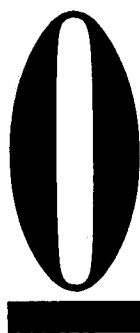


Unfunded Mandates: A Closed Chapter?



On Wednesday, March 22, 1995, President Clinton signed the Unfunded Mandates Reform Act of 1995, announcing in passing that it was a good example of a bipartisan effort. National Public Radio reported that the new statute will require the federal government to pay the costs of mandates it imposes on state and local governments. Well, that takes care of that nasty little problem. Right?

Wrong!

Rather, this enactment is far from the end of this particular issue. Churchill's comment after the victory at El Alamein comes closest to describing the situation: "Now this is not the end; it is not even the beginning of the end; but, it is perhaps the end of the beginning."

The Unfunded Mandates Reform Act of 1995 is the product of more than two years of intensive lobbying and unprecedented cooperation among the "Big Seven" state and local government public-interest groups. Yet it still is a long way from a problem solved.

What the Act Is and Is Not

Recently, ICMA's Environmental Mandates Task Force met with Dr. Bruce McDowell, director of government research at the Advisory Commission on Intergovernmental Relations (ACIR). The commission has a critical assignment under the new law. McDowell's insight into the Act was illuminating. He summarized five key points about this legislation.

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Long Shot!

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John Novinson

1. It is the best federal mandate legislation ever. Are you familiar with the phrase “damning with faint praise?” Prior mandate legislation is virtually nil. As McDowell pointed out, the Fiscal Note Act was the only previous legislation, and that was only intended to force Congress to recognize that there was, in fact, a fiscal impact to certain legislation. The requirements of that Act often are satisfied simply by the statement that an impact is not calculable.

The Unfunded Mandates Reform Act goes further, but it is not a panacea. Certainly, an enormous opportunity exists for future Congresses to ignore the substance of the Act even as they observe its form. In Illinois, a similar law routinely was circumvented by the simple expedient of exempting legislation from the effect of the legislation. Congress probably is as sophisticated as the average state legislature.

Only one thing can make this Act an effective first step: continuing and aggressive follow-up by the organizations and units of state government and local government. If we tire, become bored or distracted, this slim reed will not long support meaningful change.

2. The Act is not comprehensive. With this act, we can expect immediate and continuing relief from all federal mandates, right? Not quite! The Unfunded Mandates Reform Act of 1995 excludes any civil rights mandate. This means that the Americans with Disabilities Act and numerous other, direct and indirect (court-decision) mandates fall outside the scope of the Act.

When representatives of the Big Seven public-interest groups met with Senators Glenn and Kempthorne over a year ago, the question that stopped the conversation cold was: “Is the U.S. Constitution a federal mandate?” The Act answers that question: “No.” One reason is that the Constitution has been ratified by

the states and thus is the nation’s law—the responsibility of every citizen and every level of government.

But, in establishing limitations, the Act does not stop with the Constitution. It also excludes mandates associated with seven major entitlement programs, including, for example, Medicaid. As the Contract with America continues to wend its way through Congress, some of these programs may be converted into block grants. While the jury still is out on the Contract, there is no mandate relief under these programs.

A large number of mandates remain that are covered by the Act. Of those, the largest number are environmental measures. However, the Act only applies prospectively, not retroactively. Thus, without revisions to the Clean Water Act, Safe Drinking Water Act, and many other statutes, existing mandates remain. Much more needs to be done.

3. It is a process bill, not a reimbursement bill. Some—I suspect, few—may think that the federal government actually has obligated itself to pay for mandates that it chooses to impose or already has imposed. Not!

What it has done is impose a limited discipline upon itself. That discipline requires the Congress to recognize that it is imposing a mandate, a big first step. The Act also has a loophole, in that the Congressional Budget Office simply can find that it cannot figure out whether or not a bill will cost state and/or local governments the \$50 million threshold that makes a given mandate subject to the Act.

If Congress does find that it is about to impose a mandate, it can choose to amend the bill and knowingly do just that by a simple majority vote. If state and local governments and their respective associations are not vigilant, mandate reform will end there.

When Congress neither consciously imposes (forces a jurisdic-

tion to fund) nor actually funds a mandate, the Act does provide relief. When such a bill reaches a federal agency charged with achieving the bill’s goals, the agency either must obtain adequate appropriations; scale programs to the size of the resources it can assemble; or declare the mandate “unfunded” and not enforce or impose it on state governments or local governments in any such year. One interpretation is that annually we will play out one or all of the three acts: Imposition, Appropriation, and/or Declaration.

