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Administrative Conference of the United States
Office of the Chairman

Studies in Administrative Law and Procedure 90–1

DRAFTING FEDERAL GRANT STATUTES

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

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DRAFTING FEDERAL GRANT STATUTES

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CHAIRMAN'S FOREWORD

Over a hundred billion dollars a year of the federal budget is spent in the federal grantmaking process. Too often, this labyrinthine array of programs is seen to be neither efficient nor fair. At a minimum, the grantmaking process is difficult to understand and harder to evaluate. Too often, as this guidebook shows, administrators are constrained by poorly crafted statutes. Many of these laws are simply unclear, and could be significantly improved by a dose of "plain English." Other statutes create and regulate the operation of grant programs whose actual environments are often little understood. When good drafters lack grant expertise, or grant experts lack drafting skill and experience, the result may be a program that is difficult to manage efficiently or equitably according to the administrator's desires and the legislator's expectations.

To bridge this gap, the Administrative Conference commissioned Malcolm Mason to prepare a guidebook. Mr. Mason is a Senior Fellow of the Conference who has specialized in grant matters; he was, for instance, Chairman of the Departmental Grant Appeals Board at the Department of Health, Education and Welfare. This publication identifies some principal problems in drafting grant statutes. If drafters use this guidebook, the writing of grant statutes can be improved and interpretation of those statutes simplified.

This guidebook is intended to aid congressional staffs, agency legislative counsel, lobbyists, or others involved in drafting grant-related legislation on subjects ranging from drafting dispute clauses to addressing third party rights to writing maintenance of effort provisions to providing sanctions for noncompliance. Such questions, while significant, often receive little or no advance attention or are handled with needless inconsistency, due to multiplicity of congressional committees with jurisdiction, the crucial importance of a bill's substantive features and the sheer press of events. Ideally, this guidebook could help produce better-crafted statutes, reduce divergences, improve agency administration, and avert needless uncertainty and litigation.

The Administrative Conference has had a longstanding interest in problems of grant administration, as reflected in the other items included in this volume. At its first Plenary Assembly in 1968, the Conference recommended steps intended to protect the interests of disadvantaged persons affected by grant statutes, and since that time it has continued to focus on the problems of fair and efficient grant administration. Like the Mason guide, the Conference's grant advice embodies a number of common themes that every agency administering grant funds should heed. These include use of effective public notice, adoption of program goals and detailed selection criteria, public participation in open decisionmaking, and use of informal dispute handling procedures to encourage feedback and avert resort to formal litigation. These processes are important, not only because they promote fairness and result in better grant projects, but also because they further effective management and good government.

Notice, and particularly notice of the availability of funds and of application deadlines, is important because every agency should seek to identify all persons who might be interested in applying for particular grants and to make efforts, in addition to *Federal Register* notice, to reach them. Criteria are important, not only because they help grantees and applicants know what agencies expect from them, but also because they help agencies establish their own priorities. They should be as specific as possible. Any agency that cannot think clearly enough to be able to present a brief statement of (1) its mission, (2) its programs' goals and priorities, and (3) what it considers important in fulfilling these goals, probably is not doing as good a job administering its appropriation as it should. Feedback procedures enable applicants or grantees to complain of instances where they believe that goals or selection criteria are inadequately detailed or improper, or where agencies or grant recipients have ignored them. These procedures provide administrative personnel with valuable information about operational shortcomings.

Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, urged federal grantmaking agencies to maintain procedures to hear grantees' complaints over certain types of agency actions. The recommendations emphasized the usefulness of relatively informal complaint procedures that may make more formal adjudicatory mechanisms unnecessary, and urged agencies to make greater use of mediation and other

conciliatory approaches. The Conference also recommended that agencies provide the additional opportunity for some type of administrative appeal in certain kinds of disputes, including those involving the performance of existing grants, debarment, cost disallowances, denials of entitlement grants, and denials of noncompetitive continuation awards based on failure to comply with the terms of a previous award.

Recommendation 74-2, *Procedures for Discretionary Distribution of Federal Assistance*, called on agencies that have discretion in the distribution of domestic assistance to develop rules that set forth relatively specific criteria for the award of aid based on the formulation of desired results, specific results it expects the assistance to achieve, and any major technical obstacles that may hinder the achievement of these results. Agencies were also encouraged to establish suitable procedures to deal with complaints that the grantor or grantee has violated applicable standards, criteria, or other requirements.

Recommendation 71-9, *Enforcement of Standards in Federal Grant-in-Aid Programs*, suggested several approaches to help agencies in securing grantees' compliance with federal standards without incidentally halting worthwhile programs or adversely affecting the interests of intended beneficiaries of federal financial assistance. The recommendation called on grantor agencies to (1) provide a procedure for the impartial consideration of substantial complaints by affected persons, (2) condition their grants upon a grantee's establishment of fair procedures for handling less substantial complaints, and (3) seek to ensure that adequate information about management of grant-in-aid programs is made accessible in a timely manner to persons affected by the program. Recommendation 71-9, based on research by Jerry Mashaw and Edward Tomlinson, also called upon grantor agencies to seek to develop an adequate range of performance incentives and sanctions, short of a total cutoff of funds, for ensuring grantee compliance with federal standards.

Recommendation 69-8 urged Congress to amend the Administrative Procedure Act to eliminate the so-called "proprietary" exemption from the notice-and-comment procedures of Section 553. It called on agencies voluntarily to waive this exemption, which most major grant-making agencies (including the Departments of Health and Human Services, Labor,

Agriculture, Interior, and Veterans Affairs) subsequently agreed to do. Procedures using enhanced public participation, as recommended by the Conference, are more likely to produce well-conceived regulations that reasonably accommodate the valid concerns of grantees, beneficiaries, state and local governments, and the general public than internal methods not subject to public scrutiny and comment.

Many persons, especially outside Washington, tend to view large parts of the federal grants system as "closed," with favoritism, politics, fixers, and "buddy systems" having as much to do with awards as merit. These impressions are only strengthened by disclosures like those emanating recently from the Department of Housing and Urban Development. Agencies' use of the types of procedures the Administrative Conference has repeatedly recommended may contribute slightly to opening this system and improving its public image.

Marshall J. Breger
Chairman

ACKNOWLEDGMENTS

This project has been conducted with the active assistance of Senior Staff Attorney Charles Pou, Jr. A well-qualified Advisory Committee was appointed and has reviewed and commented on several successive drafts of the guidebook. We hope that our intended audience will find the guidebook, and the related materials contained in this volume, to be a useful addition to their libraries.

Office of the Chairman
Administrative Conference of the United States

A GUIDE TO FEDERAL GRANT STATUTE DRAFTING

By Malcolm S. Mason

Senior Fellow, Administrative Conference of the United States

Preface

Loren Smith, Chairman of the Administrative Conference of the United States, now Chief Judge, United States Claims Court, and his successor as Chairman of ACUS, Marshall Breger, and the staff of the Conference, particularly Stephen Babcock, Jeffrey Lubbers and Charles Pou, Jr., have been enthusiastically helpful and supportive.

The Advisory Board members have been similarly helpful in supplying approaches, comments and constructive criticism.

Schnader, Harrison, Segal & Lewis and Paul Dembling of that firm have been very helpful in providing facilities and services in support of this project. Paul G. Dembling has served as a member of the Advisory Board. The word-processing staff of Schnader, Harrison, Segal & Lewis, especially Ed Grzyb and Anna Gaskins, have been patient and helpful.

The National Assistance Management Association has been very helpful and its Board members, officers, and several past Presidents have participated actively.

Members of Congressional staffs have participated in discussions of the project and have supplied valuable suggestions and documentation. Among others who have participated in meetings and discussions and have supplied materials, may be mentioned: Dr. Margaret Wrightson, formerly Majority Staff Director, Subcommittee on Intergovernmental Affairs (Senate), and Ms. Donna Fossum, formerly with the Committee on Government Operations (House).

A member of the HHS Departmental Grant Appeals Board, Judy Ballard, and a member of the Staff of the Board, Terrie Gale, have assisted in the research, through the courtesy of the Board Chair, John Settle, a member of the Advisory Board.

Professor Morell E. Mullins of the School of Law, University of Arkansas at Little Rock, has recently published a very practical and sagacious handbook on statutory drafting, focusing on state law drafting (see Bibliography, Appendix). He has been both helpful and generous in his detailed and insightful criticism.

NOTE ON 1 U.S.C. 1

Attention is called to 1 U.S.C. 1, Rules of Construction:

"(3) words importing the masculine gender include the feminine as well."

If I sometimes write "the lawyer, he" or "the draftsman, he" I intend to imply no priority of masculine lawyers against feminine lawyers or of masculine draftsmen as against feminine writers of legislative drafts. In many cases where I write "the lawyer, he" or "the draftsman, he" the rest of the sentence includes a suggestion that "the lawyer, he is confused" or "the draftsman, he has confused us". Little would be gained by insisting on equal grammatical recognition for women.

DESCRIPTION OF THE PROJECT

The Conference has undertaken a study on problems in the drafting of federal assistance statutes, intended to lead to the preparation of a guidebook.

The objective of the study is to encourage clear, precise drafting of grant and assistance-related statutes.

It is not the purpose of the study to develop guidance on statutory drafting generally but to focus on aspects related to grant statutes.

It is also not the purpose of the study to develop a treatise on grants generally but to focus on aspects of the grant institution and practices that significantly affect the drafting of the statutes.

It is, further, not the purpose of the study to support particular goals of substantive policy, but to assist policy-makers in the development of statutes which are, as nearly as possible, effective in achieving the policy-makers' substantive policies, whatever they may be.

It is hoped that the outcome will help produce better-crafted assistance statutes, reduce divergences, improve agency administration, and avert needless uncertainty and litigation.

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I. INTRODUCTION

A. ARE GRANT STATUTES GENERALLY WELL DRAFTED?

Are grant statutes well drafted? Some are. Too many, though, are ambiguous, raise questions, and create unnecessary disputes and litigation. Worst of all, some lead to results different from what the drafter intended. "[O]ften Congress cannot be heard clearly because its speech is muffled."[1] While there are necessarily subjective elements in such a judgment, a consensus of experienced observers in the field and significant empirical evidence cited herein support it.

Great drafters may be born, but some simple rules and reminders can lead to better drafting.[2] Several of these have special relevance to statutes in the field of federal assistance. This Guidebook seeks to set them forth, and discuss special problems facing drafters of grant laws.

B. SOME EXPERT ASSESSMENTS INDICATE THAT GRANT STATUTES ARE OFTEN NOT CLEAR

A fundamental problem is that such statutes often lack explicitness on eligibility, on the range of administrative discretion, on the purposes for which funds may be used, on the presence or absence of federal controls or restrictions, and on provision for evaluating the results. Other goals often not met are avoidance of overinvolve-ment in the details of the regulatory function, and stan-dardization of language to insure consistent interpretation.[3]

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[1]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL.L.R.527, 535-6.

[2]Among classic writings on the subject are Dickerson, Legislative Drafting (Boston, Little Brown, 1954, reprinted by Greenwood Press, 1977), and Hirsch, Drafting Federal Law (Department of Health and Human Services, Office of the General Counsel, Legislation Division, 1980) which focuses more directly on assistance statutes. An extensive bibliography will be found below in Chapter V.

[3]Many of these points are discussed *infra*. They are made by *DEMBLING in the context of the following general comment (at 305):

The Advisory Commission on Intergovernmental Relations (ACIR), a broad and bipartisan body that has done significant research in grant problems, comments with insight on influences in the structure and operation of Congress that tend to interfere with good design of grant programs:

> In practice difficulties arise in obtaining Congressional respect of statutory design criteria. Congress may feel impelled to take action on a problem before sufficient knowledge and expertise is acquired to draft a bill meeting these criteria in all regards. . . .Congress may choose to ignore one or more principles of sound statutory design for its own coalition-building purposes. This reason may be why it combined several incompatible objectives into a single program under the small business loans portion of the Economic Development Administration Act. . . . [*E.g.*, to attract new industries or expand old ones in areas of low employment, but not to subsidize competitors against industries in the area]. (p. 70)
>
> Anxious to respond to needs, Congress is often not sure what will meet those needs. Sometimes, out of honorable impulses, it seeks many good but incompatible objectives in the same piece of legislation. (p. 73)[4]

VIII. Legislative Concerns

> While there are some efforts for consolidating and understanding the flow of information regarding federal assistance programs to the public, there has not been a uniform approach to grant and federal assistance legislative drafting by the Congress. There is no common thread to be discerned regarding the various statutes which are enacted dealing with federal assistance programs. There has been no common structure to these statutes. Each program is authorized by a statute which uses it own language. No common set of definitions has emerged.

Citations in short form such as "*DEMBLING" are spelled out more fully below in the Bibliography (Appendix), where they are identified by the initial *.

Examples of vagueness, lack of standardization, over-intensive regulation, will be cited later in this chapter and in later chapters.

[4]ACIR, in *Categorical Grants: Their Role and Design*, A-52, undated but apparently 1978, Chapter III, The Role of Congress. *Cf.* Kozinski, Remarks

*Cappalli, 2:04, p. 6, comments:

> While the "proper" size and nature of national government involvement in the socioeconomic problems of America is essentially a political judgment, the efficiency and effectiveness of what is considered appropriate by our political processes is or should be a nonpartisan concern. To phrase it another way, it is essentially a concern of all people and parties to have that program run well. Yet, the disjointed and incremental congressional process was incapable of generating a systematic appraisal of the "style" and "structure" of federal assistance.[5]

C. SOME EXAMPLES CONFIRM THAT VIEW

There are many indications of room for improvement. One such symptom of drafting deficiency is the discovery - not as unusual as it should be - that a statute just enacted must promptly be amended because its provisions direct action that the Congress did not in fact intend.

