one state's estimate of the onerous cost burdens this unnecessary and duplicative federal mandate would impose. Few argue that OSHA coverage would improve the safety in schools, while creating a duplicative structure.

**C. Environmental Mandates**

NSBA has advocated the use of risk assessment and cost-benefit analysis before environmental mandates are enacted. These processes would help ensure that any federally mandated abatement of an environmental hazard is necessary and cost-effective. Yet there has been great resistance to this approach, in part, we believe, because the federal government does not bear an adequate share of the financial responsibility.

Asbestos abatement, which has cost the country's schools at least $10 billion, is one example where accurate risk assessment can produce substantial savings. Federal laws governing asbestos removal treat harmless asbestos the same as dangerous asbestos. Scientists now recognize the harmless variety as accounting

for 95 percent of the asbestos used in the United States—especially in the area of school construction. Yet, schools have spent too many of their scarce education dollars on federal asbestos abatement that was not needed. Yet, Congress has not been willing to reexamine the specifics of its mandate, again we believe, because it has no financial incentive to do so.

A second unfunded environmental mandate that was nearly imposed on school districts during the last Congress was a mandate on all schools in EPA-determined, high-priority areas to test for radon. Despite convincing evidence that no health hazards were posed in schools, Congress was prepared to impose a mandate, and at a standard that substantially exceeded international levels and substantial costs to school systems. Again, the federal legislation would have been easy to enact because there was not financial responsibility for those who would prefer to "err" on the side of doing more than what the evidence indicated was needed.

**D. Individuals with Disabilities Education Act**

Finally, ACIR identifies the Individuals with Disabilities Education Act (IDEA) as one of the major unfunded federal mandates. NSBA agrees that this is one of our most expensive, under-funded mandates. At the same time, we supported the law when it was enacted, and still fully support its goal of providing an appropriate education for all children with disabilities.

However, our support for this goal was not matched by the federal commitment to funding its own mandate. When Congress originally passed the law, it pledged to pay 40 percent of the annual cost of the special-education mandate. Instead, the federal government pays only seven percent, leaving school districts to pay almost $30 billion in **additional** costs from local and state resources.

Overall, our nation has a $50 billion special education system that is built upon the IDEA mandate. There are major areas where this highly regulated program can be strengthened without diminishing appropriate services for children; but for 20 years, Congress has resisted. Currently, the program is being reauthorized, but with only modest efforts to save school systems what we believe are billions of dollars in costs that they should not bear.

For example, the law, coupled with unintended court interpretations, have set up a legal process that both: 1) unduly enriches attorneys through legal gamesmanship and draws funds from educational programs; and 2) results in school district decision-making that is based on avoidance of costly legal process rather than appropriate education programming. Additionally, the law works to relieve private insurance companies of their responsibilities to provide certain health benefits that are required under IDEA's individual educational planning process. These are only two examples. The list of specific mandated costs is extensive, raising the question, "What is really necessary and at what level?"

In addition to mandated activities and costs, there is the separate question of the cost in administering and complying with the paper work requirements of this very complicated and highly process-oriented law. With 5.8 million children expected to be enrolled in special education programs next year, every additional hour of process and paperwork required by the law can cost school systems as much as $200 million in man-hours alone. Further, the law has worked to authorize expenses for children and their families that could not have been intended, and would be viewed as inappropriate by taxpayers— either because of their nature or "cadillac" level of service.

Again, while NSBA fully supports the goals of the law, we fault the Congress for both not living up to its financial commitment, and, as a result, not having the incentive to make cost-benefit decisions about its mandate. As a result, IDEA is unnecessarily preempting school districts from making the best expenditures of its funds for children in both regular and special education.

## V. CONCLUSION

The Unfunded Mandates Reform Act of 1995 is a first and important step to stopping the flow of unfunded federal mandates that occur in every facet of school district business. Congress must be ever vigilant to ensure that any new federal mandates are accompanied by adequate funding; and more important, federal mandates are evaluated in terms of the existing mandates on schools. Now Congress has the opportunity to begin examining current federal mandates both for their relative priority and scope to ensuring that school districts can devote their financial resources to their mission for public education. The taxpayers who complain about the quality of public schools are finally learning that members of Congress must be held accountable for the votes that spend education's scarce dollars. The very children Congress seeks to help are the ones who are hurt most by unfunded mandates. NSBA asks you to always to remember, "Is this how your local constituents want you to spend their taxpayer money?"

Again, thank you for the opportunity to testify before your committee.

Mr. DAVIS. Thank you very much.

Mr. Balog.

Mr. BALOG. Thank you, Mr. Davis and the other members of the subcommittee.

I come here today in a dual role. I come here as chairman of the American Public Works Association's Urban Forum. We represent 25,000 members. In fact, we are the largest full service membership organization of public works officials. Also, I am the director of public works for Baltimore City. Baltimore City's Public Works Department is one of the largest in the United States. We have 27 functions, 6,000 employees, and a budget of $500 million. And we do fix potholes.

Public works officials do a lot of things. We're like the city underneath the city. We have the water pipes, we pick up the trash, and we take care of landfills, and all these things that I think are essential. We met in Texas this spring, and it was unanimous among all the public works officials of the large cities that unfunded Federal mandates was our biggest concern. We looked at the ACIR report of January, and the thing that impressed us the most about the report was the 200 mandates that are in that report. These mandates affect all the cities, just like Baltimore.

We are a poor subdivision. Our growth is less than 1 percent a year. We have a budget of $2 billion. But if we complied with the Asbestos Act, we would have to spend $700 million. That's half our budget. We have 2,000 miles of highways and several hundred bridges to take care of. We get $15 million of ISTEA money a year, but we need $1 billion. We have an example of a waste-to-energy plant that we have to put a stack on, just a little job that costs $50 million. This affects our real estate tax.

In the last 20 years, we were fortunate enough to get $500 million of the Water Pollution Act of 1972. All that money is spent. We've done great things. We have reduced pollutants that go to the Chesapeake Bay from 80 percent to 95 percent removal. But we are worried about where we are going to go from here.

When the President signed the Unfunded Mandates Act in March last year, we were pretty optimistic, but we were realistic enough to know that all the mandates weren't going to go away. And we really focused on a cost-benefit analysis, but that seems like a black box to us. What is it going to do to us? It was encouraging to hear the different departments testify in panel two, and I truly believe they are going to be reasonable. But we are looking for some kind of assurance that the fiscal constraints won't outweigh the benefits derived from the mandates.

We are not against a better environment. We are not against helping the disabled. We are not against having working and living space better. We are not against good drinking water. But we are just uncertain as to where we are going to go. And we sort of looked at a book that is on the best sellers' list now called, "The Death of Common Sense," and we think the answer sort of lies there in that book. We just don't want to spend money that we don't have unless there is a true, clear, and realistic benefit.

Thank you.

[The prepared statement of Mr. Balog follows:]

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**STATEMENT OF GEORGE G. BALOG, CHAIR**
**URBAN AFFAIRS COMMITTEE**
**OF THE**
**AMERICAN PUBLIC WORKS ASSOCIATION**

**BEFORE THE SUBCOMMITTEE ON**
**HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS,**
**HOUSE COMMITTEE ON GOVERNMENT REFORM & OVERSIGHT**

Friday, March 22, 1996

Chairman Shays and Distinguished Members of the Subcommittee on Human Resources and Intergovernmental Relations:

My name is George G. Balog, and I am Director of the Baltimore City Department of Public Works, one of the largest Public Works Departments in the Country. I am here today in my capacity as Chair of the American Public Works Association's (APWA) Urban Forum. The APWA is the largest full-service membership organization of the nation's municipal public works professionals. Our 25,000 members help maintain the nation's infrastructure. Our members have the responsibility of using limited public resources to ensure that the roads and bridges we use every day are maintained and safe. We ensure that the water you drink is clean and safe, the trash and recyclables collected, the landfills maintained -- the often invisible services that keep our cities, counties and towns running safely and smoothly.

As chair of APWA's Urban Forum, I have had the pleasure of meeting with my counterparts in other urban centers around the Country. It will come as no surprise to this Committee that unfunded federal mandates are the number one concern of these Public Works professionals. I am pleased to appear before this Subcommittee today to share some of those concerns with you.

I have read the Preliminary US Advisory Commission on Intergovernmental Relations (ACIR) Report on the Role of Federal Mandates in Intergovernmental Relations (January, 1995). State and local governments have identified more than 200 separate mandates to which they are subject. These mandates are contained in close to 170 federal laws that govern a wide range of state and local activities. The ACIR identified in their Preliminary Report 3,500 federal court decisions involving more than 100 federal laws that impact state and local governments. I will be limiting my remarks to some of the federal laws

reviewed in the ACIR Preliminary Report that have a direct bearing on Public Works activities.

Frankly, we were delighted when President Clinton signed into law the Unfunded Mandates Act of 1995. As Public Works professionals, we care about the health, welfare and safety of our citizens: it is our responsibility to carry out the programs and activities that support these fundamental needs.

Having said that, however, we are left with the pressing questions: how and when will this Act be implemented?

My own city of Baltimore has a population of under 700,000. We have a budget of $2 billion. We not only provide services to our citizens, but to the metropolitan area as well. We are the focal point in the region for entertainment, cultural events, and centers of business. But at the end of the day, people return to the suburbs, taking their taxable income with them.

In short, we are a poor subdivision.

In order for Baltimore to comply with the requirements of the Asbestos Hazards Emergency Response Act (AHERA), we would have to spend $700 million, nearly half of the city's budget. Obviously, we are not fiscally able to spend such a sum. In the interim, we spend on the average, $2 million annually to repair and contain areas of asbestos in our public buildings.

Baltimore has over 2,000 miles of highway infrastructure to maintain. While we are fortunate to receive $15 million in ISTEA funds, this amount does not begin to meet our needs. As a result, we have had to delay or put off entirely the timely repair of our bridges.

The cost to retrofit our waste-to-energy plant to comply with more stringent stack emissions is in the neighborhood of $50 million. The health benefits to be gained by such an expenditure are not clear to us.