Aside from the dim prospect of a rational process, state and local governments can expect little else to change without constant vigilance. A new process conceivably may require an even greater effort than traditionally mustered.

4. The Act does contain a process for opening up existing mandates to careful review. With all of its limitations, the Unfunded Mandates Reform Act does afford one unprecedented opportunity. It commissions a one-time comprehensive review of all existing mandates and asks whether or not each of them should continue? As with all of its other promises, the Act makes this opportunity a daunting challenge.

The ACIR, charged with this review, is to complete its work and publish a final report to Congress within only nine, count them, nine months of the adoption of the Act. I bet close to 20 percent of that time will be gone by the time you have read this sentence.

Sounds a little like a traditional opportunity to participate in a rule-making process at EPA. You know, like when you are sitting one morning reading the *Federal Register* and notice that you have 30 days to comment on a rule that has been under study in a back room for three years. Hopefully, the procedure under this Act will be a better process.

Having met Bruce McDowell and

reviewed some of the work of the ACIR (see, for example, "Federal Mandate Relief for State, Local, and Tribal Governments," January 1995 [A-129]), the author is somewhat comforted that a decent policy-making analysis is at least theoretically possible. What is not at all certain is what will become of the product. Without a vigorous and concerted effort to move the recommendations to further legislative and executive action, this review will be yet another interesting but essentially meaningless academic exercise.

5. It does open an avenue for local government participation. The Unfunded Mandates Reform Act does provide local government with a chance to participate in developing a new paradigm for what could be a renewed and evolved federalism. ACIR's review of existing mandates and recommendations for change could be a guidepost to important, even fundamental change.

Every mandate, no matter how ill conceived, has an underlying concern that often is shared at multiple levels of government and among many members of the public. Environmental mandates may be the classic example of universal concern and limited capability for most levels of government. In the end, we are all downstream or downwind from somebody else and must rely on some system that exceeds our boundaries to protect our interests. Local governments have a vested interest in reasonable and effective regulation.

Questions That Remain

There are many questions to be answered, once we cross that threshold of conceding that there are some things that should or even must be done. For example, if "polluter pays" is the rule (as most Americans seem to prefer), should governments be exempt? If our town takes care of its own waste, should our taxpayers con-

tribute to the federal funding of systems for those that do not?

What about those communities that cannot take care of their own mess? Who determines what constitutes "incapacity"? Can we fashion standards that do not give economic advantages or disadvantages to some areas of the country? Should we care? If the federal government should not set standards and impose obligations unilaterally, then who should? How?

The questions are the easy part, and the Act does not allow for a leisurely review. Within nine months of the date it was signed into law, the ACIR report is due to Congress. You probably will not read this until July. There will be about six months left.

In pursuing this work, ACIR will turn to the groups that started the unfunded mandates campaign, the Big Seven public-interest groups:

National Governors Association
National Conference of State Legislatures
National League of Cities
U.S. Conference of Mayors
National Association of Counties
Council of State Governments
International City/County Management Association

Their input can mean the difference between a report that provides a path to real positive change and the prospect of more of the same: democracy for the prepared. For its part, the ACIR probably will turn for input to those groups that are conveniently available and less expensive to assemble. Generally, people in Washington or on the East Coast will dominate: democracy for those in the nation's capital or with an expense account.

With little time and less money, it is likely that ACIR will turn to the people who served on the two task forces that produced the aforementioned "Federal Mandate Relief for State, Local, and Tribal Govern-

ments." This report was the product of two task forces. Task Force I focused on defining the mandates, identifying principles and processes involved in seeking relief, and formulating guidelines for evaluating mandates and designing relief legislation.

Ralph Bowers, manager of Jasper, Florida; Michael Monteith, assistant manager of Hampton, Virginia; and Anthony Crowell, policy analyst and staff to ICMA's Environmental Mandates Task Force, served on Task Force I (Definitions, Principles, Processes, and Evaluations). Representatives of each of the Big Seven also were present, along with representatives of a variety of other groups.

ACIR's Task Force II (Estimating the Cost of Federal Mandates) dealt with the problem of developing standards for costing out mandates and their benefits. The product of this task force's effort suggests just how daunting a problem this may be. Only three local government staff members (from Detroit and Denver and Cook County, Illinois' chief administrative officer, Albert Pritchett) served on this workteam.

As ACIR moves on to the job of evaluating the inventory of existing mandates in nine months, it likely will rely on the team it knows. ACIR will, by then, have gone through a process of reducing the mass of regulation to a manageable amount. Bruce McDowell has speculated that ACIR will weed out the minor nuisances and those that really are not open to dispute (perhaps including the constitutional mandates).