Family Educational Rights and Privacy Act, Education Amendments of 1974, 88 Stat. 484, 57, *amending* 438 of the General Education Provision Act, 20 U.S.C. 1232g, August 21, 1974, attempted to define the rights of students and their parents to information about their school records and to privacy of those records. In seeking to define both rights of access to information and rights to privacy, the Congress undertook a delicate task and the drafter stepped on his own toes.[6]

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at January 9, 1986 joint luncheon of Federal Bar Association Capitol Hill and Pentagon Chapters, reported in FBA Government Contracts Section Newsletter February 1986, p. 7.

[5]*Cf.* **Current Trends*, 35 FED.. BAR J. 163 at 186: ". . . there is a growth of particular statutory impingements on the operations of grant-making agencies which tend to express valid concerns but often are written without an appropriate broad framework so that they may lack balanced protections and may be counterproductive."

[6]No sooner was the law enacted than it became apparent that it would not do what Congress intended and in some ways, particularly in the relations of parent and child, might do just the opposite. Before the year was out, Congress enacted several pages of detailed changes, P.L. 93-568, 2, 88 Stat. 1855, December 31, 1974; retroactive to November 19, 1974. At the same time and probably for a similar reason, P.L. 93-568, 3,

Similarly ill-drafted is the Pucinski Amendment which deals with the same problem as the Administrative Procedure Act rulemaking provisions 552 and 553 (particularly, no rulemaking without 30 days advance publication in the Federal Register) but omits the carefully balanced protections of 552(a)(1) and 553(b)((A) and (B) and (d) (1)(2) and (3), which provide, as the Pucinski amendment did not, for cases of actual notice, for cases where good cause exists for departure, and for distinction between substantive rules and interpretive rules and for rules that recognize an exemption or relieve a restriction.[7]

D. THE SUPREME COURT REPEATEDLY FINDS GRANT STATUTES NOT CLEAR

The Supreme Court has repeatedly commented on the poor drafting of grant statutes that have come before it. For example:

Board of Ed. of City Sch. Dist. etc. v. Harris, deals with a grant program to assist states in moving toward desegregation and turns on whether discrimination is measured by intent or effect.[8]

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amended 901a of the Educational Amendments of 1972, 20 U.S.C. 1681, retroactive to July 1, 1972. Prohibiting educational programs receiving federal assistance from discriminating on grounds of sex, the Congress was dismayed to find it had curbed the YMCA, the YWCA, social fraternities, and other traditionally one-sex organizations which it considered benign.

[7]But *cf.* Sky, *Rulemaking in the Office of Education*, 26 AD. L. REV. 129 (1974), and Sky, 62 VA.L.REV. 1017 (1976), *Rulemaking and the Federal Grant Process in the United States Office of Education*. *See* Economic Opportunity Act of 1964, 623, as amended (1972), 42 U.S.C. 2971 ; *See Local 2677 v. Phillips*, 358 F.Supp. 60, (D.D.C. 1973) at 81-82; *contrast Local 2816 v. Phillips*, 360 F.Supp. 1092, 1100 (N.D. Ill., E.D., 1973). *cf.* General Provisions Concerning Education, Title IV of P.L. 90-247, as amended by P.L. 91-230, P.L. 92-318 (renumbered) and P.L. 93-380, 432(b), 20 U.S.C. 1232(b), which recognizes the need for qualifying the absolute terms of the old 431(b), but modifies it in a way that requires notice of proposed regulation to the pertinent Congressional Committees and the absence of disagreement by the committees and notice to the Speaker of the House and President of the Senate of final regulation and the absence of a concurrent resolution of disapproval. In addition, there is to be submission of schedules, of planned final regulation. The complexity of this raises questions of practical expediency in addition to the constitutional problems involved in the "legislative veto".

[8]444 U.S. 130, 100 S.Ct. 363 (1979) The central issue involved the ineligibility provisions of Section 706(d)(1)(B) of the 1972 Emergency School Aid Act, 86 Stat. 354, as amended, 20 U.S.C. Sections 1601-1619, repealed and simultaneously re-enacted, with amendments not material here, by Title VI of the Education Amendments of 1978, P. L. 96-561, 92 Stat. 2252, 2268, effective September 30, 1979. The re-enactment is recodified as 20

The Court, although sharply divided on the result, was unanimous in finding the statute inadequately clear.

Justice Blackmun, writing for the Court, quoting the ineligibility provisions said:

> The mere reading of this language [sec. 706(d)(1)(B) ineligibility provisions of 20 U.S.C. 1601(o) 1972 Emergency Aid Act] reveals that it suffers from imprecision of expression and less than careful draftsmanship. The first portion clearly speaks in terms of effect or impact. The second portion, arguably, might be said to possess an overtone of intent. There is nothing specifically indicating that this difference exists or, if it does, that it was purposefully drawn by Congress . . . . (444 U.S. at 138-139).[9]

Justice Stewart, writing for himself and two other dissenting Justices, said:

> Since the meaning of 706(d)(1)(B) is thus concededly ambiguous, it is necessary to look

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U.S.C. Sections 3191- 3207 (1976 ed., Supp. II). On this form of amendment, *see* discussion, *infra*, Ch. III, "Special considerations in Drafting Amendatory Grant Statutes - Leave a track." Sections 3191-3207 in turn were repealed. P.L. 97-35, Title V, Subtitle D, Ch. 2, Subch. E, 587(a)(1), 95 Stat. 480, codified at 20 U.S.C. Section 3863.

The provision in question made a school district ineligible for assistance if it has, after June 23, 1972, had in effect a practice which results in the disproportionate demotion or dismissal of personnel from minority groups or "otherwise engage[s] in discrimination . . . in the hiring, promotion, or assignment of employees." The issue was whether intent to discriminate or only a disparate impact is required to bar the school district. The majority held that discriminatory impact is the standard by which ineligibility is to be measured, relying on its perception of the overall structure of the Act, the legislative history and its reading of the section which it acknowledged was imprecise and not carefully drafted. The dissent reached the conclusion that a racially discriminatory motive or intent in the school district's faculty assignment policies was required to bar the school district. It differed from the Court on its perception of the overall structure of the Act, on the legislative history and on its reading of the language of the critical section, but agreed that the language was ambiguous.

[9]Later in the opinion he said:

While perhaps it might be possible to theorize and to parse the language of 706(d)(1)(B), as the Board so strongly urges, in such a way as to conclude that impact alone is sufficient for ineligibility with respect to 'demotion or dismissal,' but intent is necessary with respect to 'assignment of employees,' we conclude that the wording of the statute is ambiguous. This requires us to look closely at the structure and context of the statute and to review its legislative history. (444 U.S. at 140).

> beyond the statutory words in order to ascertain their meaning (444 U.S. at 154).

Since the impact-or-intent issue involved in *Harris* was a well-known matter of debate and did not come as a surprise, we may conclude that if the Congress had a legislative purpose and wished to resolve it, greater clarity should have been achievable.

If it had intended the result reached by the Court, it might have said "or otherwise engaged in practices in the hiring, promotion or assignment of employees of the agency having a discriminatory impact with respect to race, color, or national origin, whether or not there is independent proof of discriminatory intent." If it had intended the result reached by the dissenters, it might have said "or otherwise engaged in practices in the hiring, promotion, or assignment of employees of the agency, with intent to discriminate on the basis of race, color, or national origin."

Of course, from the Congress' failure to do that, it does not follow that it was careless or incompetent. There are often reasons other than carelessness or incompetence why a legislator will accept ambiguities in a statute. An issue may not be ripe for legislative resolution and insistence on clarity in details may sometimes result in a failure to enact a program believed to be overall desirable. Circuit Judge Abner J. Mikva's comment, reflecting his experience as a Congressman as well as a Judge, is:

> We certainly should not be critical of ambiguity of language. Sometimes that is the only way a bill can pass--by sloughing over the hard parts and dulling the bright lines we would like to see.[10]

Nevertheless, the case is a reasonable reminder to statute writers that, unless you are obfuscating deliberately, it is possible and sometimes desirable to be clearer than the drafter of the ESAA was in the view of both sides of the Court.[11]

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[10]Mikva, *Reading and Writing Statutes*, 28 S. Tex. L.R. 181, 187 (1986). *Cf.* Frankfurter, *op.cit.*, n.1, *supra*, at 528: "Moreover government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding." *See* also *infra* text at n.19.

[11]Other examples abound, as the reader will see in later sections. *United States v. Locke*, 471 U.S. 84, 105 S.Ct. 1785 (1985), involved the problem of defining a deadline in a statute not in the field of grants but in a closely allied field. The case is discussed at some length in *Current

Developments, Vol. 21, No. 1, Fall 1985, p. 6. "Late Filing of Mining Claims". The statute, the Federal Land Policy and Management Act, P.L. 94-579, 43 U.S.C. 1701-1784, required that to protect substantial rights, miners file an annual notice "prior to December 31."

In *Locke*, the local Office of the Bureau of Land Management had told the miners that filing their claims on December 31 would be good. (Uncontradicted affidavit). The miners, who were actively working their valuable claim, flew to the Regional Office and filed on December 31. In April they were informed that, filing on December 31, they were a day late and had forfeited their claim. A majority of the Court said this was the result Congress intended, but the whole Court clearly viewed the statute as badly written.

The Court's opinion by Justice Marshall, at 1793 referred to ". . . the fact that Congress might have acted with greater clarity or foresight . . ." Justice O'Connor, concurring, at 1802, referred to "a poorly worded statutory deadline."

Justice Powell, dissenting, at 1802, said "the statutory deadline is too uncertain to satisfy constitutional requirements" and cited with approval the adverse comments of the separate dissent by Justice Stevens. Justice Stevens, with whom Justice Brennan joined, referred to circumstances that cast doubt both on the care with which Congress drafted 314 and on its meaning (1806 cited by Justice Powell at 1803) and called the statute "at least, ambiguous." At 1805, citing his dissent in *Delaware*, 430 U.S. 93, 97, 97 S.Ct. 911, 925, Justice Stevens underlines "the unfortunate fact that Congress is too busy to do all of its work as carefully as it should." At p. 1805 at n. 3 and p. 1806, citing Sherwood article in ROCKY MOUNTAIN MINERAL LAW INSTITUTE, he speaks of "inartful draftsmanship"; at 1807 he comments: "Plain language, . . . indeed"; at 1807 "an awkwardly drafted statute"; at 1808: "poorly drafted statute"; at 1810: "an ambiguous statute."

The United States, appellant, concedes that "[i]t may well be that Congress wished to require filing by the end of the calendar year and that the earlier deadline resulted from careless draftsmanship."

Did Congress really intend the result of the *Locke* case? The majority do not question that. The opinion of the Court simply argues in substance: That's what they said and they have the power to do it. Justice Stevens dissenting, believed the actual intent of Congress was to permit filings up to the end of the calendar year. Justice Powell, dissenting, comments (at 1803): "This is certainly the more reasonable interpretation of congressional intent and is consistent with all the policies of the Act."

The Department of the Interior, when the statute was new, understood the "prior to December 31" language to permit filing on December 31. The Bureau's local office, when consulted in this case, still understood it that way. Time of filing was clearly not very important to the Department since it would accept a letter received as late as January 19 (43 C.F.R. 3833.0-5m) and only in April informed the claimants they were late. This looks like an artificial issue.

Still, if Congress really wanted a December 30 filing deadline, what should it have done? It could have said "before the close of business December 30." More likely, there was no real need for this unusual deadline and the drop-dead language of the statute should have been softened. There is no indication that national land policy suffers from filings that are so marginally delayed.

In *Dixson v. United States*,[12] the question was whether officers of a private nonprofit corporation, not a federal agency nor a federal grantee, not even a grantee of the grantee, but only a sub-sub-grantee administering and expending federal community development block grants, are "public officials" for purposes of the federal bribery statute, 18 U.S.C. 201(a). The opinion of the Court, at 1177, notes:

> As is often the case in matters of statutory interpretation, the language of section 201(a) does not decide the dispute.

The dissent, at 1183, refers more vigorously to the "ambiguity," "facial ambiguity," "ambiguous coverage of the statute."

In other instances, where Congress wanted a statute on bribery or related economic offenses to apply to non-federal employees, it has said so expressly.[13] If it wanted that result it might have said so expressly here. If, as I believe, it did not want that result, it might have said so expressly also. It should be noted that if a federal statute does not apply, state statutes would presumably make the same conduct an offense under state law and the Congress may well have been satisfied with that result. If so, it is difficult

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[12]465 U.S. 482, 104 S.Ct. 1172 (1984), discussed in *Current Developments, vol. 19 No. 4, Summer 1984, p. 16, and vol. 22, No. 1, Fall 1986, pp 11-13.