In Baltimore, where our proximity to Chesapeake Bay raised the stakes of water pollution removal beyond the federal goal of secondary treatment, we were successful in capturing half a billion dollars in federal and state grants to achieve state-of-the-art advanced wastewater treatment.

Wastewater grants are no more, having been displaced with state revolving loan funds. While local governments have taken advantage of the lower interest rates connected with these state loans, we are carrying the costs to build these facilities. Surprisingly, the greatest impact of these facilities on user rates are not the staggering capital costs, but the increased energy and chemical costs to perform wastewater treatment to such high

standards. Those costs will continue to be borne by our customers, and will continue to grow without federal help.

And our plight is not unique:

The Billings, Montana Public Works Department estimates that mandates cost them $1.3 million per year out of a total departmental budget of $23 million. While Billings might choose to carry out these programs for itself, the $1.3 million represents funds over which it has no discretion, no opportunity to choose priorities as a community. For fiscal year 1995, Billings will spend almost $43,000 in salary and benefits on staff just to keep track of environmental compliance rules and regulations.

Local governments are at the bottom rung of the ladder; the mandates stop here. I would be hard pressed to find a town, city or state in this Country that is not faced with strong fiscal constraints. We know that the federal government cannot find the money to fund all of these mandates. So where are the points in this federal, state and local government partnership equation that progress can be made?

We believe there must be room to work cooperatively with the federal government, a willingness on their part to let solutions be identified at the state and local level. We need that kind of flexibility if we ever expect to realize the intent behind these federal mandates.

Local governments need the flexibility to pursue solutions which prove successful for a variety of very site specific conditions. We need the time to develop, test and evaluate the success of these real solutions in the real environment, not the laboratory.

The Americans with Disabilities Act of 1990 is a fairly new mandate, and one for which the true costs to comply have yet to be fully understood by local governments. While the legislation states broad goals of accessibility and accommodation for disabled persons, the extent to which local governments must go to achieve those broad goals are not clear.

For some of our older cities, retrofitting buildings and accommodations is expensive, and the limited solutions to comply may not meet the expectations of the disabled or satisfy federal requirements. Since federal funds are not available, some accommodations must be made on the part of the federal government to recognize the technical and fiscal limitations local governments have in complying with this law, and work with us to identify how best to spend our limited resources to achieve meaningful results for our disabled citizens.

The costs involved in complying with provisions of ADA and other federal mandates are often beyond the financial ability of local governments. Attempts to comply with some of the provisions of ADA force local government to abandon or delay other worthwhile objectives that also might further federal goals as the competition for local infrastructure dollars intensifies . For example, under a proposed rule recently promulgated by the Justice Department, sidewalk curb ramps would have to be installed at private residences

within one year of receiving a request. This would take away discretion from local agencies to match their limited resources with installations that will do the most public good. If the individual request takes precedence and consumes all available street maintenance resources, the larger public access to facilities and programs may suffer. We would support keeping the decision as to allocation of resources at the local level.

In the environmental area, local governments are concerned that efforts to evaluate whether or not additional regulatory actions must be taken often hinge on risk/benefit analyses. We need to take a hard look at the way in which risk/benefit analyses are conducted While we recognize and appreciate the value for performing risk/benefit analyses, local governments are concerned about the length of time it takes to produce these analyses, the red tape which may result and the nagging question of whether they solve the real problem. If we are to commit our limited resources toward mandates, we all must be comfortable that our expenditures will yield meaningful results for the health and welfare of our citizens and the environment.

The Safe Drinking Water Act highlighted the frustrations local governments feel in attempting to comply with federal rules and regulations. We are concerned about how and on what basis new rules will be set.

Public reaction to specific community drinking water problems has understandably raised questions about what substances may be present in the nation's drinking water, and how dangerous these substances may be. Cryptosporidium outbreaks and alarm over trace amounts of pesticides are just two recent issues making front page news.

But just sounding the alarm is not enough. Water supplies, large and small, could be facing some potentially expensive capital costs, as well as some very sophisticated facilities and monitoring requirements. Large water systems may be able to shoulder these burdens to some extent, but small water treatment plants may not have the ability to finance such systems, and may not have the expertise on board to keep up with operational and monitoring compliance.

There has to be a relationship established between clear public health risks, and the cost to protect the public from these health risks. Our ability to detect minute amounts of pollutants is not necessarily equal to our ability to successfully remove or reduce the trace amounts, to afford the cost to do so, or to even understand the benefits to be gained by such efforts.

We must be confident that any costs to be incurred in complying with new drinking water standards, or any other pollution standards set by the federal government, are soundly based, will bear real results, and will maintain public confidence that we are protecting their interests.

We in the Public Works arena recognize the authority of the federal government to set and enforce national goals. In years past, national priorities were accompanied by federal

dollars. Providing federal funds to achieve national goals was an acceptable trade-off for states and local governments at that time.

However, as the federal budget crisis has worsened, the funds flowing to local governments have decreased, but the number of problems Congress is trying to resolve have not. As Congress and the federal government work to provide leadership on a host of important national issues without the federal dollars to back it up, someone ends up paying the price. And while in many cases local governments support the purpose of the legislation, by the time the rules reach us, we are forced to respond to the rules, rather than the problem. As a result, local governments must divert their limited resources to areas which may satisfy the rules, but may not provide the best and most efficient way to solve the problem.

In summary, we as Public Works professionals ask for the opportunity to help shape the way in which states and local governments comply with federal mandates. We can bring to the table the expertise and the experience to get the job done. We know first hand the problems we will face, and we think we can offer some innovative solutions. We are asking for the opportunity to work cooperatively at all government levels so that we may achieve the best solutions possible for our citizens.

Thank you for the opportunity to present our views today and I would be happy to answer any questions. I also offer the resources of my agency and my colleagues throughout the Country to help the Subcommittee seek reasonable solutions to the issues raised here today.

Mr. DAVIS. Thank you very much.

Mr. Saunders.

Mr. SAUNDERS. Just for the record, Mr. Chairman, those folks that are filling the potholes and picking up the trash in the city of Baltimore are members of Local 44 of AFSCME, so I want to make that clear.

Mr. DAVIS. I'm glad we have some agreement, at least.

Mr. SAUNDERS. My name is Lee Saunders, and I am an assistant to the president of AFSCME, Mr. Gerald McEntee. We represent 1.3 million State and local governments and health care workers across the United States. We are pleased to offer comments on the unfunded mandates and particularly on the Advisory Commission on Intergovernmental Relations report, "The Role of Federal Mandates," which was required to be prepared under the act.

Now, AFSCME is a member of a broad-based coalition called, "Citizens for Sensible Safeguards," which strongly opposes the preliminary ACIR report. The coalition has issued its own report, "Shirking Responsibility," which lays out in detail the various reasons why this coalition of over 150 organizations opposes the ACIR report. We have included with our written statement a copy of this important report.

I will be primarily focusing my testimony on three labor protections that currently cover State and local government employees, the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Family and Medical Leave Act, that the ACIR believes should be repealed. If the recommendations put forth by ACIR are enacted into law, every one of the millions of State and local government workers would be adversely affected.

The ACIR's recommendations directly contradict recent acts by Congress. After widespread criticism that Congress failed to give its employees the same labor and civil rights protections that it had long ago extended to private sector and State and local government workers, the House and Senate, in near unanimous votes, approved the Congressional Accountability Act last year. It is, therefore, profoundly troubling that the ACIR recommends stripping State and local employees of the very labor protections that Congress just mandated on itself.

As an employer, no level of government is justified in treating its employees differently from all other workers in the country. Indeed, government should be a model employer, not a delinquent one. All workers are entitled to be treated equitably and fairly, whether they are in the private sector or the public sector.

I think that it is noteworthy that the ACIR never reached out to State and local government employees or their representatives for their input, comment, or recommendations. Everybody has been hearing the terminology, "redesigning government," "reinventing government," "participation by employees at the work site." This was not done in this process.

Until now, this has made for a very one-sided investigation and debate. For a report which was required by Federal law to determine the financial burden of unfunded Federal mandates, it is most disturbing that there is no cost data or cost-benefit analyses of any of the worker protections it recommends for repeal.

The ACIR was charged with identifying those mandates which are duplicative, obsolete, or lacking in practical utility. But, as we all know, in the case of these labor protections, there are no comparable Federal laws, and where corresponding State laws do exist, they are often weak or inconclusive.

The ACIR has recommended repealing those provisions of FLSA extending coverage to State and local government employees, including the minimum wage, the 40-hour work week, and requiring comp. time or overtime pay for hours worked over 40. No such recommendation is made for employees with exactly the same jobs who work in the private sector. Now, is it fair to extend FLSA protections to some trash collectors and not to others, or to some corrections officers and not to others, or to some hospital workers and not to others?

There is little reason to believe that State and local governments will automatically adopt provisions similar to current Federal law if current coverage under FLSA is repealed. Twenty-three States and the District of Columbia currently lack a minimum wage law applicable to State and local government employees or have one that sets the wage lower than the Federal minimum wage. Thirty-two States plus the District of Columbia lack overtime provisions in their laws applicable to State and local government workers.

Moreover, the commission's argument that public employee unions have the ability to negotiate these protections lacks credible supporting evidence. Nearly two-thirds of State and local government workers do not belong to labor unions, and nearly 5.5 million lack collective bargaining rights altogether. As a matter of fact, in 24 States, there is no collective bargaining legislation which enables us, as employee representatives, to sit down as equals and negotiate over wages and benefits and working conditions.

Now, ACIR's recommendation that coverage under the Occupational Safety and Health Act should be eliminated for State and local government workers should also be rejected. OSHA—and let me stress this—OSHA is a voluntary program in the public sector. It is not a mandate, because the only State and local government workplaces covered by OSHA are located in States where the State legislature has voluntarily agreed to participate. Indeed, 27 States have not chosen to cover public employees under OSHA.

Additionally, the ACIR used invalid criteria on which to base its OSHA recommendation. Where is the financial analysis? Where is the cost impact?

Finally, let me just briefly touch on the Family and Medical Leave Act. The ACIR has recommended that Congress repeal coverage for State and local government employees under the FMLA, without ever hearing workers tell their real-life stories of how their lives have changed. Again, I must point out that ACIR has failed to do its homework. Where is the financial data to back their findings? We don't see it.