Those mandates that remain will be evaluated, and options will be presented, including full federal funding, state options, local options, full repeal, and any number of other ideas. For example, some current mandates may be recommended as "standards," with the mandate limited to identifying whether a locality does or does not meet the standard and what that implies for the public health or for the environment in that

Area. Task force members may recommend that some mandates be turned back to the states.

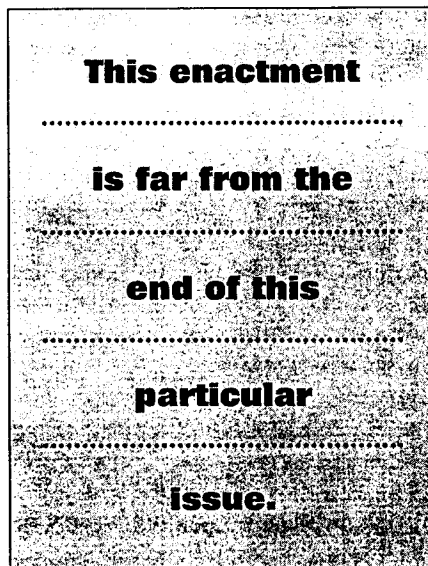
The product will be the foundation of a new round of legislative initiatives. Many, if not all, of the recommendations will be the subjects of great debate. Out of that debate will come the only substantive opportunity for fundamental change. Will ICMA be ready to participate? Not necessarily.

What Do You Think?

ICMA's work on unfunded mandates has been concentrated on two task forces: Environmental Mandates and Superfund. Membership on the task forces has been voluntary and largely self-supporting, through special participant fees. Participation thus has required an extraordinary commitment of time and money from a relatively small portion of the ICMA membership. The number of participants willing and able to maintain this special effort has been declining.

There is no formal task force that addresses the broad spectrum of mandates, although mandates are an item on ICMA's Public Policy Committee agenda. There is no present mechanism to guarantee ICMA's capacity to provide staff resources and membership involvement for this effort, even through the ACIR study. We are even less sure of resources for the next big legislative debate. The Association must decide, either from the bottom up or from the top down, whether or not this is going to be a front-burner project.

The author serves on the Environmental Mandates Task Force, with the voluntary support of the 35 towns and 5 townships that make up the Northwest Municipal Conference, a council of governments bordering Chicago. Each jurisdiction pays \$150 annually. Yakima, Washington, fully supports one cochair's membership at about \$6,000 (membership and



expenses). Northbrook donated 185 hours of the other cochair's time (worth \$17,850 if he were billing, say, a developer per Northbrook's annual fee ordinance) in 12 months (April 1994 through March 1995).

Every other jurisdiction that participates carries a similar burden. It seems doubtful that these few jurisdictions can or will continue to support the Association's unfunded mandates effort without either a surge in voluntary participation or a special assessment on the membership. There may be ICMA members who believe that this is not a proper role for our Association, and some may not be convinced that unfunded mandates are all that unreasonable. Those members "downstream" from a big pollution problem might applaud current policy.

Others may see the debate on unfunded mandates as a policy matter. Those holding this view may believe that local government managers' role as professionals is best fulfilled by supporting elected officials. After all, this debate may boil down to the question of federalism. For example, not many federal officials perceive a difference in perspective between local and state officials. Some of ICMA's members may see federalism as pretty close to

a pure policy topic. They might believe the Big Seven should be the Big Six on such issues.

Yet other members see ICMA's role as critical to the development of balanced, de-politicized policy. One achievement of the Environmental Mandates Task Force's two years of effort is bringing a politically neutral perspective to the debate. ICMA is problem-oriented. ICMA's voice often is the only governmental perspective not seen in terms of how it will advance a partisan agenda or a political career. If ICMA members believe that such a perspective is important to the work that lies ahead, then we will find a way to maintain and enhance the resources available for this effort.

Currently, the task force has the equivalent of a one-third-time staff person for this effort. The money that the task force members contribute directly to the effort will need to be increased twofold to provide the intensity and continuity of effort necessary for the next two years. If we cannot find these resources, then we really cannot be a full partner in this debate.

It is nearing the time for a decision. If ICMA members want this effort to continue, we must:

- Join up. Start contributing by joining the Environmental Mandates Task Force.
- Or campaign for new or redirected ICMA resources for this effort. Either a special assessment might be made, or some less valuable effort might be terminated.

Either way, the commitment must be made before the next ICMA Annual Conference, in Denver. A failure to act promptly would severely limit ICMA's ability to have an impact on this critical issue. **DM**

John Novinson is village manager, Northbrook, Illinois, and cochair of ICMA's Environmental Mandates Task Force.