[13]*See* *Current Trends, 35 FED. BAR J. at 167-168, 179-180. There is a long history of Congressional action that provides where necessary specific criminal statutes where it wants criminal sanctions rather than apply to grants broad general criminal statutes. By enacting the specific statutes, Congress showed that it did not understand the general statute to apply. Examples are 42 U.S.C. 1396h (kickbacks, bribes, or rebates in medicaid programs) recently strengthened by the Medicare and Medicaid Patients and Program Protection Act of 1987, P.L. 100-93, August 18, 1987; 18 U.S.C. 874 (kickbacks from public works employees on work financed by loans or grants from the United States); 42 U.S.C. 2703 (embezzlement or kickbacks and related misconduct in economic opportunity grant programs, repealed as part of general revisions of Economic Opportunity Act, P.L. 90-222, Title III, 301, *see* 1304; *see* 42 U.S.C. 2971(f), P.L. 97-35, Title VI, 6836). *See* 18 U.S.C. 665, theft or embezzlement in CETA program. *See also*, Job Training Partnership Act, section 182, amending 18 U.S.C. 665, Pub. L. 97-300; note also 436 dealing explicitly with the application of provisions of federal law to enrollees in the Job Corps. Robert Carmody has called my attention also to 18 U.S.C. 666 added by Pub. L. 98-473, Title II, 1111, Oct. 12 1984, 98 Stat. 2149. This action was proposed precisely to provide a specific statute instead of relying, as the Supreme Court did, on a general one of questionable applicability. Senate Report No. 98-225, p. 369 in 1984 U.S. CODE CONG. AND ADM. NEWS 3182 at 3510-3511.

to expect the Congress to anticipate the Court's reading of the statute, so the drafting may not be seriously at fault. I believe the Court was poorly informed. It may however, be appropriate for Congress to enact a general grant framework which announces that unless the contrary is clearly expressed, a grantee is not an arm, agent, or instrumentality of the federal government, its records are not records of a federal agency, its torts are not federal torts and its personnel are not federal employees or federal officials.[14]

Pennhurst v. Halderman,[15] involved the question whether a federal "bill of rights" for the retarded actually established substantive rights for the retarded and gave them a cause of action when they were denied those rights in an institution established by the State using federal grant funds. The Court held it did not. Justice Blackmun, concurring in part and concurring in the judgment, referred, at 1547 to "this confused and confusing legislation." Justice White, however, with whom Justices Brennan and Marshall dissented in part thought the statute "plain enough to me" (at 1550). Opinions can and do differ on such matters, but on questions of private rights of action, it would be well for drafters to consider greater explicitness.[16]

Board of Educ., etc. v. Rowley,[17] involved the question whether the Education for the Handicapped Act, which states as a condition for receiving federal assistance, the providing of free appropriate public education entitles a deaf child to a sign-language interpreter in the classroom. The opinion notes:

> We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education": [in terms of "appropriate"].

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[14]•Current Trends, 35 FED. BAR J. at 179-180.

[15]451 U.S. 1, 101 S.Ct. 1531 (1981)

[16]This view was underlined by Justice Powell, joined by the Chief Justice, concurring in *Guardians Ass'n v. Civ. Serv. Com'n of City of N.Y.*, 463 U.S. 582, 608-9, 103 S.Ct. 3221, 3236 (1983): "Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of-action question. The result frequently is uncertainty and litigation as to available remedies without clear legislative guidance."

[17]458 U.S. 172, 102 S.Ct. 3034 (1982).

> ... Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent.... (458 U.S., at 187-188)
>
> Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.... (458 U.S., at 189)
>
> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. (458 U.S., at 203).

In calling the requirements "tolerably" clear, the Court, "loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act," was hardly awarding a commendation. The Court held that the lower courts should not have concluded, as they did, that the Act requires the provision of a sign- language interpreter, and reversed and remanded. Justice Blackmun, although reaching the same result, stated that he read the legislative history and goals of the Act differently (458 U.S. at 210). Justice White, dissenting, with Justice Brennan and Justice Marshall, expressed the view that the majority opinion contradicts itself, the language of the statute and the legislative history and disregards congressional intent (458 U.S., at 212).[18]

It must be acknowledged that the Supreme Court is not the most reliable evaluator in this field. Most Justices' awareness of the problems of grant operation is unfortunately minimal. The Court sometimes finds or says it finds unclear a statute that more experienced, equally disinterested observers find clear enough. The Court similarly finds or says it finds statutes plain and clear that others may find murky. Nevertheless, statutes are usually not written to provoke litigation. While Court pronouncements are not absolute tests of the clarity of a

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[18]Note that the Congressional failure (if it is a failure) to define "appropriate" better (appropriate is defined in terms of appropriate) may have been wise. I do not intend to prejudge questions of that kind. This may be the best way to break new ground. But if the drafters knew what they wanted and could get the bill passed, perhaps better drafting was possible.

statute, when the Court repeatedly says statutes are unclear and difficult to interpret -- and especially when both majority and minority in the same case say so, -- there is good reason to look carefully at the draftsmanship.

E. AMBIGUITY IS SOMETIMES DELIBERATE AND SOMETIMES JUSTIFIED BUT SHOULD BE HELD TO A REASONABLE MINIMUM

As previously noted some statutes are deliberately vague or ambiguous: Precision may be premature in the development of a new social program.[19] Precision of expression moreover might lose the possibility of gaining a majority.[20] It is a fair question whether such vague statutes should be enacted, but it does happen, and no guidebook on drafting will cure deficiencies that are introduced intentionally.[21] Indeed, when a clear statute cannot be enacted, a drafter may show exceptional skill in writing one ambiguous enough to gain the votes of legislators on both sides of the issues involved. These skills are reserved for a more advanced course.

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[19]*See* Frankfurter, *op.cit. supra*, n.1., at 528, and n.10. *supra*. *See* Cleveland, The Future Executive, Harper & Row, 1972, p. 34: "... look sharp to see whether clarity or ambiguity serves the system better". *See* *Current Developments, vol. 22, No. 1, Fall 1986, p. 12 Comment C. *See* Mason, Separate Statement on ACUS Rec. 74-2, 3 ACUS 38, 42.

[20]ACIR, Categorical grants, A-52, *op. cit. supra*, n.4, at pp. 71 and 73 suggests:

> Modifications that destroy good design features are probably the easiest changes made in the coalition - building process. . . . Most importantly, during the coalition - building process to achieve enactment, preferred design features are frequently compromised.

Clarity is one of the design features often so sacrificed.

It is not only in legislative drafting that this kind of compromise occurs:

Chief Justice Hughes once said that he tried to write his opinions clearly and logically, but if he needed the fifth vote of a colleague who insisted on putting in a paragraph that did not 'belong', in it went, and let the law reviews figure out what it meant. Rehnquist, THE SUPREME COURT: HOW IT WAS, HOW IT IS (William Morrow, New York, 1987), p. 302.

[21]James J. Kilpatrick, *The Idea Is to Communicate*, Washington Post, Monday, Nov. 18, 1985, Op-Ed: "...sometimes we write for the pure pleasure of turning a pretty phrase; sometimes we draft tax law. Most of the time we write in the hope of being clearly understood." *Cf.* *Hirsch, p. 30: A draftsman may seek a degree of vagueness for reasons of policy; unnecessary vagueness should not be inflicted on his client because of the draftsman's ineptness.

F. WHO SHOULD BE INTERESTED IN GRANT STATUTE DRAFTING PROBLEMS?

Drafters of grant statutes are not only the legislators and their staffs, but also agency legislative and program personnel, who originate many programs, and representatives of potential recipient and beneficiary groups who may be affected favorably or adversely by grant legislation. Advocates and courts interpreting statutes in the grant field may benefit by greater familiarity with the drafting problems involved in writing the statutes.

This Guidebook eschews substantive preconceptions. It seeks to be content neutral. It is not, however, neutral about the value of the grant institution, properly used. Whatever your substantive goals, you should know how to use the tools available to write them into effective legislation. Doing so requires an awareness of the grant as an institution that has evolved a distinctive character. Drafters must know, for example, that a grant is assistance to an autonomous recipient. They should understand when it is more effective to use grants rather than other techniques, why a grant is sometimes said to be like a contract and why it can be harmful to adopt this line of thought.

Features of our grant system include:

(a) Local governance in certain areas is protected.

(b) Pluralism is a goal.

(c) Operational independence is preserved.

(d) Delegation is characteristic.

(e) Grants are a congressional monopoly: No grant without statute.

(f) When made to a state, a grant is an arrangement between sovereigns.

Major changes are going on in the field of grants. Whereas in the 35 years beginning about 1950, grants grew from about $2 billion annually to about $175 billion, Reagan Administration policy and harsh fiscal facts have recently caused this explosive growth to level off and may even cause it to reverse.[22] Some decreases and program terminations have already occurred.

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[22]Reliable figures for the amount of grant funds are very difficult to get. The most readily available, such as the Budget Special Analyses are for various reasons incomplete and possibly misleading. *See* for example, *Current Developments, Vol. 20, No. 1, Fall 1984, *The Size of the Grant Budget*, p. 7; No. 2, Winter 1985, *Breul's Figures for the Size of the Grant Program*, p. 10.

Current Administration policy (1988) favors cutting down the number of grant programs, not only reducing them in dollar amount but consolidating separate programs and converting some to block grants,[23] or other forms of assistance.

While we can expect that there will be fewer, smaller grant programs in the near future, these trends hardly represent watershed changes that will lessen the importance of the grant process.[24]

Factors indicating that grants will continue to represent a major federal activity are these:

(1) They take advantage of an efficient and largely fair federal tax system.

(2) They avoid growth of an even more massive federal bureaucracy.

(3) They permit local choices as to how best to deal with problems of national scope that nevertheless require or are seen to require adjustment to local circumstances, such as police, education, medicine, publication, welfare, research.

(4) In the absence of federal support, many grantees such as universities would turn to alternative courses that are limited and potentially detrimental: state funding, private-sponsored research, tuition increases.

(5) Without federal support, research levels and important service levels will be reduced.

(6) Federal funding can protect autonomy where it is essential. Where it is necessary to "fight city hall", you can't expect city hall to fund you.

Many existing programs will be reauthorized, usually modified as a result of congressional oversight and changed goals. In all likelihood, new grant programs will be enacted from time to time.[25] In any event, grants have a variety of

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[23]Discussed below at Ch. II, 2, Types of grants.

[24]This question was addressed in an extended discussion of *Zero-Funding the Grant Technique, Zero Funding Grant Supported Activities, The Uniqueness of the Grant Approach* and *Two Basic Questions*, *Current Developments, Vol. 14, No. 2, January 1979, P. 14 *ff.*

[25]Thus, the Safe Drinking Water Acts Amendments, P.L. 99-339, June 19, 1986, adds a demonstration grant program; the Mentally Ill Individuals Act, P.L. 99-319, May 23, 1986 also adds a new grant program; the Excellence in Minority Health Education and Care Act, P.L. 100-97, August 18, 1987, creates a grant program for health professionals schools; the Stewart B. McKinney Homeless Assistance Act, P.L. 100-77, July 22, 1987, creates several related grant programs.

The "Orphan Drug Amendments of 1988," P.L. 100-290, sec. 3, extends and continues a small grant program. April 18, 1988. The Child Abuse Prevention, Adoption, and Family Services Act of 1988, P.L. 100-294,

advantageous features, serve valid governmental purposes and will survive.

As noted by the Supreme Court in *United States v. Orleans*:

> Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well.[26]

There are activities that will not be done as well, or not at all, if left to diverse private sources or local authority alone. Here is an example: Rational use of energy resources is a pressing national need. Yet the short term local interests of each consumer and each community may pull against the long run national interest of all consumers and all communities.[27] Only national action can deal with this problem.

To form a sound judgment of whether grants are appropriately to be used in a particular case, we must look at two questions: (1) what should be federally supported (and, because federally supported, can be steered or regulated for major federal goals) as opposed to state or local or only privately supported? (2) If federally supported, what should be done by grant as against being done by federal government directly, "in-house", or by contract or by other techniques?

The answer to the second question turns on what can be done best or what should be done on a local level.[28]

Certain activities are felt in American tradition to be properly local. To federalize them would wrench strongly

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April 25, 1988, restructures previous activities and creates new grant programs.

The Augustus F. Hawkins - Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, P.L. 100-297, April 28, 1988, reauthorizes existing programs and creates new grant programs.

The Civil Rights Restoration Act of 1987, P.L. 100-259, March 22, 1988, corrects recent decisions of the Supreme Court, cutting across major grant programs.

[26]425 U.S. 808, 817 (1976).

[27]Another example is the interstate highway system. *See, e.g.*, NATIONAL COUNCIL ON PUBLIC WORKS IMPROVEMENT, FRAGILE FOUNDATIONS (Final Report to the President and Congress), February 1988, Criteria for Evaluating Public Works Roles, pp. 81-86, Highway Roles, pp. 87-89. *See* review of (Netherlands) Committee for the Development of Policy Analysis, *The Subsidy Instrument*, November 1975, in FBA FEDERAL GRANTS COMMITTEE NEWSLETTER, October 31, 1975, par. 5.

[28]*Cf.* FBA Federal Grants Committee Check List on the Uses of Grants in the Energy Field, June 14, 1977, pp. 3 *ff.*, 8 *ff.*

held beliefs that have some validity and have, in any case, more force than their actual merits justify as a mere pragmatic matter. We do not want a federal police force, a federal education system, a federal practice of medicine, a federal newspaper. We believe that welfare laws should be in important respects responsive to locally divergent situations. We know that creative research needs autonomy in the conduct of the research.[29] When these feelings are involved, the federal government will not appropriately conduct the program itself nor by contract, but will use other techniques of which grant is a principal example.

Thus, grants belong to the area where two inconsistent trends cross: where the problem requires national action rather than local, but our policy perceptions nevertheless call for local control and adjustment to local circumstances. Both pulls may sometimes be satisfied by a federal grant to encourage local action in a direction broadly defined by national goal considerations. Where both of these inconsistent crossing needs are not present, the appropriateness of the grant technique should be questioned and zero-funding of a grant approach is probably a correct outcome. Where both are present and are of substantial importance, serious consideration should be given to the possible effectiveness of the grant technique and a decision for funding may be justified if the goal is important enough, the cost acceptable, and the benefits and costs of alternative techniques less compelling.