On the contrary, the DOL's bipartisan commission on leave reported that just the opposite occurred in the private sector. We find it difficult, if not impossible, to accept that the experience in the public sector is so dramatically different, especially since State and local governments offered more extensive family and medical leave than the private sector, prior to FMLA's enactment.

Finally, Mr. Chairman, my written statement sets forth AFSCME's views pertaining to the implementation of the Unfunded Mandates Act, and I would be prepared to answer any questions.

Thank you.

[The prepared statement of Mr. Saunders follows:]

Statement of Lee Saunders

Assistant to the President

American Federation of State, County and Municipal Employees, AFL-CIO

Good morning Chairman Shays and members of the Committee. We appreciate the opportunity to appear before you today. My name is Lee Saunders, and I am an Assistant to President Gerald McEntee of the American Federation of State, County, and Municipal Employees (AFSCME). AFSCME represents 1.3 million state and local government and health care workers across the United States. We are pleased to offer comments on the Unfunded Mandates Act as well as on the recommendations of the Advisory Commission on Intergovernmental Relations's (ACIR) report, "The Role of Federal Mandates."

AFSCME is a member of a broad-based coalition called Citizens for Sensible Safeguards which strongly opposes the preliminary ACIR Report. The Coalition has issued its own report, "Shirking Responsibility," which lays out in detail the various reasons why this coalition of over 150 organizations opposes the ACIR report.

I am primarily focusing my testimony on three labor protections that currently cover state and local government employees: the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), and the Family and Medical Leave Act (FMLA) that the ACIR believes should be repealed. If the recommendations put forth by ACIR are enacted into law, every one of the millions of state and local government workers would be adversely affected.

The Advisory Commission on Intergovernmental Relations' Report

The ACIR's recommendations directly contradict recent acts by Congress. After widespread criticism that Congress failed to give its employees the same labor and civil rights protections that it had long ago extended to private sector and state and local government workers, the House and Senate, in near unanimous votes, approved the Congressional Accountability Act last year. It is therefore profoundly troubling that the ACIR recommends stripping state and local employees of the very labor protections that Congress just extended to its own workers.

As an employer , no level of government is justified in treating its employees differently from all other workers in the country. Indeed, government should be a model employer, not a delinquent one. As Labor Secretary Reich said in his comments on the report, "If the recommendations in the report were implemented, state and local government workers would become second class citizens – deemed unworthy of the same basic protections as their neighbors, friends, and family who work in the private sector or for federal agencies." All workers are entitled to be treated equitably.

AFSCME and other unions representing federal employees have demonstrated their willingness to work in a cooperative manner to re-examine the role of government where it needs to be re-examined. Front line workers and their unions were involved in Vice President Gore's reinventing government project from the very start. We are therefore disappointed that the Commission, in compiling this report, did not adopt an inclusive, "reinventing government" style approach.

The ACIR never reached out to state and local government employees or their representatives for their input, comment, or recommendations. The only voices that the ACIR chose to listen to were state and local elected officials and their representatives and managers. Until now, this has made for a very one-sided investigation and debate. It is no wonder that the recommendations do not reflect the voices of the workers who perform the services that every American depends upon.

Our disappointment in the process which ACIR employed to reach its conclusions is exceeded only by our opposition to the substance of the report. For a report which was required by federal law to determine the financial burden of unfunded federal mandates, it is most disturbing that there is no cost data, or cost-benefit analysis of any of the worker protections it recommends for repeal. The ACIR was charged with identifying those mandates which are "duplicative, obsolete, or lacking in practical utility". But, as the Department of Labor's letter correctly states, in the case of FLSA, FMLA, OSHA, and other protections, "there are no comparable federal laws and where corresponding state laws do exist, they are often weak or inconclusive."

Fair Labor Standards Act (FLSA)

The ACIR has recommended repealing those provisions of the Fair Labor Standards Act extending coverage to state and local government employees, including the minimum wage, the 40 hour work week, and requiring comp time or overtime pay for hours worked over 40. No such recommendation is made for employees with exactly the same jobs who work in the private sector, including secretaries, laborers, clerks, nurses, doctors, prison guards and sanitation workers, among others. Is it fair to extend FLSA protection to some trash collectors and not to others, to some prison guards and not to others, to some hospital workers and not to others?

As the U.S. Supreme Court found in its 1985 decision, Garcia v. San Antonio Transit Authority, efforts to distinguish between the governmental and proprietary functions of state and local governments were "unsound in principle and unfair in practice." Moreover, in response to state and local officials, Congress amended the FLSA in 1985 to provide state and local governments more flexibility in applying the law than it has extended to private sector employers. It allowed them to grant compensatory time instead of overtime pay, included special rules for the use of volunteers, and delayed the implementation of compliance obligations.

The ACIR claims that under the FLSA "a state or local government cannot amend its personnel policies to accommodate situations unique to government employment or to reduce its budgets." This is patently false. Nothing in the Act denies employers the flexibility to change work schedules, work shifts, operation schedules and hiring practices for the purpose of controlling overtime hours. As with any other organization, controlling overtime in the public sector relies primarily on good management.

There is little reason to believe that state and local governments will automatically adopt provisions similar to current federal law if current coverage under FLSA is repealed. Twenty-three states and the District of Columbia currently lack a minimum wage law applicable to state and local government employees or have one that sets the wage lower than the federal minimum wage. Thirty-two states, plus the District of Columbia, lack overtime provisions in their laws applicable to state and local government workers.

Moreover, the Commission's argument that public employee unions will negotiate these protections even if Congress repeals them lacks credible supporting evidence. Nearly two-thirds of state and local government workers do not belong to labor unions, and nearly 5.5 million lack collective bargaining rights altogether.

Occupational Safety and Health Act (OSHA)

ACIR's recommendation that coverage under the Occupational Safety and Health Act (OSHA) be eliminated for state and local government employees should also be rejected. I would like to quote directly from the Department of Labor's comments, which I think hit the nail on the head:

> "As a preliminary matter, the Department cannot accept the Commission's assertion that a voluntary program constitutes a mandate. It is not a mandate because the only state and local government workplaces covered by OSHA are located in states where the state legislature has voluntarily agreed to participate."

Indeed, 27 states have not chosen to cover public employees under OSHA.

Other criteria ACIR used in its analysis also argue that OSHA should not even be included in this discussion of mandates First, the Commission was directed by Congress to focus on laws that involved substantial expenditures for state and local governments. The ACIR reported no information to suggest that OSHA compliance is a financial burden for states. In fact, federal grants can fund up to 50 percent of the administrative costs for those states that choose to cover public sector workers.

Moreover, extending OSHA coverage to state and local employees may actually save money. A recent study by Ruttenberg and Associates found that expanding OSHA coverage to all public employees would, in fact, save state and local governments as least $600 million annually.

Second, the Commission was instructed to focus on laws that "abridge the historic powers of state and local government without a clear showing of national need." The national need for safety and health in the workplace was established by Congress when it passed this law in 1971. Nevertheless, there can be no abridgement of state and local powers under OSHA because state and local participation is voluntary.

Third, ACIR was to look at laws that "impose requirements that are difficult or impossible to implement." Other than a few anecdotal accounts, this report offers no compelling empirical evidence that OSHA standards are difficult or impossible to administer. It seems likely that they are neither since states could simply choose not to participate in OSHA rather than struggling with difficult or impossible requirements.

Finally, ACIR was to focus on laws that were the subject of widespread complaints. As with many other recommendations in the report, this seems to have been the governing criterion. Here again, however, the voluntary nature of OSHA coverage suggests states that do complain have a simple remedy available to them.

The overriding reality is that public employees have dangerous jobs. We are nurses and public health workers, fire fighters, sanitation workers, corrections officers, construction workers, hazardous waste technicians and the like. Public employees suffer 3.5 times the number of work-related deaths as private sector workers and 25 percent more injuries.

National statistics bear this out. According to the National Safety Council, the 1993 national average fatality rate for all industries was 8/100,000 workers while the rate for government workers was 11/100,000. The rate for manufacturing was only 4/100,000. Given these statistics, how can anyone argue that public employees should be denied the workplace protections provided to someone with the same job in the private sector?

**Family and Medical Leave Act (FMLA)**

Finally, the ACIR has recommended that Congress repeal coverage for state and local government employees under the Family and Medical Leave Act without ever hearing workers tell their real-life stories of how their lives would have been destroyed if this law were not available to them. My comments focus instead on erroneous assumptions ACIR made in adopting this recommendation in the first place.

First, the ACIR has failed to demonstrate that the FMLA imposes a significant financial burden on state and local governments. The ACIR recommendation asserts that the FMLA creates costs related to revising leave policies and continuing health insurance policies. According to the Department of Labor, the bipartisan Commission on Leave reported very different findings in two reports released in October 1995. Over an 18-month period, 90 percent of private sector employers reported little or no costs associated with administration, hiring and training, and continuation of benefits under the statute. Eighty-five percent reported no noticeable effect on employee turnover, absence, or productivity. We find it difficult, if not impossible, to accept that the experience in the public sector is so dramatically different, especially since state and local governments offered more extensive family and medical leave than the private sector prior to FMLA's enactment (56 percent of public employees were covered versus 34 percent of private employees).

Moreover, state and local governments are granted flexibility under FMLA for several implementation issues, including whether to require medical certifications for leave, whether to require employees to exhaust accrued paid sick and annual leave, whether to allow employees to use accrued sick or annual leave during leave, and how to treat benefits other than health insurance during leave.

Unfunded Mandates Act

Regarding the unfunded mandates reform act, I would say that although AFSCME opposed it, we believe that Congress made certain beneficial modifications from the original version, including dropping the original "no money, no mandate" requirement. The law, as signed by the President, only applies to prospective federal mandates and the law also has several important exclusions, including ones for constitutional rights, rights that prohibit discrimination and Social Security. Nevertheless, we remain concerned that the Act is still flawed. Instead of providing relief from the bleak fiscal situation confronted by state and local governments, the Act provides opponents of federal health and safety, environmental and labor protections and safeguards a new procedural mechanism which can be used to grind legislative and regulatory processes to a standstill.