The grant system will change. It may, by some measures -- dollar amount, number of different programs -- shrink, but it has not outlived its usefulness and is not at the edge of disappearing. It should be understood by those who determine its size, shape and other characteristics. This includes legislators and legislative staff, executive department staff, advocates, the courts, lobbyists and representatives of those who may be affected by grant programs. It is a distinctively American governmental device that will continue to be needed and is worth handling better than it has been in the past.

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[29] *Cf.* Smith, *Judicialization: The Twilight of Administrative Law*, 85 DUKE L.J. 427, 445 (1985): "You can do many things by threat or promise, but you cannot create or invent by that method . . . creativity and invention can spring only from the individual human mind, while law operates at the level of society."

II. PLANNING AN ASSISTANCE PROGRAM

Before the drafting of a grant statute begins, the program itself should be planned: its goals and subgoals, its structure, its social and administrative techniques. A drafter may sometimes be the policy-maker. More often a drafter is a technician aiding the policy-maker. Yet there is an unavoidable overlap between the role of policy-maker and drafter. When it is possible, it is desirable that the drafter participate from the beginning of the planning of the program: the drafter should understand fully the policy that is to be effectuated and should be in a position to point out early that there are options that should perhaps be considered or that have been left undecided. The drafter must know the techniques to be employed; should judge whether they are likely to effectuate the policy goals; and has a responsibility to inform the policy-maker, if necessary, when the techniques to be employed may not be those best calculated to achieve the policy goals, that others are available to achieve them better.

This is a give-and-take that should, if possible, start early in the process. Planning a grant statute begins with the planning (or with helping to clarify the planning) of the program.

In this Chapter we shall examine some leading considerations in planning a grant program. In the next Chapter, considerations in planning the statute. The order of topics is, broadly speaking, an appropriate chronological sequence of topics as they should be given attention or as they affect successive stages in the operation of an assistance program:

A. The choice of instrument.

1. Is the program to be a grant program as opposed to a direct federal operation?

2. Should the program instrument be a grant or a contract?

3. Why should it matter whether one instrument or the other is used?

4. If the program is to be assistance, is the instrument to be a grant or cooperative agreement?

B. Types of grants.

C. Various programs in addition to grants have assistance elements.

D. Grants in context

1. A grant program need not and generally does not stand alone.

2. Good grant statute drafting calls for at least consideration of setting the purposed grant statute in a context of such other activities, and adjusting the various elements to each other.

E. The constitutional basis for grants.

F. Grants are a Congressional monopoly.

G. The administering office

1. If a program is to be a grant program, who should administer it?

2. It is recommended that absent clear reasons to the contrary, grant authority should normally be conferred on agency heads with express or implied power of delegation rather than on specified subordinates.

H. How much discretion should be left to the Executive?

I. What should be the funding mechanics of the program?

J. What is the intended class of recipients?

K. Should there be a requirement for local sharing in the costs?

L. Should there be a requirement for maintenance of local effort?

M. No-Supplant: Should there be a requirement that federal funds not be used to supplant local effort?

PLANNING AN ASSISTANCE PROGRAM

A. CHOICE OF INSTRUMENT

1. IS THE PROGRAM TO BE A GRANT PROGRAM AS OPPOSED TO A DIRECT FEDERAL OPERATION?

"Grant programs represent a means for the governance of our society which is rooted in a pluralistic conception of the value of drawing on both private and governmental sources."[1]

For convenience, the word "grant" will be used throughout to include both grants in the narrower sense and related assistance instruments, except where the distinction is

[1]Leventhal, Cir. J., in *Forsham v. Califano*, 587 F.2d 1128, 1138 (D.C. Cir., 1978), *aff'd. Forsham v. Harris*, 445 U.S. 169 (1980).

important and made clear by the context as it is in Section A4, *infra*. A principal advantage is that "grant" is not only the more usual instrument but the term most commonly used in such general discussion as Judge Leventhal's comment quoted above.

A drafter may be called upon to develop grant legislation for a program that is not best accomplished by grant, or to develop non-grant legislation for a program that would be better achieved by grant. The line is not always distinct, but the guiding principle is clear:

> 2. USE A GRANT WHEN TWO CONDITIONS ARE PRESENT:
>
> a. There is an important federal purpose to be served.
>
> b. There are also local concerns that should share in shaping the remedy for the problem perceived, and should be encouraged to supply drive, imagination, creativity, modification to local circumstances.

Both must be present. If both are not present in a significant degree, something other than a grant is likely to be a better choice. For example, the food stamp program at an early stage allowed for modification from state to state to permit adjustment to local circumstances and local perceptions. The statute's declaration of policy expressly stated that

> the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, and local governments to the maximum extent practicable to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households.[2]

Increasingly, however, uniform federal regulations overwhelmed the areas for local variation. Administratively, OMB then correctly determined that this was not really a grant program.[3]

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[2]Act of August 31, 1964, P.L. 88-525, 2.

[3]Budget of the United States Government Special Analyses 1977, at 260; 1989, at H-12. The Congress apparently had envisioned and intended some such result, because it progressively withdrew from its policy statements first, "to the maximum extent practicable" and then the whole reference to the cooperative action. Compare Act of August 31, 1964, *supra*, with Act of January 11, 1971, P.L. 91-671 1; Act of September 29, 1987, P.L. 95-113, Title XIII, 1301 (7 U.S.C. 2011).

Differences between a grant program and a direct federal program are illustrated by two major health care programs. Medicaid is a grant program; Medicare is not (Titles XVIII and XIX of the Social Security Act). Both are, broadly speaking, parallel systems for providing medical services to wide classes of beneficiaries. Medicaid provides assistance to states which wish to make medical services meeting the standards of the Act available to eligible beneficiaries.[4] Medicare, not a grant program, is part of the Social Security system directly administered in theory by the Federal Government.[5] In practice, the States may serve as agents for the Federal Government, so the external resemblance of the two systems is close. The distinction between the two systems -- one a grant program, one not -- makes sense if it is desired that the medical services for those who are eligible because of lack of resources (Medicaid) be administered in a way that effectively allows each state to measure for itself the cost of services to be provided and in a significant way to adjust, to its own conditions and its own perceptions, the style and kind of medical services program. If not, this should be a federally administered program like the medical services for those eligible by having qualified for social security (age or disability rather than indigence).[6]

If the two conditions described above at the beginning of this section are present and grant is chosen as the program instrument, that implies a commitment on the part of the Federal Government to respect for local initiative, planning, preferences, ways of operating that should be honored. Accordingly, the legislation should not be drafted in a way which allows the Federal Government to run the program,

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[4]Medicaid supports state and local efforts to provide health services to roughly 25 million low-income residents, with roughly $37 billion of Federal assistance, which is somewhat more than half of the total cost. *See* FY 1988 Special Analyses H-12; 1989, B-15, H-10; Budget, FY 1990, at 5-115; The FY 1991 estimate for Medicaid federal payments has increased to $45 billion, *id.* FY 1991 at A-208, A-719.

[5]Medicare is expected to serve about 33 million persons, aged, disabled, or suffering from end-stage renal disease. It is expected to cost very roughly $95 billion, FY 1989 Budget 5-114, and 6g-35. Budget FY 1990 at 5-123; *cf.*, Budget FY 1991 at A-721-724 (changes of format make comparison with past years difficult). This is before the Medicare Catastrophic Coverage Act of 1988, P.L. 100-360, which was estimated to provide revenues exceeding outlays until 1990 (Cong. Budg. Off. Estimate, U.S. CODE CONG. & ADMIN. NEWS, August 1988, p. 803, 904.) That Act was almost entirely repealed, P.L. 101-234, as of Dec. 31, 1989.

[6]In fact there are proposals to terminate Medicaid as a grant program and substitute a federally administered program. *E.g.*, Remarks by Senator Dave Durenberger to the National Assistance Management Association, March 8, 1983, 2 Assistance Management, No. 1 December 1983, 6, 8.

dominate the program, or intrude beyond need. The statute should be written on the assumption of respect for grantee autonomy.[7]

3. SHOULD THE PROGRAM INSTRUMENT BE A GRANT OR A CONTRACT?

If the purpose is acquisition of goods and services for the Federal Government, the program should be a contract program; although this should be obvious, in practice it has not always been done that way. If the purpose is assistance, it should not be a contract program but a grant program (or, see below, a cooperative agreement program. As noted earlier, the term "grant" is used for convenience to cover both grants and cooperative agreements except when the difference is important.). This is the distinction made by the Federal Grant and Cooperative Agreement Act [P.L. 95-224, 41 U.S.C. 501, recodified at 31 U.S.C. 6301] It is not a perfect distinction, but it is a workable one. What is "assistance" (also called "a public purpose of support or stimulation") is not defined, and perhaps is not quite definable. The key to what is "assistance", however, is that assistance respects the autonomous goals of the recipient and encourages them rather than directs or compels or dominates them.

4. WHY SHOULD IT MATTER WHETHER ONE INSTRUMENT OR THE OTHER IS USED?

It matters because contracts of the Federal Government are the subject of elaborate rules, statutory and regulatory, that are in many important respects inappropriate to the grant relationship.[8] The contract rules are designed to

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[7]Wallick, *Why Grants? Why Not Direct Federal Program?*, p.5, in ABA National Institute, "Focus 77, Public Contracts and Grants From Local and Federal Perspectives", April 21-22, 1977:

> Why grants--Why not let the federal government manage the programs directly? The answer is not, I submit, merely for the purpose of providing two layers of bureaucracies where one would suffice. Consequently, I suggest there should be a rebuttable presumption against any statute or regulation which further limits local initiative or difference. Their need and value must be quite clear and convincing before they are adopted.

[8]Some of these distinctions may be summarized:

Government contracts normally provide for cost plus a profit. Grants normally provide cost minus a cost-sharing.

Contracts are normally subject to objective competition based, in the case of formally advertised contracts, primarily on price or, in the case of negotiated contracts, on efficiency and effectiveness. Grants are subject to

operate in areas of entrepreneurial competition, which is untypical for grants. They are designed to minimize certain abuses that have been encountered in government procurement which do not generally arise in grant situations. They express generally an arms-length relationship between contracting parties which normally is not appropriate to grants. Contracts and grants, moreover, have in intangible but real ways developed cultural styles of their own. Confusion of these styles creates undesirable misunderstanding.[9]

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no competition or to a subjective competition not based on price and not even necessarily on efficiency; the poorest supplier may sometimes be preferred because it most needs help.

Contract specifications are normally clear and the goal is to make them precise. Grant specifications often and appropriately are general and vague.

Contracts are subject to strict rules of advertising, bidding, bid protest. Grants are subject to no rules or looser rules of advertising and application. Generally, in grants, there is no provision for protest by A if A is rejected in favor of B. The qualified best bidder has a right to the contract. A qualified applicant has a right to a grant of the mandatory type but not to a grant of the discretionary type.

The Government may unilaterally terminate a contract for its convenience. The contractor may not unilaterally terminate for its convenience. The Government may not unilaterally terminate a grant for its convenience, but the grantee may do so.

The Government has remedies for a contractor's failure to perform or for poor performance. Specific performance is available to the extent normally provided in private transactions. The Government generally has no remedy for grantee's failure to perform or for poor performance except that unauthorized expenditures may be recovered. Specific performance is generally not available to the Government as grantor, except perhaps on civil rights issues.

Quantum meruit may be available in contract cases. It is often said that *quantum meruit* is not available in grant cases (but *see* Southern Illinois University - Carbondale, HEW DGAB Docket No. 78-5, Decision No. 49, October 31, 1978 esp. at 5-8).

Some of these contrasts are noted, discussed, and qualified in *Highlight 2-4; Mason, Administrative Review of Performance, Payment and Termination Controversies, 1-2, in ABA National Institute, April 21-22, and May 11-12, 1977 "Focus 77, Public Contracts and Grants from Local and Federal Perspectives"; *Current Trends at 166-168, 187-189.

[9]Mason, in ABA National Institute, *supra*, n.8:

> Procurement contracts are dominated by the ethos of the market place; cold, hard-boiled, arms-length most-bang-for-the-buck relations in competition for the award, in supervision and enforcement of the deal. Not always, but typically so. Procurement contracts deal mostly with what can be counted and measured, the abstract, the impersonal, the formalized. A mile of road, a ten story building, a thousand desks, a million vaccinations.

It matters also because experience has shown that administrative officers, if permitted to do so, will often misuse one instrument for the other in order to escape from restrictive contract rules in a procurement situation by calling the arrangement a grant, or to escape from specific grant consequences in a grant situation by calling the arrangement a contract.[10]

> Grants are dominated by the spirit of assistance: hot, enthusiastic, personalized, concrete, concerns about people, services to people with faces, names, ages, needs. Instead of a procurement contract, grant administration accepts the spirit of partnership, and grantee autonomy in place of bought and paid for control.

These differences of style are particularly visible in the important field of scientific research. Much of the most important results of Nobel prize winners, for example, were their failure to do what they set out to do. If they had had grants, the grants would have been glorious successes. Had they had contracts, they would simply have turned in failures. Examples are the work of Penzias and Wilson who got the Nobel award for failing in the task they had undertaken, namely to construct and calibrate a radiation receiver of sufficient precision and so free of adventitious distortions as to show no excess radiation above that received from identified targeted sources of radiation; and the work of Michelson who got the Nobel award for failing in the task he had confidently undertaken, to set up an interferometer with sufficient precision, eliminating instrumental causes of inaccuracy, so as to measure the difference in the speed of light in the direction of the earth's movement from that across the direction of the earth's movement. *See* *Current Developments, Vol. 20, No. 1, Fall 1984, p. 7, "Luria's Slot Machine"; *cf.* Vol. 21, No. 2, Winter 1986, p. 11, "The Joking Physicist."

[10]P.L. 95-224, the Federal Grant and Cooperative Agreement Act of 1977, February 3, 1978, Sec. 2(a)(1),(2),(3):

> Sec.2.(a) The Congress finds that --
>
> (1) there is a need to distinguish Federal assistance relationships from Federal procurement relationships and thereby to standardize usage and clarify the meaning of the legal instruments which reflect such relationships;
>
> (2) uncertainty as to the meaning of such terms as "contract", "grant", and "cooperative agreement" and the relationships they reflect causes operational inconsistencies, confusion, inefficiency, and waste for recipients of awards as well as for executive agencies; and
>
> (3) the Commission on Government Procurement has documented these findings and concluded that a reduction of the existing inconsistencies, confusion, inefficiency, and waste is feasible and necessary through legislative action.

For these reasons the Federal Grant and Cooperative Agreement Act drew the distinction between acquisition and assistance. It is not a perfect distinction, but it is a useful and broadly desirable one and should be respected at least until substantial experience with the Act has been accumulated.

New statutes should, as a matter of course, accept the distinction drawn by this general statute. They should not needlessly contradict it nor needlessly repeat its provisions.

5. IF THE PROGRAM IS TO BE ASSISTANCE, IS THE INSTRUMENT TO BE A GRANT OR COOPERATIVE AGREEMENT?

The Federal Grant and Cooperative Agreement Act distinguishes between them in terms of whether substantial involvement is anticipated between the executive agency and the recipient (cooperative agreement) or not (grant) (sec. 5(2) and 6(2)).[11] Cooperative agreements, in practice, seem largely employed to fudge the application of grant rules.[12] It

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[11]P.L. 95-224, February 3, 1978, originally codified as 41 U.S.C. 501-509, recodified with some amendments as 31 U.S.C. 6301-8. The appropriate use of grants is now specified in 6304 and of cooperative agreements in 6305.

[12]The Act directed OMB to study these questions and to issue interpretative guidelines (sec. 8 and 9 of original Act). The OMB did not make effective use of this opportunity. OMB, Managing Federal Assistance in the 1980s (March 1980). *See*, *Current Developments, Vol. 15. No. 4, July 1980 p. 6. Agencies that wish to smuggle some contract characteristics into an assistance relationship, or otherwise avoid application of grant rules they find troublesome, or on the other hand to avoid contract rules by making a grant instead of a contract, are able to take advantage of the lack of clear guidance to do what the Act intended to prevent their doing. A GAO analysis of the OMB guidance and of agency practice makes the following points: Agencies Need Better Guidance For Choosing Among Contracts, Grants, and Cooperative Agreements GGD-81-88, September 4, 1981:

> [B]ecause Federal officials are not systematically examining assistance relationships in selecting either grants or cooperative agreements, there is no certainty that officials are limiting requirements in assistance awards to those consistent with the intended relationship....
>
> [W]e found several actual or proposed assistance awards which we believe should have been procurement contracts. Most of the proposed or actual awards were cooperative agreements. (p.8)....
>
> Two years after OMB issued its guidelines, officials of Federal agencies, OMB, and we, ourselves, do not clearly understand what a cooperative agreement is for. (22)...

may be questioned whether the provision for cooperative agreements in fact serves a useful purpose.[13] The Office of Management and Budget, instructed to study and provide guidelines on this matter, has had an opportunity, but did not use it, to propose a clearer definition which today still does not exist. Notwithstanding the broader advice given above (Sec. A.4) not to tamper unnecessarily, Congress might therefore usefully consider eliminating this verbal category or proposing a sharper definition. Drafters may well note the possible problems if a proposed statute should use the cooperative agreement as its model instrument.

B. TYPES OF GRANTS

If the program is to be a grant program there are several distinguishable types of grants to be considered: mandatory grants which give the grantor agency limited discretion and discretionary grants which give the grantee less entitlement.

A grant statute may define a class of eligibles and may provide that an eligible who chooses to participate shall be entitled to receive a specified amount of grant or a grant in an amount determined by a formula contained in the statute. Because the right to receive the grant (and the duty on the part of the executive to make the grant) is fixed by the statute, the program is generally called *mandatory* or, sometimes, an entitlement. When the amount is set by formula, the grant is called a formula grant. Most mandatory grants are formula grants and most formula grants are mandatory. Typically, the recipient of a mandatory grant is a state. Often (but the trend is perhaps away from this), a condition of a mandatory grant program to states will be the submission of a State Plan conforming to the statute. In that case, the grant may be called a State Plan grant. Most mandatory grants are State Plan grants and most State Plan grants are mandatory.

> Currently there are no standard operational differences between grants and cooperative agreements.... The operational consequences of choosing a grant or a cooperative agreement are presently so unclear that some officials consider the choice to be a distinction without a difference (54)." These comments remain valid.

See also Parker, *95-224* [the Federal Grant and Cooperative Agreement Act] *Doesn't Work, So What's Next?*, 3 ASSISTANCE MANAGEMENT No. 1, Spring 1986.

[13]*Current Developments, Vol. 14, No. 1, October 1978, p. 6.

The formulas for many of these grants have often depended on the amount the State chooses to spend for the statutory grant purpose: the federal government reimburses (or advances on the basis of an estimate) a portion, defined by the formula, of what the State spends. Such grants are called open-ended. They tend to create awkward problems of interpretation and for obvious reasons of fiscal stringency they are becoming less frequent than they were some decades ago.[14]

In contrast, a grant statute may leave to the discretion of the administering agency whether to make a grant or not. Such programs are called *discretionary*. In most cases discretionary grant programs permit the administering agency to determine in its discretion not only whether a grant should be made but what should be the size of the grant, within the limits of the available appropriation and of any statutory requirement to spread the awards amongst the states or among other classifications. (An Administrator should not channel all the awards towards his home State or his alma mater). Provisions for such spreading may look something like a formula fixing the exact amount of a mandatory grant but fix instead only the ceiling for the total of all the discretionary grants going to recipients in a particular state or of a particular kind: an example of the latter provision would be a requirement that a certain share of all grants go to rural recipients or to institutions of higher education. Most discretionary grant programs require the submission of an application describing in some detail a particular proposed project and are therefore called "project" grants. With limited funding, applications may be weighed against the merits of other applications, but the process of grant competition is more subjective and generally less structured and less price oriented than is the case with competed procurement.[15]

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[14] Derthick, Uncontrollable Spending for Social Services Grants, The Brookings Institution 1975, esp. at 106. An effort to escape from some of these problems is Title XX of the Social Security Act. Title XX of the Social Security Act, providing a "cap" for social services that will receive federal matching, was an attempt to deal with a runaway expansion of expenditures which the Congress blamed in part on HEW's failure to impose limits. *See* Legislative History of P.L. 92-512, Title III, State and Local Fiscal Assistance Act of 1972, 3 U.S. Code Cong. & Admin. News '72 pp. 3937-8; Legislative History of P.L. 93-647, Social Services Amendments of 1974. 4 U.S. Code Cong. & Admin. News '74 p. 8135. Title XX was later further revised by P.L. 97-35, the Omnibus Budget Reconciliation Act of 1981, Title XXIII, Subtitle C. 2352(a).

Some hybrids exist. For example, a program may call for mandatory grants to the states out of which sub-grants shall be made to local governments or other recipients within the state at the discretion of the state, or at the discretion of the state with federal approval.[16]

Grant programs ordinarily define the purposes for which the grant funds may be used. If the purposes are defined with some narrowness, the program is called "categorical".[17] If it is defined more broadly, it is called a "block" grant.[18] If defined very broadly it may be called revenue sharing, or general purpose fiscal assistance. Special revenue sharing is a term sometimes used for programs that impose some restriction on the area of use but are still very broad. Such programs may be regarded as block grants or as something

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[15]*See* n.8, *supra*. *Cf.* *Settle and Yamada, The Award Process, at 66 and 72.

[16]Examples are 42 U.S.C. 300 w(c)(2), Preventive Health and Health Services Block Grant; P.L. 98-377, August 11, 1984 207(b)(1)(A), 20 U.S.C. 3967, Education for Economic Security Act, Catalog 84.164.

[17]An example of a categorical program is P.L. 99-605, the Refugee Assistance Extension Act of 1986, 8(2)(A).

> The Director [of the Office of Refugee Resettlement, HHS]. is authorized to make grants to States for assistance to counties and similar areas in the States where, because of factors such as unusually large refugee populations.... there exists and can be demonstrated a specific need for supplementation of available resources for services to refugees. (B) Grants shall be made available under this paragraph -- (i) primarily for the purpose of facilitating refugee employment and achievement of self-sufficiency...."

[18]An example of a block grant is 42 U.S.C. 300x *ff.*, the Alcohol and Drug Abuse and Mental Health Services Block Grant. These grant funds may be used for:

> (1) planning, establishing, maintaining, coordinating, and evaluating projects for the development of more effective prevention, treatment, and rehabilitation programs and activities to deal with alcohol and drug abuse; and (2) grants to community mental health centers in accordance with section 1916(c) and grants to community mental health centers for the provision of the following services: (A) Services for chronically mentally ill individuals.... (B) Identification of severely disturbed children and adolescents....(C) Identification and assessment of mentally ill elderly individuals... (D) Services for identifiable populations which are currently underserved in the State... (E) Coordination of mental health and health care services provided within health care centers. Amounts provided for the activities referred to in the preceding sentence may also be used for related planning, administration, and educational activities.

intermediate between block grants and general revenue sharing. The lines here are not sharply drawn.

The principal line of distinction for operating purposes is between mandatory grants and discretionary grants. For budget purposes, the General Accounting Office regards the principal line of distinction in grants as that between block and categorical grants.[19]

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[19]The General Accounting Office classification is indicated by the following excerpts from A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS (March 1981).

> GRANTS
>
> Assistance awards in which substantial involvement is not anticipated between the Federal Government and the State or local government or other recipient during the performance of the contemplated activity. Such assistance is not limited to a State or local government as in the case of grants-in-aid. (*See* P.L. 95-224, Federal Grant and Cooperative Agreement Act of 1977.
>
> The two major forms of Federal grants are block and categorical. Block grants are given primarily to general purpose governmental units in accordance with a statutory formula. Such grants can be used for a variety of activities within a broad functional area. Examples of Federal block-grant programs are Omnibus Crime Control and Safe Streets Act of 1968, Comprehensive Employment and Training Act of 1973, and assessment of severely mentally disturbed children and Housing and Community Development Act of 1974, ad the 1974 Amendments to the Social Security Act of 1935 (Title XX). Categorical grants can be used only for a specific program and are usually limited to narrowly defined activities. Categorical grants consist of formula, project, and formula-project grants.
>
> Formula grants allocate Federal funds to States or their subdivisions in accordance with a distribution formula prescribed by law or administrative regulation. Project grants provide Federal funding for fixed or known periods for specific projects or the delivery of specific services or products. (*See also* Cooperative Agreement; Grants-in-Aid.)
>
> GRANTS-IN-AID
>
> For purposes of the budget, grants-in-aid consist of budget outlays by the Federal Government to support State or local programs of governmental service to the public. Grants-in-aid do not include purchases from State or local governments or assistance awards to other classes of recipients (*e.g.*, outlays for research or support of Federal prisoners). (*See also* Cooperative Agreement; Grants; Revenue Sharing.)
>
> REVENUE SHARING
>
> Federal funds distributed by formula to State and general-purpose local governments with few or no limits on the purposes

C. VARIOUS PROGRAMS IN ADDITION TO GRANTS HAVE ASSISTANCE ELEMENTS.

Examples include loans, loan guarantees, insurance, direct training. To the extent that they resemble grants, some of the considerations applicable to the drafting of grant statutes are worth taking into account. Each, however, has some elements of difference and some historic incrustation of its own that makes the drafting factors at least traditionally different.[20]

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for which the funds may be used and few restrictions on the procedures which must be followed in spending the funds. (*See also* Grants-in-Aid.)

850 GENERAL PURPOSE FISCAL ASSISTANCE
Federal aid to State, local, and territorial governments that is available for general fiscal support. Also included are grants for more restricted purposes when the stipulated purposes cross two or more major budgetary functions and the distribution among those functions is at the discretion of the recipient jurisdiction rather than the Federal Government. It includes payments in lieu of taxes, broad-purpose shared revenues, general revenue sharing, and the Federal payment to the District of Columbia. Payments specifically for community development or social service programs are not included in this function.

851 General Revenue Sharing
The general revenue sharing program.

852 Other General Purpose Fiscal Assistance
All other programs in this function, which are mainly shared revenues, counter-cyclical fiscal assistance whenever there is such a program, and the Federal payment to the District of Columbia.

Another influential classification is ACIR's *A Typology of Federal Grants*, in A-52, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN (approved May 6, 1977) pp. 5-9.

[20]The range of these programs is suggested by a classification made in the Catalog of Federal Domestic Assistance, (6-88) p. X.

Types of Assistance

Currently, programs in the Catalog are being classified by GSA into 15 types of assistance. (Cooperative Agreements as a type of assistance is used for programs administered under that mechanism. However, the definition does not appear in this section.) Benefits and services of the programs are provided through seven financial types of assistance and eight nonfinancial types of assistance. The following list defines the types of assistance which are available through the programs. Code letters below (A through O) which identify the type of assistance) will follow program titles in the Agency Index,

Applicant Eligibility Index, the Functional Index, Deadlines Index, and in the list of added programs.