We continue to believe that many so-called federal "mandates" serve compelling national purposes. While the federal government may indeed ask state and local governments to do too much without adequate financial resources, we should not lose sight of the fact that the federal government has the paramount responsibility to safeguard the public's health, safety and welfare.

We appreciate the opportunity to appear before you today, and we are pleased to answer any questions you may have.

Mr. DAVIS. Thank you very much.

Let me start the questioning, then I will go to Mr. Towns.

We had a tough vote this week on the immigration bill, in terms of public school systems that currently have to, under law—some would say constitutionally, others would say Federal law—educate the children or, in many cases, illegal immigrants—not the children, illegal immigrants altogether.

It was a tough vote for me, because I don't know what else you do with them once they are here. You turn them loose, they get into gangs, everything else. But it's a huge mandate to come from the Federal Government and a job of policing the borders that ought to be the Federal Government's. So we wrestled with that.

It passed the House by a fairly substantial margin. In the end, I decided, along with the majority of my colleagues, that the mandated function of this—we should not bar illegal immigrants from being educated, but not mandate from the Federal Government that local funds be used for that. But it's one of many tough trade-offs that you have when you take away a Federal guarantee and send it down to States and localities that may act in a different way.

Any thoughts on that particular aspect or in general about losing some of the guarantees you have when the Federal Government gives them up and sends it down to the States and localities?

Mr. RESNICK. Well, I think you certainly point to an important issue that is particularly sensitive in the five or six States across this country that have a very high impact of immigration, both legal and illegal. Of course, the Supreme Court, in the case of *Plyler* v. *Doe,* decided for us that the public schools have to educate the children involved.

Our association does make a distinction between what our national immigration policy is, and what we do with children who come into this country under that policy. And we believe that, particularly with the requirements of *Plyler* v. *Doe,* that they should be educated.

The question, then, is that, as a result of the immigration policy that the country pursues, what is the role of the Federal Government to help us fund the aftermath of its policy? Further, what should be the administrative requirements that are involved? We are concerned that there have been provisions put forth in the Congress that would result in significant recordkeeping and bookkeeping on the part of school districts, and in their other programs to decide which students are here legally and illegally.

But, in terms of the larger point, Mr. Davis, from our perspective, the Supreme Court certainly has required that school districts, using local tax dollars, educate immigrant children, both legal and illegal. The incidence of the districts where they attend school is only by happenstance. Therefore, if this requirement is a matter of national policy, certainly the Federal Government has an interest, if not an obligation, to help support us, so that the education of all children in those communities can be retained at the highest levels possible.

Mr. DAVIS. There was an amendment offered in the Rules Committee that would have sent Federal money with the Federal requirement, and we weren't able to get that to the floor. That's prob-

ably the fairest way of all is that, if there's going to be Federal responsibility, at least help out in the funding mechanism, and that was not forthcoming.

Let me ask this: The Unfunded Mandates Reform Act, of which I was one of the four major sponsors in the House, talks about pilot programs that OMB can establish to test innovative and flexible regulatory approaches to governing. Can any of you think of any pilot programs we might work out, that OMB might look at, in terms of testing new approaches in government? If you don't have anything off the top of your head, that's all right.

Mr. RESNICK. Well, in the last Congress, there was legislation enacted, under the extension of the Elementary and Secondary Education Act, that does provide for half a dozen States to engage in a special ed. flex program, to begin combining more educational programs and engaging in waivers. I think that test, in effect, in education is underway.

What we would also like to see occur is for us to begin to look at flexibility of programs among Federal agencies. Very frequently, school districts do receive money from several sources, from different agencies, that we feel could be combined and be used more effectively. That is, of course, inside the grant and aid programs, but that's certainly one area that we're very interested in pursuing.

Mr. DAVIS. One of the concerns I've always had is that, when the Federal Government mandates and doesn't fund it, that we are basically shifting the cost from a fairly—at least today—progressive income tax to very regressive local property taxes. And in terms of who should be paying and those kinds of things, we never talk about the fact that we're hitting, in many cases, some of the underclass and people who aren't as well off, to pay for these programs at the local level, than you would get from a progressive income tax.

Any thoughts on that tax shift, as well?

Mr. RESNICK. Well, for us—and it's a point that we elaborated on in our written statement—you raise a matter of particular concern, because anytime the Federal Government does legislate a mandate, and there is no funding, the school districts have a choice: They can either raise their local property taxes, which, as you point out, is a regressive tax to fund a Federal priority; or they can reduce their expenditures in other areas of the school program.

Particularly in poorer communities, that really puts them on the horns of a dilemma: that is, whether or not local property taxes reach beyond the taxpayers' ability to pay, on the one hand, or whether the school program will begin to suffer and provide a level of education that is not the same, and therefore it doesn't provide the same educational opportunity for children who are in other districts.

Overall, though, the property tax is a regressive tax that probably has a negative impact on most citizens and most communities.

Mr. DAVIS. Any other thoughts?

Mr. BALOG. I think it has a very dramatic effect on the cities. Most of the cities are poor and struggling, and their growth isn't great. And what happens is, they have to cover for cultural events that the surrounding counties have. When the taxes go up, the people leave the city and go to the county. There's a flight. And I know

the Asbestos Act put a great deal of burden upon the city of Baltimore, and other acts.

Mr. SAUNDERS. Let me say this: We see firsthand, our union, the difficulties, the fiscal difficulties that exist at the State and local government level, whether it's through smaller wage increases or no wage increases, or layoffs, or ways in which we've got to look at controlling health care costs.

We honestly believe that there is a responsibility by the Federal Government to provide funds for some of these mandates. But there is also a policy issue, and that policy issue is that regardless of how these programs are funded, some are very, very important programs that need to be dealt with. And you can't lose sight, or you just can't review or take a look at what the fiscal implications are, you've got to look at the policy implications also.

Mr. CALLAHAN. Mr. Chairman.

Mr. DAVIS. Yes. Sure. Vince.

Mr. CALLAHAN. Let me make a comment that might interest you, coming from Fairfax County, like myself. Some information I have here: In 1993, a National Association of Counties study of 12 Federal mandates projected that, between 1994 and 1998, the costs associated with these mandates, for Fairfax County, would reach $295 million. This is coming right out of our property taxes.

Mr. DAVIS. Vince, let me just ask a question, too, looking at it from the State legislative level. Many times the States have given unfunded mandates to counties and cities. What are doing at the State level? For example, in Virginia, I know there has been an effort to try to recognize that and to cut back on the mandates coming from the Commonwealth.

Mr. CALLAHAN. There's been a concerted effort, I'd say in the past half dozen years, to address this problem, mainly because of the complaints we get. But I always say, there is a significant difference between a State mandating something to a locality and the Federal Government mandating something to a State. Localities are creatures of State government. The Federal Government is a creature of State government also, and not the other way around.

With that said, we are identifying, as a matter of public policy and law now, the costs associated with mandates going to localities, and this is all being coordinated. Anytime we have any type of legislation that would affect the pocketbooks of localities, we have to have a fiscal impact statement along with it. This doesn't mean we're not going to unfunded mandates. It's still going on, unfortunately, but not to the extent we used to do it.

Mr. DAVIS. Well, it's good to see that in the Virginia House of Delegates, which is the longest running democratically elected institution in the free world—1619?

Mr. CALLAHAN. July 29, 1619, to be exact.

Mr. DAVIS. There we go. The House of Burgesses came into being. Thank you.

I am going to now recognize the ranking Democratic member of the subcommittee, Mr. Towns.

Mr. TOWNS. Thank you very much.

Let me begin by saying that I understood what you were saying, Mr. Callahan, but there's also another side to it, that when you get involved in mandates and you pass them down to States, States

can have the option, sometimes, to pass them through without doing too much. When it gets down to the end, somebody has got to have some revenue. So there's that part of it, too. Otherwise, I agree with your comment, but I just wanted to add that.

Let me just sort of move on to say that, Mr. Saunders, I listened to your comments very carefully and also read your testimony. You noted that there was no attempt, I think you said, by the commission to obtain the input of State and local government employees, that no employees were actually talked to. Let me just sort of make certain. Did you make an attempt or did your organization make an attempt to have your views represented in the ACIR? If so, what was the response, if you did?

Mr. SAUNDERS. Our position is very public, as far as supporting these issues that the ACIR dealt with. Our lobbyists attempted to deal, on various occasions, in putting those in writing and dealing with the concerns, and sitting down as equals to talk about the issues and the problems that this report or these recommendations were going to bring to us. We did not have that opportunity.

And let me go a step further and say that there is a public hearing that's supposed to take place, and the ACIR scheduled this hearing as a conference, which was a conference which participants would have to pay to get in to provide that public testimony. There was such an outcry to that, that that plan was changed, and now there is a session, and I believe it's next Tuesday, where there, in fact, is going to be public testimony.

But at one time they were planning a conference where you had to pay to get in to provide testimony. That, to us, does not seem fair; it doesn't seem equitable. We think that we have some good things to say about these issues, and the employees and the employee organizations, and those groups that are concerned about the recommendations coming out of ACIR had no opportunity to provide input.

Mr. TOWNS. Thank you very much for your comments.

Let me just sort of go to you, Mr. Resnick. I listened to your comments, too. In April 1995, in the GAO report entitled, "School Facilities: America's Schools Not Designed or Equipped for the 21st Century," it was determined that schools with 50 percent or more minority populations were more likely to have unsatisfactory environmental conditions, such as lighting, physical security, and less likely to have technology elements, wiring, they went on to say, in terms of inadequacies in that area.

Without Federal education mandates, how can we address inequities such as these?

Mr. RESNICK. Well, this is a very serious question that you're asking. I don't mean to be flip in my response, but with some of the mandates, they impede our ability to get the job done. The problem that we face—and I'm sure you're familiar with Jonathan Kozol's work, "Savage Inequality," containing heart-rending stories of urban school districts that we're familiar with, in which the conditions in which students have to learn are just deplorable. You wouldn't want to work there; why would you expect a child to be able to learn in those environments?

We just simply can't continuously, though, place mandates on the schools and expect the money to be generated inside the tax base

of the local community. The financial wealth doesn't exist. If Congress mandates on school districts to construct more and better buildings, where are they going to get the money?