A Formula Grants -- Allocations of money to States or their subdivisions in accordance with a distribution formula prescribed by law or administrative regulation, for activities of a continuing nature not confined to a specific project.

B Project Grants -- The funding, for fixed or known periods, of specific projects or the delivery of specific services or products without liability for damages for failure to perform. Project grants include fellowships, scholarships, research grants, training grants, traineeships, experimental and demonstration grants, evaluation grants, planning grants, technical assistance grants, survey grants, construction grants, and unsolicited contractual agreements.

C Direct Payments for Specified Use -- Financial assistance from the Federal government provided directly to individuals, private firms, and other private institutions to encourage or subsidize a particular activity by conditioning the receipt of the assistance on a particular performance by the recipient. This does not include solicited contracts for the procurement of goods and services for the Federal government.

D Direct Payments with Unrestricted Use -- Financial assistance from the Federal government provided directly to beneficiaries who satisfy Federal eligibility requirements with no restrictions being imposed on the recipient as to how the money s spent. Included are payments under retirement, pension, and compensation programs.

E Direct Loans -- Financial assistance provided through the lending of Federal monies for a specific period of time, with a reasonable expectation of repayment. Such loans may or may not require the payment of interest.

F Guaranteed/Insured Loans -- Programs in which the Federal government makes an arrangement to indemnify a lender against part or all of any defaults by those responsible for repayment of loans.

G Insurance -- Financial assistance provided to assure reimbursement for losses sustained under specified conditions. Coverage may be provided directly by the Federal government or through private carriers and may or may not involve the payment of premiums.

H Sale, Exchange, or Donation of Property and Goods -- Programs which provide for the sale, exchange, or donation of Federal real property, personal property, commodities, and other goods including land, buildings, equipment, food and drugs. This does not include the loan of, use of, or access to Federal facilities or property.

D. GRANTS IN CONTEXT

1. A GRANT PROGRAM NEED NOT AND GENERALLY DOES NOT STAND ALONE.

The program has as its goal the effectuation of a federal purpose in a context in which local participation is considered important. In effectuating that federal purpose, the Congress may appropriately draw on a panoply of weapons. It may assist local undertakings by grant, but it may at the same time, within its constitutional powers, direct local action or forbid certain contrary local actions. It may direct the federal executive agencies to serve the same

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I Use of Property, Facilities, and Equipment -- Programs which provide for the loan of, use of, or access to Federal facilities or property wherein the federally-owned facilities or property do not remain in the possession of the recipient of the assistance.

J Provision of Specialized Services -- Programs which provide Federal personnel to directly perform certain tasks for the benefit of communities or individuals. These services may be performed in conjunction with nonfederal personnel, but they involve more than consultation, advice, or counseling.

K Advisory Services and Counseling -- Programs which provide Federal specialists to consult, advise, or counsel communities or individuals, to include conferences, workshops, or personal contacts. They may involve the use of published information but only in a secondary capacity.

L Dissemination of Technical Information -- Programs which provide for the publication and distribution of information or data of a specialized technical nature frequently through clearinghouses or libraries. This does not include conventional public information services designed for general public consumption.

M Training -- Programs which provide instructional activities conducted directly by a Federal agency for individuals not employed by the Federal government.

N Investigation of Complaints -- Federal administrative agency activities that are initiated in response to requests, either formal or informal, to examine or investigate claims of violations of Federal statutes, policy, or procedure. The origination of such claims must come from outside the Federal government.

O Federal Employment -- Programs which reflect the government-wide responsibilities of the Office of Personnel Management in the recruitment and hiring of Federal civilian agency personnel.

goals by contract activities or by direct activities inhouse. It may also encourage certain action by providing tax incentives ("tax expenditures").

2. GOOD GRANT STATUTE DRAFTING CALLS FOR AT LEAST CONSIDERATION OF SETTING THE PROPOSED GRANT STATUTE IN A CONTEXT OF SUCH OTHER ACTIVITIES, AND ADJUSTING THE VARIOUS ELEMENTS TO EACH OTHER.

For example, a program that gives formula financial assistance to states that undertake programs of energy conservation may be a part of a more comprehensive program (in the same statute or not) that affords loan guarantees for the opening of new fuel sources, requires manufacturers to meet energy efficiency targets, undertakes federal research, gathers energy data, authorizes government purchase of petroleum for a petroleum reserve, calls for federal government officials to abstain from over-use of official automobiles, permits price fixing, authorizes limited anti-trust exemptions, provides tax incentives, and so on.

E. THE CONSTITUTIONAL BASIS FOR GRANTS

The drafter of course must operate within a constitutional framework. The principal source of authority for grants is the "spending power", Article I, Section VIII, cl.1: "To...provide...for the general welfare of the United States" reinforced by the "necessary and proper" clause, (I, VII, cl.18):" To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Untied States, or in any department or officer thereof." This authority is, of course also supported by the individual substantive powers that may be relevant: to regulate commerce, provide for the common defense, to declare War...raise and support Armies...provide and maintain a Navy...make Rules for the Government and Regulation of the land and naval forces...provide for calling forth the Militia... organizing, arming, and disciplining, the Militia... and so on. It may be limited, of course, by other provisions of the Constitution (seem obvious but some untested) such as Amendments I (establishment of religion), X (reserved powers of the States).[21]

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[21] *South Dakota v. Dole*, ___ U.S. ___, 107 S.Ct. 2793 (June 23, 1987), sustained the validity of the Minimum Drinking Age (attached as a condition to highway funds grants), against a contention that this was a matter reserved to the states under the Twenty-First and Tenth

F. GRANTS ARE A CONGRESSIONAL MONOPOLY

Only Congress may authorize a grant program. The fact that a program may be seen by the Executive as being desirable does not authorize the Executive to make a grant unless Congress has provided the authority by statute.[22] Article I, section IX, cl.7 provides: "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law..." Article IV, section 3, provides: "...The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting Territory or other Property belonging to the United States...

G. THE ADMINISTERING OFFICE

1. IF A PROGRAM IS TO BE A GRANT PROGRAM, WHO SHOULD ADMINISTER IT?

Grant authority can of course be granted to the President, who will delegate it. Much more commonly however, authority is granted by statute directly to the head of an agency, who will normally delegate it within the agency.[23] Authority is sometimes split: this usually does

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Amendments. Current Developments, Vol. 23, No. 1, Fall 1987, "A Right to Drive Alcoholized."

[22]This may seem obvious but it is not always obvious. *See* *Current Trends, 169. In Legis 50/The Center for Legislative Improvement, HEW DGAB Docket No. 76-17, Dec. No. 48, September 26, 1978, then Vice President Ford made a suggestion (it was apparently heard by some agency officials as an order) that a program he found desirable be funded. Inadequate attention was paid by the funding agency to whether there was statutory authority for funding. *See* DGAB Dec. p. 2 and Order to Show Cause in the case file, p. 6. The Board, although aware of the issue, found that the case could be disposed of without confronting this embarrassing issue. The facts are something of an aberration. The rule that grants are validly made only as authorized by statute is safely established and in general respected. In contrast, it is generally accepted that contracting is an inherent power; contracts entered into by Federal officers may be valid without legislative authorization. *See, e.g., Van Brocklin v. Anderson*, 117 U.S. 151, 154, 6 S.Ct. 670, 672 (1886); MCBRIDE & TOUHEY, GOVERNMENT CONTRACTS (Matthew Bender, 1987), 1.10; GOVERNMENT CONTRACT LAW (Procurement Associates, Covina, California, 1984) 1.1.

[23]Paul Dembling, in drafting the National Aeronautics and Space Act of 1958, placed the functions and authorities of the organization in the "Administration" rather than in the "Administrator." 42 U.S.C. 2473. Of course, the Administrator is given direction over the Administration. 42 U.S.C. 2472. Mr. Dembling comments, "This was done primarily to obviate the problem of delegability. It also made delegation a simple administrative matter." Letter to Charles Pou, Jr., ACUS, February 23, 1988. This is a model worth considering.

not work although it may satisfy political needs sometimes. A special trap is the giving of grant authority by statute expressly to a subordinate within an agency.[24] This may sometime be done deliberately, but it may sometimes occur inadvertently. In either case, the result is often confusion of administration: the subordinate has direct statutory power and tends to believe that the discretion and responsibility are his. The agency head, having organizational supervision over the subordinate tends to believe that control over the discretion and some of the responsibility are his.

2. IT IS RECOMMENDED THAT ABSENT CLEAR REASONS TO THE CONTRARY, GRANT AUTHORITY SHOULD NORMALLY BE CONFERRED ON AGENCY HEADS WITH EXPRESS OR IMPLIED POWER OF DELEGATION RATHER THAN ON SPECIFIED SUBORDINATES.

H. HOW MUCH DISCRETION SHOULD BE LEFT TO THE EXECUTIVE?

In an ideal world, perhaps, Congress would define the goals of its grant programs and the money limits, and give

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The more usual model of conferring power on the Administrator will also work well if clear and express powers of delegation are provided. The Peace Corps, for example, has had a history of structural changes, into ACTION and out again. Its Act now confers authorities on the President, 22 U.S.C. 2502 and 2509, but provides: "The President may exercise any functions vested in him by this Act through the Director of the Peace Corps. The Director of the Peace Corps may promulgate such rules and regulations as he may deem necessary or appropriate to carry out such functions, and may delegate to any of his subordinates authority to perform any of such functions." 22 U.S.C. 2503(b).

P.L. 97-113, the International Security and Development Cooperation Act of 1981 (December 29, 1981), also provides, 601(d)(2): "The Director of the Peace Corps shall continue to exercise all the functions under the Peace Corps Act or any other law or authority which the Director was performing on December 14, 1941." The intention of this provision to protect the then existing authority of the Director is spelled out in the Conference Report, p. 76 (1981 U.S. CODE CONG. & ADMIN. NEWS, 2489 at 2513). In consequence, there has been little need since then for active consideration of delegations. (Telephone conversations, September 1988, with John Scales, General Counsel, Peace Corps). There is a complication in this pattern. Since the Peace Corps operates abroad by agreement with foreign countries, it is almost unavoidable that the President and the Secretary of State retain recognized authorities that may cut across at times those of the Director of the Peace Corps. Although split authority, it is suggested in the text (Section G.1 at note 24), is ordinarily not desirable, the reasons for this split are quite clear.

[24] *See* Chapter III, sec. 5, Establishment of Administering Office.

the Executive broad powers to carry out the program goals within the money and other applicable limits. This may be a good general prescription for legislation. It is particularly relevant to grant programs because they generally operate in very complex fields (medicine, education, scientific research, environmental pollution, social welfare) where adjustments must be made to changes in circumstances and where initial perceptions of the problem to be solved are rarely sufficiently detailed and balanced: wisdom comes with living.

It is the legislative function to sketch the elevation and side views of a proposed construction, but not to draw the blueprints or hammer the nails. Those are functions of the executive. There is therefore good sense in suggesting that grant statutes be broad in their terms and leave much to administrative discretion.

Unfortunately, there is a great deal of history of administrative discretion being used in directions contrary to what the Congress expected and intended. There is also a great deal of history of administrative discretion being abdicated: there is a well-known bureaucratic drive to take no unnecessary initiative. Both of these tendencies, in opposite directions, disappoint the Congressional purpose. As a result, the Congress often believes it necessary to write more detailed instructions. Undesirable results often follow.

One of the undesirable results of over-specific statutory instructions is that they typically discourage executive impulses to use common sense when it is called for: 'if the Congress has spelled out its wishes, let us follow them -- it is safer and easier than to run the risks of fitting our actions to the underlying statutory purpose.' By taking the responsibility of spelling out its wishes, the Congress reinforces the bureaucratic impulse, which is there in any event, to abdicate discretion. Examples abound. One illustration may suffice.

As part of the "War on Poverty", Title I of the Elementary and Secondary Education Act of 1965 authorized expenditures to improve the education of children in low-income areas. The Office of Education construed the statute as generally restricting Title I assistance to school attendance areas having a percentage of low-income children at least as high as the district-wide average. As a general rule for starting an approach to the complex problem of distributing limited funds, this was not unreasonable, but specific concrete applications of this general rule plainly were unreasonable.

Assume two schools in the State, one very poor with 30 percent of its enrollment poor, one distinctly less poor with 15 percent of its enrollment poor; the less poor school may qualify for assistance because it is in a relatively wealthy district with a district average of 10 percent poor while the very poor school is disqualified because it is in an extremely poor district with a district average of 35 percent poor. In this situation, the general rule, which is administrative, not statutory, is not reasonable. The administrators should have had enough common sense to modify their rule, but institutional common sense is not very common in many bureaucracies.[25] The Congress rightly thought this administrative application absurd. In 1974, the House Committee on Labor and Education said, "the special needs of the educationally disadvantaged child and programs to meet their needs must be locally devised... [I]t was never intended by the Act to render any school with a 30% concentration ineligible."

Faced with this appropriate admonishment, the Office of Education amended its rules to correct the precise horror case put by the Committee, but did nothing to correct its basic wrong-headed approach. In 1977, testimony before the relevant House Subcommittee showed that there were still "schools in relatively affluent counties receiving Title I assistance with no more than 5% Title I children while schools in Baltimore City with 25-30% Title I children are excluded from this program."

Congress, commenting again adversely on the inflexible targeting rules of the Office of Education regulations, now amended the Act, administrative good sense having defaulted and admonishment having failed. The 1978 amendment provided that any school attendance area would be eligible if at least 25 percent of its children were from low-income families.