To the extent that the taxpayers don't vote for bond issues, which is their choice—keeping in mind that 75 percent of all households do not have children currently attending the schools, then we simply can't do the construction. We're not like—and I'm not suggesting on private industry—but we can't simply raise our prices and pass them along to our customers.

In some States, as I alluded to before, there are constraints on the amount of money that school districts can raise, even if the citizens want them to, because of constitutional limitations and State law, which raises very important questions of federalism. We believe that Congress should take a look at the needs of school construction in urban areas and certain rural areas of this country, recognize that it's a national need, and then put forward the funding to help us do it.

It's not going to happen by mandates. I don't think you can mandate the construction of a $25-million high school, or a $40-million high school, and expect that the school system is going to be able to raise that money to do that job, if it's in an impoverished area.

Mr. TOWNS. Well, we aren't talking about standards. I mean, you know, that's another issue. Let me just say this. I agree with you, we can't just sort of flip this off very lightly, because I think there are a lot of things that we're dealing with here. When I look at trade deficits with countries, and I think that sometimes the reason we have a trade deficit is because of the fact that we have an educational deficit. And I think that we need to address these things.

I think the question is, how do we get there? I just have some concerns when you have 50 States just running out there doing basically whatever they want to do when they want to do it. I think that becomes a real problem for me. I'm trying to agree with you, in terms of the fact that we need to do it, need to get there, but I'm not sure how we get there without a mandate of some sort.

Mr. RESNICK. I think it's a question of, again, looking at a partnership among three levels of government, recognizing what each level of government can do best, and also recognizing the limitations by the happenstance of geography and wealth in certain local communities. Ultimately, it's a matter of what priority do we hold for the education of the children of this country.

If three levels of government enter into a partnership to recognize that the have-nots, particularly, need to have their educational standard raised and raised beyond the level that a local community can afford, then the resources have to come from somewhere else. It's simply not going to come by mandating it on that local level of government. And it's our hope that, as the Congress looks forward to the 21st century, that we can enjoy a higher level of priority for education that's targeted where the greatest needs are.

Mr. TOWNS. Thank you very much. I appreciate your comments. Thank you all for your testimony.

On that note, I see the red light is on, I yield back, Mr. Chairman.

Mr. DAVIS. Thank you very much.

I notice the gentleman from New Jersey has joined us. Mr. Payne, we welcome you.

I was going to recognize Mr. Green next—he was here—for any questions he may have.

Mr. PAYNE. Sure.

Mr. DAVIS. A former member of the Texas Senate.

Mr. GREEN. Thank you, Mr. Chairman.

To Delegate Callahan, I served 20 years in the Texas legislature, and I appreciate your comment about the Federal Government's creation of the 13 States, but at least the rest of us, other than the 13, had to get permission from Congress to join the Union. So, admittedly, the first 13 created the Federal Government; the rest of us are here because of Congress.

Mr. CALLAHAN. We got in under the wire.

Mr. GREEN. That's right.

Mr. DAVIS. It was just conditional permission. They are on probation still.

Mr. GREEN. When I left the Texas Senate, my good friend, the Lieutenant Governor served in lots of capacities, Bob Bullock told me—he sent me up here, after 20 years as a House member and Senator, and said, "Cut out the Federal mandates." And I looked at him and I said—I had served 7 years in the Senate on the Education Committee—and I said, "Bob, that's what my local school boards have been telling me for 7 years as a State senator, 'Cut out those mandates coming from the State capital to the local community.'"

And I think that's the frustration that I had, both as a Member of the legislature and now in Congress, that the role of Government is to mandate, it seems like, whether it be from the Fed to the State, from the State to the city. In Texas, the State tells the city, the county, and the school districts what to do. Ultimately, it's the individual who has to pay the bill, whether it be school property taxes, Federal taxes, county levies, or State sales taxes.

I guess that's the frustration that we have. We're attacking mandates, and we're saying, "Well, who pays the bill?" And I think the School Board Association has said that you need to have a partnership. We have to work together. And I know that's why I voted for the mandate bill in 1995 was because of the need to get control on that. But the same thing happens in State legislatures. Like I said, I had school board members and city council members tell me the same thing.

And I appreciate our witness from public works when he mentioned the death of common sense. I have the same frustration dealing with the Federal Government, but I also had to try to get constituents' permission to put culverts in their ditches. Working through the public works department in some of my local communities was almost as frustrating as getting someone Social Security. So I can see the frustration.

I guess what concerns me about the whole report is the notion that all mandates are bad and one good example is the drug and alcohol testing for commercial drivers. Now, granted, that was an intrusion, I guess, on local government. A school bus driver or a school delivery person had to do that. But then so would the other commercial drivers on the road.

It is a mandate, but I don't know if it fits right up there with some of the other things that we consider a selective burden because it applies to everyone. And that's the other frustration, because we, last year, passed a bill here that made Congress live under the laws that we pass, which was part of the effort. By not having mandates are we then saying, "Well, if you're a school district or a city, you don't have to comply with something like drug testing of the local delivery or the local permit person may have?"

I know you heard my question about Davis-Bacon. Again, in Texas, we have prevailing wage laws that apply. And I know Davis-Bacon typically doesn't apply unless the school districts are using some Federal funding to build that local building. So Davis-Bacon may not be the best case for a Federal mandate that's not—they are not paying for the whole school, but they are paying for something on it.

I guess what I'm concerned about, as I see the testimony from the school boards, if you could point out some of the mandates. And Davis-Bacon and drug-free commercials drivers are probably not the best. Let's talk about some that are so egregious that we can deal with, and that's, I think, what you do in your agencies, as well as we do.

Thank you, Mr. Chairman. That's what I would like to see if we could ask about. For example, Davis-Bacon, on the State level or on the school district level, and I know on the city level, most States have some type of Davis-Bacon or prevailing wage requirements. They are the ones that are in force against my school districts.

Mr. RESNICK. If I can try to respond to that, Mr. Green. Certainly, there are a number of States that have legislated their own Davis-Bacon programs. To a great extent, I think, there was a lot of political pressure on States to mirror the Federal law. So, in addition to the Federal law itself—the Federal law provides a level of leadership that becomes very persuasive, probably, on many State legislatures.

In my own experiences with the Davis-Bacon Act, some years ago I served on a school board in northern Virginia, and we sought to apply for Federal vocational funds to help us build a facility, and found that the amount of money that would be awarded by the State would have been equal to or exceeded the additional cost that we would incur through Davis-Bacon. So the issue for us was, do we receive the money and have it serve no real substantial purpose, if you will?

And then it raised a concern for us, as a school board, either rightly or wrongly, that that would then add to the general standard with which we would have to perhaps pay, in future contracts, that were not federally funded. So, for us, Davis-Bacon does raise a number of concerns that are the inferences of the legislation as well as what may be viewed as the specific mandate itself.

On the drug program, one of the difficulties that Congress has is that any issue that is right in front of it does seem very compelling at the time. And certainly we support the idea that school employees, where appropriate, should be subject to drug and alcohol testing. The issue is, what is the best way of doing it? Sometimes local school systems have a better way that is better suited to their

particular situation, but they are hampered by Federal mandates, and perhaps incur greater expenses unnecessarily because of that.

Second comes the question, when you look at the totality of all of these attractive mandates, what is the sum total of their cost? So even some of the mandates that may be regarded as less onerous, individually, are a part of a total package.

And I think what would be helpful is if the Congress did take a look at the full range of mandates and determine, not just the mandate itself, but the level of regulation inside the mandate, and whether circumstances have changed to the point that mandates that may have been on the books for many years just simply don't require the same level of attention today as they may have some years ago.

Mr. GREEN. Mr. Chairman, I know my time is up. I agree, and that's why I think the last 3 years, on reauthorization of Elementary and Secondary Education Goals 2000, you have not seen some of the requirements that may have been passed if that act would have been passed 10 years ago. So I think there's sensitivity to that.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Gene Green follows:]

Statement of Representative Gene Green
Subcommittee on Human Resources and Intergovernmental Relations
March 22, 1996

Thank you, Mr. Chairman for an opportunity to speak this morning. One year ago, the President signed into law the Unfunded Mandates Reform Act. The purpose of the Act was to make Congress more accountable in the mandates it gives to states and localities. As a former State Legislator myself, I was sympathetic with the goals of the bill and I voted for it.

The Act did not require that mandate end or that we repeal current mandates. Rather, it established a process by which a Member could object to the bill on the ground that it contained an unfunded mandate, and force the House to go on the record in support or in opposition to the mandate.

The Act also required the Advisory Commission on Intergovernmental Relations (ACIR) to study issues involving the calculation of costs and benefits related to unfunded mandates; conduct a study of the impact of existing mandates on intergovernmental relations; and monitor and evaluate the implementation of the Act.

The report that is before us this morning does not fulfill the bill's requirements. Instead of providing an even handed discussion of costs and benefits of local mandates, the ACIR published a one-sided, partisan attack on laws which lie at the core of worker protection and workplace fairness: the Fair Labor Standards Act, the Individuals With Disabilities Education Act, the Occupational Health and Safety Act and the Davis-Bacon Act.

Also, the report does not discuss Congressional implementation of the Act, which when you get down to it, is the only way the law will work. It has to be implemented. Nevertheless, several House rules have been devised by the Rules Committee to circumvent the requirements of the law. I wish the ACIR would have taken more time to touch on these matters in the report and I hope we can do so today.

Mr. DAVIS. Thank you very much.

We now have a member of the ACIR, the distinguished gentleman from New Jersey.

Mr. PAYNE. Thank you very much.

Let me ask Mr. Saunders a question. You said that there will be hearings on Tuesday, which would be March 26th, that will be held. As you know, the comment period ended on March 15 for the public review and comment. Will your comments be accepted? Will they revise their date?

And second, I think you had some criticism about the content of the ACIR report. In your view, this report, does it comply with the intent of the Unfunded Mandates Reform Act, in your opinion? First of all, have you had any conversation about the hearing? Is it official, and will testimony be included in this public comment period which has ended?