This kind of congressional action, getting into the mechanical details of administrative rulemaking is undesirable and should not be made necessary. It is particularly undesirable when it is a response to unwise rulemaking because it polarizes the relationship of legislature and administrative agency and reinforces the worst tendencies of bureaucracy: if Congress is going to spell out these details, we will take it at its exact word,

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[25]This history is reviewed in *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555 (1985), esp. in dissenting opinion by Justice Powell, 470 U.S., at 646. The legislative history and the case are discussed in *Current Developments, Vol. 20, No. 4, Summer 1985, p. 17, but that discussion contains an arithmetic slip for which I am responsible; it is revised here.

follow blindly and refuse to go an inch beyond or to use a pinch of common sense salt. Persistent wrongheadedness by an administrative agency, unfortunately encouraged by too crude efforts at correction, gives little scope for a healthier relationship. If Congress specifies, "don't eat the grass", the agency develops an appetite for daisies ("you didn't tell me not to eat the daisies").

Is there a solution? There is no easy one, but a general pattern of conduct can be suggested.

- Start by assuming that the agency head does have good sense, and give the agency broad discretion.
- Be explicit about goals and try to be clear that specific rules that clearly do not serve the goals should yield.
- Do not make statutory prescriptions for agency heads more specific or more mandatory in tone or terms than is really necessary to guide the agency.
- Supplement the statutory definition of goals with realistic oversight, which, again, should emphasize serving goals more than watching specific mechanical rules.

Once the specific rules get the upperhand, Caligula can appoint his horse consul because the rules didn't mention the obvious presupposition of humanity.[26]

I. WHAT SHOULD BE THE FUNDING MECHANICS OF THE PROGRAM?

There are two principal patterns of funding for grants. Mandatory, state plan, formula grants are typically funded in advance, often quarterly on the basis of expenditure estimates, submitted by the grantee, of its probable

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[26] *Cf.* LON L. FULLER, ANATOMY OF THE LAW (reprinted 1976, Greenwood Press, Westport Conn.) 62. Some other examples of these problems have also been commented on in *Current Developments, *e.g.*, Vol. 20, No. 4, Summer 1985, "Who will educate the educators"; and at some length in Ohio Department of Public Welfare, HEW DGAB Docket No. 78-50-OH-HC, Dec. No. 66, October 10, 1979, p. 3 *ff.* In that case, involving the Medicaid system (Title XIX, Social Security Act) requirement for annual medical review of patient care (Section 1903(g)(1)(D)), "The medical review requirement was for sometime after its enactment substantially or wholly unenforced by HEW. After an expression of Congressional displeasure, HEW reversed its practice and went to the opposite extreme of strict literal enforcement of the same provision. (H.R. Rep. No. 393-Part II, 95th Cong., 1st Sess. 84, 85 (1977); S. Rep. No. 453, 95th Cong., 1st Sess. 40, 41 1977). This overreaction was required neither by Congressional intention nor by a sound interpretation of the law." *Ibid.* 3.

entitlement, subject to later correction after actual expenditure reports are submitted and subject to other adjustments (occasionally pluses, more often minuses) for exceptional performance or defective performance).

Discretionary project grants are typically funded, also in advance, on the basis of projected cost budgets. Money not validly spent in accordance with the grant conditions may be returnable to the agency but often is carried over for use in a later year after submission of new budget projections.

Although grants must, of course, be made out of appropriated funds and must be awarded for a present need (not for the shelf, not for a program to begin next fiscal year or two years from now), it is entirely proper to make awards this year out of this year's appropriation for a project starting this year, even though the money will be expended over several years. HHS has regularly made grants for research projects, particularly in NIH, intended to last several years. The projects are approved on a multi-year basis but funded by successive annual grants. These grants are made with notice that there is a recommendation only, not a commitment of future funding.[27]

J. WHAT IS THE INTENDED CLASS OF RECIPIENTS?

The nature of the prospective recipients governs some basic assumptions of accountability and other relationships. If the proposed recipients are states, it is well to remember that the grant is an arrangement between sovereigns.[28] Intergovernmental comity plays a role that is not involved where the recipient is, say, a non-profit corporation created to apply for and receive federal grants. What would be

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[27]This system was modified by the Office of Economic Opportunity which invented the "program year" system under which the initial grant was made of an amount estimated to last a year but susceptible in theory of being available indefinitely. Successive awards were then made, without advance commitment to do so, of new amounts for any estimated amount needed in addition to the available carryovers. The NIH system is better known but still inadequately understood. It is described in more detail in *Mason and Dembling, Federal Grant Litigation, 30 The Practical Lawyer No. 7 (October 15, 1984) pp, 57-59; Missouri Health and Medical Organization, HEW DGAB, Docket No. 77-24; Rejection of Appeal, June 21, 1978, pp. 3-6 and 8-9; Southeast Philadelphia Community Corporation, HEW DGAB, Docket No. 79-75, Rejection of Appeal, Sept. 24, 1979. See also, in *Current Developments, Vol. 20, No. 4, Summer 1985, p. 18 "NIH Multi-Year Grants", discussion of a recent controversial departure by NIH from its usual pattern of funding.

[28]Noted *supra*, Ch. I, p. 15. On the whole subject of this section, *see also* Ch. III, section 7, Authorization of Assistance.

appropriate and prudent administration in the latter case, might be unsuitable meddling in the former. States are appropriately assumed to be financially stable, accountable, entitled to use their own fiscal and auditing procedures as far as possible. Local governments and United States Territories, as well, are reasonably indulged to some extent, on similar assumptions, although history does show some large local governments to have engaged in questionable bookkeeping and to have been at the brink of bankruptcy at various times, recently.

Educational institutions have ancient traditions of academic independence; unnecessarily to infringe these creates frictions that can sometimes be avoided with benefit to both sides. Hospitals and other non-profits provide different problems again. Among non-profits, it may be wise to distinguish between those that have independent financial stability and those that do not.[29] In a small number of cases, individuals and profit-seeking entities may be eligible for grants.

It is said that spokesmen for Indian Tribes consider that it is demeaning to receive a "grant" and more dignified to receive a "contract." This may be an overgeneralization, but it is an element to inquire into and consider. It is also said (notably, for example, in the energy field) that profit-making corporations prefer to receive assistance by contract because their administrative mechanisms and personnel are geared to deal with contracts and do not understand grants.

There are provisions for international assistance. Again distinctive considerations come into play: it is unavoidable that, if you wish to extend the aid you must accept a large measure of respect for national sensitivities.

The OMB Circulars have distinguished some of these cases: State and local governments (A-128, Audits; A-102, Grants and Cooperative Agreements; A-87, Cost Principles); Non-profit organizations (A-122, Cost Principles); Educational Institution (A-88, Indirect Cost Rates, Audit, Audit follow-up); Educational Institutions, Hospitals and Other Non-Profits (A-110, Administrative Requirements).

The Catalog of Federal Domestic Assistance contains an Applicant Index that identifies for each program the eligibility of some of these categories of potential grantees (1989 edition, AEI-1).

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[29] *See, e.g.*, HEW, A Program for Improving the Quality of Grantee Management, Vol. II, Financially Dependent Organizations (1970).

K. SHOULD THERE BE A REQUIREMENT FOR LOCAL SHARING IN THE COSTS?

The grant is intended to encourage grantee initiative. There should therefore be assurance of sufficient grantee involvement to stimulate and trigger local initiative. Unless counter-balancing values of sufficient importance are clearly present, the grant program should be designed to meet this threshold test: there should be a requirement or an assurance that the grant recipient will make a significant investment in the program.

In addition to helping to assure a realistic local involvement, the local share requirement has a leveraging effect. It makes a limited amount of federal money go further by the requirement that grantee money be added to the undertaking.

The local investment is usually measured by money or money equivalent. It may be expressed as a requirement for contribution of a non-federal share towards the whole cost of the grant activity or, equivalently, as a limitation on the permissible federal share of the whole cost.[30] Some grant programs call for the grantee to supply from non-federal

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[30]For an example of belt-and-suspenders, expressing the requirement both ways, *see* P.L. 100-77, the Stewart B. McKinney Homeless Assistance Act, July 22, 1987, sec. 601, Grant Program for Certain Health Services for the Homeless:

> (e)(1)(A) The Secretary [of Health and Human Services] may not make a grant under subsection (a) to an applicant --
>
> (i) in an amount exceeding 75 percent of the costs of providing health service under the grant; and
>
> (ii) unless the applicant agrees that the applicant will make available, directly or through donations to the applicant, non-Federal contributions toward such costs in an amount equal to not less than $1 (in cash or in kind under subparagraph (B)) for each $3 of Federal funds provided in such grant.

A simpler local share example is P.L. 100-4, the Water Quality Act of 1987, February 4, 1987, 514(a):

> The Administrator is authorized to make a grant to the San Diego Water Reclamation Agency, California [does "authorized" here mean "directed"?] to demonstrate and field test for public use innovative processes which advance the technology of wastewater reclamation and which promote the use of reclaimed wastewater. (b) The Federal share of grants made under this section shall be 85 percent of the costs of conducting such demonstration and field test.

sources a half, or a third, or a quarter, or a fifth, or a tenth of the funds needed to carry out the program.[31]

In place of money contributions, grantees may generally contribute the use of space or equipment, or services. Special rules for the valuation of such "in-kind" contributions, and special safeguards against possible abuse (particularly by over-valuing the contributions in kind), are generally provided in regulations and need not be in the statute. The services of volunteers (doctors, nurses, teachers aides, crossing guards, bookkeepers) form an important part of the Head Start program, for example, and fully demonstrate the reality of the local involvement in a typical Head Start project.[32]

When such contributions in kind are not permitted, the requirement is said to be for a "hard match".[33] This tends to make for inflexibility that may not always be desirable.

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[31]Research programs often do not have a statutory requirement for a specific non-federal share, but agencies have sometimes been directed or encouraged administratively to require some non-federal share, such as one percent or five percent, depending on such factors as the special benefits to the grantee from the project itself or from the equipment to be acquired in connection with the project. *See, e.g.*, former OMB Circular A-100 (FMC 73-3).

[32]Head Start became a very successful nationwide program under the Office of Economic Opportunity. Its complicated statutory history traces to the Economic Opportunity Act of 1964, as amended by section 215 of the Economic Opportunity Amendments of 1966, 80 Stat. 1462. After numerous amendments, the Economic Opportunity Act was repealed, 42 U.S.C. 9912(a) effective October 1, 1981, but Project Head Start was continued by the Head Start Act, P.L. 97-35, Title VI, Subtitle A, ch. 8, subch. B, 635, 95 Stat. 499. 42 U.S.C. 835(b) provides "... Non-Federal contributions may be in cash or in kind, fairly evaluated, including plant, equipment or services." *See also* the almost identical provision in P.L. 98-377, the Education for Economic Security Act, August 11, 1984, 309(a)(2) The Federal share for each fiscal year shall be 50 per centum. (3) The non-Federal share of payments under this title may be in cash or in kind, fairly evaluated, including plant, equipment or services.

Very similar language is used in the Stewart B. McKinney Homeless Assistance Act, July 22, 1987, sec. 601, *supra*, n.30, at (e)(1)(B).

[33]A leading example of "hard match" was LEAA, P.L. 96-157, the Justice System Improvement Act, sec. 2, amending Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 401(b)(2)(A) [42 U.S.C. 3741(b)(2)(A)], "The non-Federal portion of the cost of such program or project shall be in cash." This section was tacitly repealed and replaced, but see the similar provision in P.L. 98-473, further amending Title I of the Omnibus Crime Control and Safe Streets Act of 1968, new sec. 403(b)(2).

A letter from Betty Jo Christian has called my attention to the "Section 18" formula grant program providing capital and operating funds for public transportation in nonmetropolitan areas, 49 U.S.C. 1614 (1982), and furnished a memorandum by Kenneth J. Pierce of her office which illustrates some of the problems that arise in connection with programs of

Exceptionally, funds supplied by the federal government under one program may be used as the non-federal contribution under another. This is specially provided for in a few statutes.[34] Unless expressly authorized, it would generally not be acceptable.[35] While this practice does not necessarily defeat the purposes of the non-federal share

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this kind. The statute requires, with respect to operating expenses, at least a 50% local contribution and, of that, at least 50% must come solely from undistributed cash surpluses, replacement, or depreciation funds or reserves available in cash or new capital. 1614(e). Thus, half the local contribution must be "hard match." The remaining half of the local contribution may be soft match and may apparently include funds originating in other federal grant programs to the extent that is not prohibited, or in contribution of services.

A sample question: if a grantee busline contracts with the grantee of, say, a Head Start program to transport its children or with a program for the elderly to transport its clientele, may the contract payment then be used by the busline grantee as "hard match?" Federal Highway Administration and UMTA staff apparently first considered that the proceeds of such service contracts could be used as hard match. UMTA staff then changed its view and decided that such service contract payments could be used for soft match, not for hard match. This is qualified by considering a fund that pools both Federal and non-Federally-derived funds on the assumption that non-Federal funds flow first and to the extent that such funds are in the pool may be used as hard match. Still later UMTA staff, it appears, proposed to treat service contract payments even from an agency receiving no federal funds as ineligible for the hard match. This shifting view seems to indicate that the underlying grant statute is not clear in an area where real problems exist. I suspect that the complexities envisioned by staff go beyond anything the Congress could have anticipated. It is possible that the statute itself is more complicated than any realistic intention of the Congress required. I believe that left to itself, agency staff might not have been as tough as Congress wanted but would have been nearly as tough and much simpler and straightforward. Perhaps a simpler statute and a better oversight process might have worked better. [For the statements of staff position, I rely on Mr. Pierce and documents he quotes from].