Mr. SAUNDERS. Well, it's my understanding that the comment period has been extended beyond the March 15 date, and therefore you have the public hearings taking place on Tuesday. Although, again, I would like to stress that initially those public hearings were not scheduled. What was scheduled was a pay conference. We thought that was completely inappropriate. But because of the pressure, those public hearings are extended, and the public testimony will be accepted on Tuesday.

We believe that the ACIR just went completely off track. They did not respond to their charge. They essentially looked at what they called "mandates" and made recommendations with no input from labor unions, from consumer organizations. They made no attempt to do that whatsoever.

Their charge was also to look at the cost factor, cost analyses. To our knowledge, that was never done in formulating the report. As far as health and safety, and I mentioned this before, as far as OSHA, we don't even consider OSHA to be a mandate, because it is a voluntary program.

So we look at what the ACIR did and really have got to strongly oppose not only how they went about doing it but also the results of the report.

Mr. PAYNE. Thank you very much. I'm a member of the commission. I agree with you on those points.

Also, I have some question, too, about even the composition. I think there is a lack of balance in the commissioners. You have various categories: Governors, for example. If you look at the Governors, you will find that they are from small States, you know, the kind of rugged individualism, you know, get-government-out-of-my-face-type philosophies. I'm not saying that's necessarily the philosophy of those Governors.

But if you look at the composition of the commission, I think there could be, perhaps, at least in that category, perhaps a better balance, to get more diversity in the views.

I do have a question to Mr. Resnick from the school boards. IDEA provides and extends important civil rights protection, as you know, to make sure that all children have access to a public education. And I agree, too, that funding from the Federal Government is tremendously low. I mean, we were doing $350 billion in defense.

If the Federal Government provided $20 billion a year to education, it was high year.

So there is no comparison between what our Government spends to so-called "provide for the common defense," and how little it does spend to "promote the general welfare," in particular, in the whole area of education. So having said that, though, the reality is that there will not, certainly, be more Federal Government dollars coming from Washington down to States and counties and localities.

But because the funds are not there, I cannot justify that States can be recused from providing adequate education to children. So I just wonder how can then an individual be guaranteed the 14th amendment, equal protection under the law? I mean, you are protected. if you have a handicap or not have a handicap, you are supposed to be treated the same. How do you justify it? What will happen then to youngsters who need some special help?

Mr. RESNICK. That's a very good question, Mr. Payne. Clearly, as you point out, there is a constitutional right that is guaranteed to children with disabilities to have an appropriate education. That's to be distinguished, though, from the process for how to ensure that that right is appropriately implemented.

When the special ed laws were enacted 20 years ago, it was done prospectively, not necessarily being able to know exactly how it would play out. Since then a whole field of expertise has developed around special education. There are personnel in school systems who are deeply committed to special education regardless of the Federal protection. School board members, like others in the community, very frequently are parents of children in special education.

We have had a whole body of case law that has interpreted the original mandate. Quite frankly, we believe the time has really come to take a look at the direction that that has taken. For example, we face onerous lawyering fees, in a process that is not even available in other areas of civil rights protection, that simply do not result in fair play, in terms of bringing an issue to due process as much as provide a vehicle for attorneys to collect fees against school systems.

We find that it's very typical for a due process hearing to cost $10,000. That's twice the cost of educating a child or the cost of educating two children for an entire year in regular education. We have proposed to the Congress that there are alternatives to the litigious process that we have, that we think will be better, in substantive terms, for the education of children, and less expensive, in terms of legal cost to the school system and to the taxpayer.

There are a variety of provisions in this legislation that we've recommended to the Congress, that's now going through the reauthorization process, that begin to get at those kinds of issues.

I think what's really important in looking at special education is that we have 5.8 million children who are in special education. So if you have a general regulation that will result in one man-hour of time, that applies to all of those children, in terms of administration, that's $200 million for school systems.

And the question I think really to be put is, what are the real priorities and needs inside of this program, in order to guarantee that there's a free, appropriate, public education to all children. It's

different than what the legislation originally envisioned when it was enacted 20 years ago.

Mr. PAYNE. I agree, which is why there's an alternative dispute resolution process like mediation incorporated into the administration IDEA proposal.

Mr. RESNICK. But they don't require medication, and that's the problem. The lawyers will then be involved in mediation. They will either choose to do it or not do it. From our perspective, mediation should be required, and the attorney should not be present in the process at all, so that it can be engaged as an education process, not as a litigious process.

Mr. PAYNE. But it's left up to the States, right, to determine who can participate, the presence of lawyers and all that? In other words, it's at that level now. It's not specifically stated.

Mr. RESNICK. We're not entirely sure yet where the legislation is going to land. The administration's proposal is one thing—our concern is not directly with the administration's proposal; it is in fixing the problems in the legislation.

Mr. PAYNE. Well, it looks as though my time has expired.

Mr. DAVIS. If you want to take another minute, we can do that, because there's nobody else here. I'm going to recess the meeting, if you would like.

Mr. PAYNE. Yes. Just on the whole question of, for example, some of the mandates that—the Family and Medical Leave Act, which was talked about as being an unfunded mandate, when you looked into the legislation, once again, you find that there was very little cost.

We even see the outcry for the Americans With Disabilities Act, the whole question of ramps at public facilities. The average ramp costs $50. You had a whole hue and cry about "I can't afford it." And it said, when that legislation was passed, "If feasible."

After studies showing between $50 and $75 to provide an incline into a public facility, you would think that the cost of this mandate--even for buses, if they are not retrofitted. But, as you know, Greyhound was totally opposed to the ADA. We were just talking about new buses being built, that certain numbers have lifts. And once they were built into the building of the bus, the cost was very minimal.

But you had the hue and cry and knock down and drag out battle opposing ADA, when, when it was all said and done, the costs of many of these—a fellow even argued about depressing the curbs. Well, if you're going to put in a curb—it didn't say go around cutting curbs down, but if you're putting in a new curb, just simply have an indentation so a wheelchair could pass.

In other words, I think opponents to things mandated by the Federal Government just overreacted to every little mandate. You know, Socrates said, "The government which governs less is best." But that was a long time ago. And the reason that the government got involved in State and local activities is because of the local governments not moving toward things like clean water and clean air.

As a matter of fact, States that were good State citizens, that had, for example, double sewage treatment for their waste water, are actually penalized because, unless the Federal Government

came in and said everyone has to do it, other States which are not good corporate or good State citizens failed to do it.

And if you waited then for the Federal Government to come in to pay for doing it, then no one—I think this is something that would—why do it, just wait, because then the government's going to come in and pay it, even though it should be a local responsibility. You're almost saying that we have no real responsibilities other than to pick up the garbage, I guess, and have policemen.

So this whole question really becomes—like I said, I agree. I don't think that they had adequate hearings on this report. I don't think that the commissioners really were totally aware that this was a final report they were voting on. I think many of them thought they were just talking about printing it up. Next thing you find it's in a form, because it had been approved.

Like I said, there are just so many questions that I hope that, at a future hearing, these questions can be answered. The vote was taken when the Federal Government was closed down. You couldn't even call some of the agencies that were there, because they were closed. For something so important, it was done sort of a flimsy way.

And I'm on the commission, and I'll be the first to admit it. So I guess I'm part of the problem, but that's the fact. And that's what I will continue to reiterate whenever the commission reconvenes itself.

Mr. DAVIS. Thank you very much.

Let me just make a couple of clarifying remarks before we conclude. First of all, as I take a look at Public Law 104–4, of which I was one of the four sponsors in the House, it notes that "A Federal mandate means 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." So ACIR has a very wide-ranging mandate.

Now, the reality is that ACIR is just one set of recommendations. We're going to want to hear from AFSCME and anyone else before we touch or make any changes in that. But we want to hear from ACIR, and I can just assure you that we want to make sure you're going to get wide participation before Congress changes any of those laws. Because, of course, there are a lot of different pressure points. When you start changing one thing, it has some unintended consequences downstream.

Mr. SAUNDERS. It's my understanding, Mr. Davis, that that is prospective only.

Mr. DAVIS. Right. No, no. We asked them to take a look at existing laws, as well, in terms of what their effects are. Now, that's just a report.

Mr. SAUNDERS. Sure. I understand.

Mr. DAVIS. I don't think you need to fear a report of the facts. That doesn't mean anything is going to happen. And we are very grateful to hear from you, in terms of the other side and what else is affected by that. But I think this is within the charter that we gave ACIR. That's just to clarify that. This is only a preliminary report we're talking about today, as well.

But I very much appreciate your comments here today. I would just note that I was in local government for 15 years before coming here, and we always made a place for AFSCME at the table. Even if we were doing things we disagreed on, we wanted to know what the effect would be downstream, and they were very, very productive for us in that regard.

I just want to say that the one thing we were very frustrated about in Federal Government out in Fairfax and the mandates coming down is what I call the "law of unintended consequences," that you may put some new mandates on our education system out there, but the end result was many times, yes, you would help that child that was intended to be helped through the legislation in Washington, but it forced local school boards to raise pupil-teacher ratios and do other things with a limited amount of funds in other areas.

You either have a belief that many of these decisions are best made locally, with the local situation and people who serve on local school boards, local PTAs who care about the local environments and the particular concerns there, as opposed to sometimes the, I think, very well-intentioned programs, but the one-size-fits-all mentality that comes out of programs from Washington.

So we wrestle with this, and we recognize there are tradeoffs on everything. Health, safety, local governments care about that, too, but sometimes the Federal Government has to bring it together. So I appreciate Mr. Payne's remarks, and we're going to try to put it all together. That's why we're holding these hearings.

The record is open. By the way, you quoted Socrates as saying, "The government that governs least governs best." Jefferson, a great Virginian, also said that. And I remember, just a few months ago, hearing, "The era of big government is over." That was by another great statesman, in the State of the Union Address. So no matter how you look at it, Socrates gets repeated from generation to generation, in different ways.

The record will remain open. I thank our panels that have participated today, and the members for participating, on behalf of Chairman Shays. We will now adjourn the meeting.

[Whereupon, at 1:22 p.m., the subcommittee was adjourned.]

[The ACIR letter and prepared statement of Mr. Robert A. Georgine follow:]

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March 26, 1996

The Honorable Christopher Shays, Chairman
Subcommittee on Human Resources and Intergovernmental Relations
Committee on Government Reform and Oversight
United States House of Representatives
B-372 Rayburn House Office Building
Washington, DC 20515

Dear Representative Shays:

Since the Advisory Commission on Intergovernmental Relations released a Preliminary Report titled *The Role of Federal Mandates in Intergovernmental Relations*, there has been a great deal of misunderstanding of the process that the Commission went through in the preparation and adoption of this report, as well as on what this report represents. I would like to clarify for Members of the Committee the following points.

Development and Adoption of Preliminary Report. Following enactment of the *Unfunded Mandates Reform Act of 1995* in March 1995, four meetings of the Commission were held in Washington, DC during 1995. Over the course of those meetings, an extensive workplan was adopted, criteria were adopted for selecting mandates to be studied and evaluating those mandates, specific mandates to be examined closely were chosen, and optional recommendations for consideration by the Commission were discussed. A draft Preliminary Report was circulated to the Commission for review and action prior to the December 19, 1995 meeting. At the December 19 meeting, Commission members present requested a series of changes in the draft. However, because a quorum of the Commission was not present, a decision was made to ballot Members of the Commission on the draft as amended by those Members who were present at the meeting. Following the meeting, a revised draft Preliminary Report was sent to each Commission member with a ballot requesting a vote to approve or disapprove issuance of the revised Preliminary Report for public review and comment. By a vote of 15 to 3 with 7 Members not voting (there was one vacancy at the time), the issuance of the Preliminary Report was approved for public review and comment.

Mandate Definition and Mandate Exclusions. Title III of the Act, which specifies ACIR's responsibilities, defines the term "federal mandate" 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] " This broad definition is not considered in conflict with Section 4, Exclusions of the Act, because the exclusions relate only to "any provision in a bill, joint resolution, amendment, motion, or conference report before Congress and any provision in a proposed or final regulation." The exclusions quite clearly were meant to cover proposed laws and regulations under Titles I and II of the Act and not to ACIR's reviews of already passed and effective laws.

The Preliminary Nature of the Report. The Preliminary Report was published by direction of the Commission in order to elicit public comment. It was and is intended to be a preliminary report--that is, a draft, a work in progress. After Commission Members consider all of the information and analysis provided to them--including all of the public comments received--the Commission will draft a final report for submission to the President and Congress.

State and Local Impacts. The Preliminary Report reflects a series of concerns expressed by state and local government officials about problems they have experienced in complying with federal mandates. The *Unfunded Mandates Reform Act of 1995* specifically directed ACIR to review the impact of federal mandates on these governments. Much of the information received in the early stages of the Commission's work, and contained in the Commission's Preliminary Report, reflects reports from these governments. It is our hope that by exposing these findings to public attention, we can elicit helpful suggestions on ways they might best be addressed.

Limitations in Preliminary Report. I want to point out that the Preliminary Report prepared by ACIR covers only some of the subjects the Commission was directed by Congress to study. It is not intended to cover all of the matters included in Title III of the *Unfunded Mandates Reform Act*, and indeed, there are topics contained in Title III on which ACIR will be unable to report because there were inadequate federal funds committed to complete the studies. For example, the study of state mandates, an analysis of impacts on the private sector and a study of methodological issues involved in measuring direct and indirect costs and benefits are yet to be carried out because of the lack of funds. Also, because of the lack of funds, the Commission's original workplan relative to matters contained in the Preliminary Report had to be drastically cut back. Our original workplan called for extensive original fact-finding and extensive consultation with affected individuals and groups. We also planned to conduct extensive public field hearings around the country. None of this was possible because of the lack of funds.

The Honorable Christopher Shays
March 26, 1996
page 3

Commission Efforts to Seek Out and Receive Public Comment. Having drafted a Preliminary Report for public review and comment, the Commission is reaching out in multiple ways to solicit the comments and views of individuals and organized groups. The Commission inserted a notice in the *Federal Register* of the availability of its Preliminary Report and to date has distributed 2200 of these documents without cost. The Commission announced in the *Federal Register* plans for a public hearing on the report. Originally scheduled for March 8, the hearing was subsequently rescheduled and held March 26, 1996. A public comment period of three months was instituted and to date over 300 written comments have been received. The Commission conducted a Conference on March 6-7, 1996 to give additional opportunities to experts on various matters under consideration to discuss draft findings, conclusions and recommendations contained in the Preliminary Report.

I hope that this clarification will be helpful to Members of the Committee in correcting some of the misunderstandings relative to the Advisory Commission's work on unfunded mandates.

Sincerely,

William E. Davis
Executive Director

TESTIMONY OF ROBERT A. GEORGINE, PRESIDENT,

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

Before the

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

HUMAN RESOURCES AND INTERGOVERNMENTAL

RELATIONS SUBCOMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

**HEARING ON IMPLEMENTATION OF**
**THE UNFUNDED MANDATES REFORM LAW**

Mr. Chairman and Members of the Committee:

My name is Robert Georgine. I am President of the Building and Construction Trades Department, AFL-CIO.

I am appearing today on behalf of the approximately four million members of the 15 national and international unions affiliated with the Building and Construction Trades Department to comment on the preliminary report issued by the Advisory Commission on Intergovernmental Relations entitled *The Role of Federal Mandates in Intergovernmental Relations*.

In recent years, Congress has been accused of resorting more and more to what are now referred to as "unfunded mandates." Officers of state and

local governments routinely argue that the Federal Government has imposed at an accelerating rate expensive federal requirements on state and municipal governments without appropriating sufficient funds for implementation, thereby diverting their limited fiscal and administrative resources and interfering with their ability to respond to their own constituents' concerns. This opposition captured the attention of the United States Congress which passed the Unfunded Mandates Reform Act of 1995, Public Law No. 104-4, 109 Stat. 48, early last year.

Section 101(a) of the Act, which adds Section 425(a) to the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 658d, establishes a point-of-order rule of legislative procedure that provides "it shall not be in order in the Senate (of) the House of Representatives to consider . . . Any bill, joint resolution, amendment, motion, or conference report that would increase the direct costs of Federal intergovernmental mandates" in an amount equaling or exceeding $50 million per year, unless the bill embraces one or more of several specified mechanisms to ensure that Congress either (a) appropriates sufficient funds to pay the state, local, or

tribal governments' total direct implementation costs, or else (b) considers reducing or suspending the proposed mandates to ensure that they are effective only to the extent funding is provided. Thus, Congress, through this Act, imposed on itself a set of internal procedural barriers designed to decrease the likelihood that it would impose costly and unfunded regulatory burdens on state, local, and tribal governments.

## WHAT IS THE COMMISSION'S MANDATE?

Section 302(a) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1552, provides:

> In General.--The Advisory Commission on Intergovernmental Relations shall in accordance with this section--
>
> (1) investigate and review the role of ***Federal mandates*** in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;
>
> (2) investigate and review the role of unfunded State mandates imposed on local governments;

(3) make recommendations to the President and the Congress regarding--

(A) allowing flexibility for State, local, and tribal governments in complying with specific ***Federal mandates*** for which terms of compliance are unnecessarily rigid or complex;

(B) reconciling any 2 or more ***Federal mandates*** which impose contradictory or inconsistent requirements;

(C) terminating ***Federal mandates*** which are duplicative, obsolete, or lacking in practical utility;

(D) suspending, on a temporary basis, ***Federal mandates*** which are not vital to public health and safety and which compound the fiscal difficulties of State, local, and tribal governments, including recommendations for triggering such suspension;

(E) consolidating or simplifying ***Federal mandates***, or the planning or reporting requirements of such mandates, in order to reduce duplication and facilitate compliance by State, local, and tribal governments with those mandates;

(F) establishing common Federal definitions or standards to be used by State, local, and tribal governments in complying with ***Federal mandates*** that use different definitions or standards for the same terms or principles; and

(G)(i) the mitigation of negative impacts on the private sector that may result from relieving State, local, and tribal governments from ***Federal mandates*** (if and to the extent that such negative impacts exist on the private sector); and

(ii) the feasibility of applying relief from ***Federal mandates*** in the same manner and to the same extent to private sector entities as such relief is applied to State, local, and tribal governments; and

(4) identify and consider in each recommendation made under paragraph (3),to the extent practicable--

(A) the specific ***Federal mandates*** to which the recommendation applies, including requirements of the departments, agencies, and other entities of the Federal Government that State, local, and tribal governments utilize metric systems of measurement; and

(B) any negative impact on the private sector that may result from implementation of the recommendation.

*(Emphasis added.)*

It is clear that the Commission is authorized by Section 302(a)(1) of the Act to "investigate and review the role of Federal mandates in inter-governmental relations and their impact on State, local, tribal, and Federal

government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters." However, the Commission's authority to make recommendations to the President and the Congress is expressly limited to the areas set forth in Section 302(a)(3) of the Act.

Thus, Section 302(a)(3)(C) of the Act only authorizes the Commission to recommend to the President and the Congress termination of "Federal mandates which are duplicative, obsolete, or lacking in practical utility."

## THE COMMISSION HAS EXCEEDED ITS MANDATE.

### The Fair Labor Standards Act, the Family and Medical Leave Act, and the Occupational Safety and Health Act

Notwithstanding this narrow authorization, the Commission's Preliminary Report recommends repeal of the provisions of the Fair Labor Standards Act, the Family and Medical Leave Act, and the Occupational Safety and Health Act that extend their respective requirements to state and local governments, not because it found that such requirements are "duplicative, obsolete, or lacking in practical utility," but rather because the

Commission believes "public accountability of [state and local] elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers" or, in the case of the Occupational Safety and Health Act, because all states should be allowed to "set their own health and safety standards taking into consideration their priorities and budgetary constraints." In essence, the Commission's recommendation to repeal the provisions of each of these statutes that extend their application to state and local governments appears to be based on a sense of the sovereign authority of state and local governments. It is submitted, however, that this rationale is inappropriate under our federal system of government.

This is because, with rare exceptions, the Constitution does not carve out express elements of state sovereignty that Congress may not use its power to displace. Instead, state sovereignty is protected from overreaching by Congress by the very structure of the Federal Government. That is, state sovereignty is protected by the structure of the federal system whereby the states have a defined constitutional role in the selection of the President and both chambers of Congress. As a result, many federal statutes including the

National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Employee Retirement Income Security Act and the Sherman Anti-Trust Act, to name a few, contain express or implied exemptions for state and local governments.

These and other federal laws and regulations of general applicability that exempt state and local governments from coverage reflect the effectiveness of the procedural safeguards inherent in the structure of the federal political process. On the other hand, state and local governments have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants-in-aid and other forms of federal financial assistance. As a matter of fact, according to the Commission's own figures, such federal funds account for about one-fifth of state and local government expenditures.

Thus, while state and local governments have been able to obtain a substantial share of federal revenues, they have also been successful in exempting themselves from a wide variety of federal mandates. The merits

of exempting state and local governments from federal laws of otherwise general applicability is certainly not unprecedented, nor uncommon.

Perhaps Congress narrowly limited the Commission's authority to recommend repeal of provisions in federal laws that extend their application to state and local governments because it understands the weight and the deference that recommendations by the Commission will have on public opinion and the federal political process, and does not wish unduly to slant debate concerning the propriety of extending federal statutory requirements of general applicability to state and local governments except when they "are duplicative, obsolete, or lacking in practical utility." Accordingly, it is submitted that the Commission's recommendations regarding the Fair Labor Standards Act, the Family and Medical Leave Act, and the Occupational Safety and Health Act should be withdrawn inasmuch as they exceed the scope of authority delegated to it by Congress to recommend repeal of provisions of federal statutes.

## The Davis-Bacon Related Acts

Section 101(a) of the Unfunded Mandates Reform Act of 1995, which added Section 421(5)(A)(i) to the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 658, defines "federal intergovernmental mandates" to mean "any provision in legislation, statute, or regulation that--would impose an enforceable duty upon State, local, or tribal governments." In addition, Section 421(7)(A)(i) of the Act defines "federal private sector mandates" to mean "any provision in legislation, statute, or regulation that--would impose an enforceable duty upon the private sector." Significantly, the definition of both "federal intergovernmental mandates" and "private sector mandates" excludes any provision in legislation, statute, or regulation that would impose an enforceable duty on a state, local, or tribal government as a condition of federal assistance, or is a condition or requirement for participation in a voluntary discretionary aid program. Furthermore, Section 421(6) of the Congressional Budget and Impoundment Control Act of 1974, as amended by Section 101(a) of the Unfunded Mandates Reform Act of 1995, defines "federal mandate "to mean a federal

intergovernmental mandate or a federal private sector mandate, as defined in paragraphs (5) and (7)."

Thus, it is clear that the Commission's authority is limited to reviewing and making recommendations concerning "federal mandates," as defined in the Congressional Budget and Impoundment Control Act of 1974, as amended by Section 101(a) of the Unfunded Mandates Reform Act of 1995.

The Davis-Bacon Act is designed to protect wage standards in the local construction industry by preventing competition for federal construction contracts and subcontracts based on paying wages lower than those prevailing in the same locality. According to Congressman Bacon, co-author of the bill, the purpose of the Davis-Bacon Act is "simply to give local labor and the local contractor a fair opportunity to participate in [federal building programs]."

In order to accomplish this objective, the Davis-Bacon Act requires payment of a prevailing wage and prevailing fringe benefits to laborers and mechanics on projects over $2,000 "to which the United States or the District of Columbia is a party, for construction, alteration and/or repair,

including painting and decorating, of public buildings or public works of the United States or the District of Columbia." Davis-Bacon Act, as amended, 40 U.S.C. § 276a(a). Consequently, the Davis-Bacon Act does not apply to public works construction in which the Federal Government is not a direct party, but rather provides aid such as grants, matching funds, loan guarantees, and other financial assistance for the construction of public buildings and public works by state and local governments.

Nonetheless, Congress has chosen to include Davis-Bacon prevailing wage requirements in a variety of legislation creating federal-aid programs, such as the the U.S. Housing Act of 1937, that encourage state and local governments to undertake public construction activities. Today, there are more than 60 federal statutes that require all contracts and subcontracts for federally-assisted construction of public buildings or public works to include a requirement that all laborers and mechanics employed on the job must be paid not less than the wages and fringe benefits determined by the Secretary of Labor pursuant to the Davis-Bacon Act to be prevailing in the same locality. These statutes, most of which are listed in 29 C.F.R. § 5.1 of the

Secretary of Labor's regulations, are euphemistically referred to as the "Davis-Bacon Related Acts."

Neither the Davis-Bacon Act nor any of the "Davis-Bacon Related Acts" is a law of general applicability like the Fair Labor Standards Act, for example, that is based on the Commerce Clause in the Tenth Amendment of the U.S. Constitution. Instead, Congress is authorized to condition receipt of federal financial assistance to construct public buildings and public works upon compliance by state and local governments with the directive in "Davis-Bacon Related Acts" to include prevailing wage requirements in contracts and subcontracts for their construction pursuant to its power under the Spending Clause in Article I, § 8, of the U.S. Constitution. Significantly, unlike laws of general applicability, federal laws such as the "Davis-Bacon Related Acts," that condition receipt of federal financial assistance on compliance with federal policy choices, permit the residents of the recipient State or locality to decide whether or not it will comply with that policy. If the citizens of the State or locality view the federal policy as

sufficiently contrary to local interests, they may elect to decline a federal grant.

Thus, federal laws such as the "Davis-Bacon Related Acts" that condition receipt of federal financial assistance upon including federal prevailing wage requirements in state and local governments' construction contracts encourage, rather than "mandate," state and local regulation. This is an important distinction that Congress apparently understood when it expressly excluded provisions in federal laws and regulations that impose enforceable duties on state and local governments as a condition of federal assistance from the definition of a "federal mandate" in the Congressional Budget and Impoundment Control Act of 1974, as amended by Section 101(a) of the Unfunded Mandates Reform Act of 1995.

Accordingly, it is submitted that the Commission is without authority to make any recommendation to Congress and the President concerning the "Davis-Bacon Related Acts."

Aside from the fact that the Commission's recommendations concerning the Davis-Bacon Related Acts are beyond the scope of its mandate from

Congress, they are unsupported by fact or reason. The Commission explained its rationale for these recommendations as follows:

> State, local, and tribal governments should be able to manage their construction project costs without Davis-Bacon pre-conditions when the major share of the project is being funded by the state or local government. Besides potentially increasing costs, Davis-Bacon requirements impose extensive reporting and recordkeeping that may be especially burdensome for small projects, and may make it difficult for small local businesses to compete.

*The Role of Federal Mandates in Intergovernmental Relations* at 15.

Therefore, the Commission has recommended that each "Davis-Bacon Related Act" should be amended to exempt otherwise covered federally-assisted construction projects that costs less than $1 million dollar, or less than 50 percent of the total costs of which are federally funded.

However, the recommendations in the Commission's preliminary report lack any quantitative support. Instead, the underlying basis for its recommendations are the "concerns" expressed by state, tribal, and local governments that relate to criticisms about the administration of the "Davis-Bacon Related Acts" rather than how these federal requirements impact on

the state and local governments in a way that Congress intended the Commission to address.

According to the Staff Working Paper attached to the Commission's preliminary report as Appendix A at A-40, "[r]aising the dollar threshold that defines applicable contracts would reduce the number of state and local contracts subject to Davis-Bacon while assuring that major contracts for publicly funded construction projects still contain basic Davis-Bacon protections." This is a gross understatement.

The Congressional Budget Office has estimated that an increase in the threshold for application of the Davis-Bacon Act to federal construction contracts, that is those in which the Federal Government is a party, to $1 million would exempt 90 percent of all such contracts and 27 percent of the total dollar volume of federal construction contracts. Although comparable figures concerning the effect of raising the threshold for application of Davis-Bacon prevailing wage requirements to federally-assisted construction contracts is not available, it is fair to say that the impact would be as dramatic, if not more so, inasmuch as the magnitude and cost of most

federally-assisted construction projects tend to be relatively modest compared to federal construction projects such as dams, national defense projects, and federal buildings. Consequently, adoption of a $1 million threshold in the "Davis-Bacon Related Acts" would virtually eliminate application of Davis-Bacon prevailing wage requirements to federally-assisted construction projects.

Moreover, most of the other federally-assisted construction projects not exempted by the $1 million threshold would most certainly be excluded from coverage by the Commission's second recommendation that such projects should be exempt unless at least 50 percent of their costs are funded by federal assistance.

Many federal-aid programs are not designed to finance more than 50 percent of the cost of construction, but are intended to be used by state and/or local governments as leverage to obtain the bulk of the financing from private or public sources such as banks and bond issues. Furthermore, creation of such a coverage standard is an open invitation to wholesale avoidance of federal prevailing wage requirements because the "total costs

of a project" is frequently difficult to determine, especially in anticipation of construction of the project. Experience under the labor standards provision in the Housing and Community Development Act of 1974, for example, demonstrate that the scope of a "project" is an elastic concept that is susceptible to varying interpretations depending on what effect size will have on various federal requirements.

These changes, if enacted by Congress, would address several of the programmatic concerns expressed to the Commission by state, local and tribal governments.

Adoption of this recommendation would likely result in application of Davis-Bacon prevailing wage requirements only to projects covered by the Federal-Aid Highway Act which finances between 80 and 90 percent of the cost of such projects. In any event, it is fair to say that adoption of the Commission's recommendations would essentially result in emasculation of most of the "Davis-Bacon Related Acts."

It is submitted that the Commission's concern about the burden imposed upon state and local governments by Davis-Bacon prevailing wage

requirements, relative to the amount of financial assistance provided is without merit because, as we discussed hereinabove, unlike "federal mandates" as defined in the Congressional Budget and Impoundment Control Act of 1974, as amended by Section 101(a) of the Unfunded Mandates Reform Act of 1995, state and local governments are not compelled to accept federal financial assistance if they determine that the costs exceed the benefits to be derived. Hence, there is no need to adopt higher thresholds for application of Davis-Bacon prevailing wage requirements to federally-assisted construction projects in order to relieve state and local governments from what some may perceive as heinous federal mandates. They can just say "no thank you."



○