[34]P.L. 100-4 the Water Quality Act of 1987, February 4, 1987 Sec. 202(f): Notwithstanding any other provision of law, Federal assistance made available by the Farmers Home Administration to any political subdivision of a State may be used to provide the non-Federal share of the cost of any construction project carried out under Section 201 of the Federal Water Pollution Control Act.

The contrary is expressly directed in the Stewart B. McKinney Homeless Assistance Act, *supra*, n.30, at (e) (1)(B): Amounts provided by the Federal Government, or services assisted or subsidized to any significant extent by the Federal government, may not be included in determining the amount of such non-Federal contributions.

[35]GAO, Principles of Federal Appropriation Law (June 1982) pp. 13-26. OMB, Circular A-110, Attachment E, b.(5); and common rule issued in connection with A-102, ___.24(b)(1). 53 Fed. Reg. 8088 at 8092. A-110 is expected to be revised in a parallel format.

requirement, it should not be authorized without careful attention to the relation of means to end.

L. SHOULD THERE BE A REQUIREMENT FOR MAINTENANCE OF LOCAL EFFORT?

Since the grant is planned to encourage local action rather than offset local funding, it should be reflected in an increase, not a diminution of grantee activity. This is normally measured by the amount of money spent. There is therefore often a requirement that the grant recipient shall spend in the grant year for the grant purposes not less than it was already spending for the purposes (in the preceding year, perhaps, or in the average of two, or of three, preceding years. This requirement is called Maintenance of Effort (MOE).[36] It has a measurable test for compliance: dollars spent per year. The Maintenance of Effort requirement is related to the non-federal share requirement, but is not the same requirement. Suppose that a grant project contemplates $100,000 of total cost: $80,000 of federal funds supplemented by a 20% non-federal requirement; that is $20,000 of local funds to make a total of $100,000. Now suppose that the grantee has already been spending $40,000 of its own funds for the grant purpose. A contribution of $20,000 will satisfy the non-

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[36] *E.g.*, P.L. 99-570, October 27, 1986, Title XII, the Commercial Motor Vehicle Safety Act of 1986, 12005(e)(1). The Secretary [of Transportation] may not make a grant to any State under this section unless such State agrees that the aggregate expenditure of funds of the State and political subdivisions thereof, exclusive of Federal funds, for testing of operators of commercial motor vehicles will be maintained at a level which does not fall below the average level of such expenditure for its last two fiscal years preceding the date of this Title [Note that by fixing the test period as preceding the date of the statute, the provision avoids a ratchet effect that would result from a test period preceding the date of the grant: in the latter case each succeeding grant year might raise the level required but could not lower it. Note, also, that in fixing the test period in terms of the State's own fiscal year, the provision simplifies the determination of the required level even though it may introduce disparities from state to state with different fiscal years].

Contrast P.L. 98-473, October 12, 1984, 660, amending the Juvenile Justice and Delinquency Prevention Act of 1974, adding a new Title IV, Missing Children, 406(c) [42 U.S.C. 577(c)]. In order to receive assistance under this title for a fiscal year, applicants shall given assurance that they will expend, to the greatest extent practicable, for such fiscal year an amount of funds (without regard to any funds received under any Federal Law) that is not less than the amount of funds they received in the preceding fiscal year from State, local and private sources. *See infra*, text at n.38.

federal share requirement but it will not satisfy a maintenance of effort requirement. To meet the MOE requirement, the grantee must spend at least $40,000 of its own funds, receiving only $60,000 of federal funds to make a $100,000 total project, or must spend $40,000 of its own funds, receiving $80,000 of federal funds to make a $120,000 total project, in either case substantially exceeding the non-federal share requirement.

A trap: requirements of MOE are generally desirable because they help assure that the grant serves the basic grant purpose of encouraging certain forms of local action instead of encouraging local abdication in reliance on federal funding. In certain cases, however, they can be counter productive. MOE requirements should not be so rigidly drawn as to force counter productive results. An example is the city which undertakes an experimental program that proves successful and by its success
helps the enactment of a national grant program to carry out similar undertakings. It may have done this with the aid of a one-time foundation grant.[37] A strict maintenance of effort requirement in the federal grant statute might have the perverse effect that the one city that had the foresight, the initiative and the interest to start the program rolling might now be the only city in the country excluded from carrying on after federal funds are available. This can hardly be the federal intent, and if it is not, it would be unfortunate if the statute were so written as to compel or encourage that result.

Another trap: the ratchet effect. If each year the grantee must maintain the previous year's level of effort, the required amount may continually increase. It can go up but must not go down. Be clear about whether you want that result or want maintenance only of the level established before any federal grant.[38]

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[37]*See, e.g.*, Bloomfield College Cooperative Education Program, HEW DGAB Docket No. 78-4, Decision No. 82, February 22, 1980, esp. at 2-3. This problem is sometimes helped in part by including in an MOE provision such a phrase as "excluding expenditures of a non-recurring nature." *See* for example, P.L. 92-157, the Comprehensive Health Manpower Training Act of 1971, 104(a) amending the Public Health Service Act 770(f), 773(d); P.L. 92-158, the Nurse Training Act of 1971, 3(b) and 4(a) amending the Public Health Service Act, 805(c) and 806(e)(1)(B).

[38]*See* Juvenile Justice and Delinquency Prevention Act of 1974, *supra* n.36.

M. SHOULD THERE BE A REQUIREMENT THAT FEDERAL FUNDS NOT BE USED TO SUPPLANT LOCAL EFFORT?

If a grant program simply transfers an activity from a local budget to a federal budget, it does not satisfy the basic purpose of grant programs to stimulate local action and does not face the fiscal reality of a federal budget that needs to be controlled. If such a transfer is prevented by a requirement of maintaining a previous dollar level of expenditure, that is maintenance of effort, discussed in the previous section. There is, however, a quite different approach to this problem that is not often clearly understood.

A statute may require the grantee to give an assurance that grant funds will be used to "supplement, not supplant" the activities grantee *would carry on* in the absence of federal funding.[39] The purpose is clearly similar to that of the maintenance of effort rule, but the operation is quite different. This is often not understood.

Note, to begin with, the conditional expression "would carry on". This does not permit the same objective, measurable, test presented by a maintenance of effort rule. It is not a requirement that can be monitored by an accountant and that sort of enforcement should not be expected.

The No-Supplant rule is normally essentially precatory. It is sometimes said, incorrectly, that it is wholly unenforceable and should therefore not be used.[40] That is

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[39] *E.g.*, Preventive Health and Health Services Block Grant, 42 U.S.C. 200 w-4(c).

> As part of the annual application required by subsection (a) of this Section, the chief executive officer of each State shall certify that the State--
>
> (4) Agrees that Federal funds made available under Section 300w-2 of this title for any period will be so used as to supplement and increase the level of State, local, and other non-Federal funds that would in the absence of such Federal funds be made available for the programs and activities for which funds are provided under that section and will in no event supplant such State, local, and other non-Federal funds;..."

Very similar but not identical provisions are in P.L. 98-377, the Education for Economic Security Act, 209(b)(6), and P.L. 99-570, the Anti-Drug Abuse Act of 1986, October 17, 1986, 4126(a)(2)(G).

[40] *See, e.g.*, Comptroller General, Report to the Congress, Proposed Changes in Federal Matching and Maintenance of Effort Requirements for

not correct. No-Supplant does have teeth, but mainly at the inception of a project when the agency can and should ask whether the applicant has planned a budget realistically and in good faith so that it is not relying on federal funds to replace local funding.[41]

If the budget is properly prepared, the agency can get a reasonable assurance at the beginning of the project that the grantee is not planning to withdraw its own support and rely on federal support. After that stage, absent flagrant bad faith, the bookkeeping of state and local fiscal systems does not make it rewarding to attempt to identify whether specific expenses have been supplanted. Failure to understand this leads to bad legislative drafting, bad regulatory drafting, wasted effort in grant monitoring and unnecessary nuisance to grantees.

A potential trap in this area is that failure to distinguish clearly between the Maintenance of Effort approach with its auditor's perspective and the No-Supplant approach with its management perspective often leads to apparently confused mixtures of the two in the same statute.[42] Clarity of thought, here as elsewhere, is desirable in drafting statutes.

State and Local Governments, GGD-81-7, December 23, 1980, esp. at 54-57.

[41] *Cf.* St. Landry Parish School Board, HEW DGAB, Docket No. 75-4, Dec. No. 17, May 28, 1978, 5 *ff.*

[42] An example of such a hinny is the Education of the Handicapped Act, amended by the Rehabilitation Act Amendments of 1986. 20 U.S.C. 1413(a)(9)(B) requires State plans to provide satisfactory assurance that Federal funds made available "will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds", subject to a waiver provision. 20 U.S.C. 1414(a)(2)(B)(ii) requires applications for grants by local educational agencies and intermediate educational units to provide satisfactory assurance that Federal funds expended by local educational agencies and intermediate educational units "shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds." These provisions, slightly different from each other for no apparent reason, are both clearly supplement -- no-supplant clauses. They lack, however, the classic conditional clause: "that would be expended in the absence of such federal assistance", so it is possible to call them MOE clauses. They also lack, however, the precision of a comparative basis to be expected of a maintenance of effort clause.

P.L. 99-506, the Rehabilitation Act Amendments of 1986, Sec. 1005 is captioned Maintenance of Effort and provides: Notwithstanding any other provision of the Education of the Handicapped Act, the Secretary and the State educational agency, in the case of Section 614(a)(2)(B) (ii) of that Act [20 U.S.C. 1414(a)(2)(B)(ii), quoted above], shall not include expenditures made from an accrued fund reserve surplus after July 1, 1983, and prior to October 1, 1985, which are used for services for handicapped children.

The whole record betokens very loose conception and very loose expression of intent with respect to maintenance of effort and no-supplant. The 1986 amendment is what physicians sometimes call "a beautiful case". It is probable that the drafter knew what was meant, and it seems possible that insiders, having heard discussion, knew what was meant, but it seems impossible for an uncommitted outsider to draw any intelligible meaning from the words of Section 1005. Although the section is captioned "Maintenance of Effort," the sponsors of the provision referred to it as providing an exception to a "non-supplanting" clause, remarks of Senators Eagleton and Danforth, 132 CONG. REC. No. 115, pp. S12100-1 (September 8, 1986). What is an accrued fund reserve surplus? Nothing in either the amended or the amending Act gives a clue. Are the Secretary and the State educational agency not to "include expenditures from an accrued fund reserve surplus" in the "Federal funds expended" or in the "State and local funds expended"? This was a Senate amendment. The Conference Report offers some but very little help. Going back to its original submission, it turns out that this amendment was cobbled to fit the feet of the St. Louis Special School District, of St. Louis County, MO. Once that is understood it hardly matters what the statutory language, but it would all have been clearer if the statute had said so. The purpose seems to be quite avowable: the School District had led the country in providing education for the handicapped and would have been penalized unfairly if required to maintain after enactment of the Education of the Handicapped Act its exceptional effort in the period 1983-1985. On the other hand, if the language of the Education of the Handicapped Act had been a standard no-supplant provision, and had been correctly understood, the problem would have disappeared or would have required no more than some kind words in a Committee report or a planned floor interchange. On the propriety of not enforcing literal MOE provisions against grantees who have been unusually forthcoming, *see supra*, text at n.37.

III. PLANNING A GRANT STATUTE

In the previous chapter, we have considered the planning of the grant program itself, an operation that should normally precede the planning of the grant statute which will authorize the program. We now examine the statute-planning. The following sequence of discussion is intended to parallel a typical line of examination that assists good statute drafting. The suggestions made in this chapter are intended primarily not as prescriptions for drafting but as invitations to ask certain useful key questions.

HOW SHOULD A GRANT STATUTE BE STRUCTURED

There are great variations from one grant statute to another, not always a result of considered choice. *Dembling[1] deplores the failure to develop a uniform approach, a common structure, a common set of definitions, a parallelism of expression where parallel results are intended. Dembling also deplores the failure to develop general statutes which would give a common framework to grant programs that do not deliberately depart from a common structure.

Nevertheless, some common elements of structure are developing. The following is a suggested outline that may serve both as a tentative order of topics for a typical grant statute and as a checklist for consideration in planning the statute.

A. OUTLINE OF A TYPICAL GRANT STATUTE

Sec. 1. Short Title
Sec. 2. Table of Contents
Sec. 3. Findings and Purposes
-- State your sources of power explicitly
-- State your purposes explicitly
Sec. 4. Definitions [and herein other questions of language]
-- Anticipate litigation

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[1]*Dembling, p. 305. This and other publications referred to by short titles or author's name only are identified in Chapter IV, *infra*, with full citations.

-- Define your terms
-- *Plain language* can be a trap
-- Borrowed language and borrowed provisions
-- A danger in cut and paste
-- Standardization
-- Remember that your proposed statute is intended to affect live people

Sec. 5. Establishment of Administering Office
-- A trap: Who's the boss?
-- The problem of micromanagement
-- Overdemanding rules

Sec. 6. Authorization of Appropriations

Sec. 7. Authorization of Assistance
-- Do not unnecessarily or inadvertently direct state or local governments or private bodies to act through structures or particular officers that the State (or local government or private body) would not choose for itself.
-- Be explicit about eligibility
-- Be explicit about intended beneficiaries
-- Think about flow-through of grant rules to sub-grantees and contractors under grants.
-- Administrative discretion
-- Provide explicitly for discretion
-- Deal explicitly with questions of federal preemption
-- Be explicit about last dollar provisions
-- Autonomy

Sec. 8. Allotment formula

Sec. 9. State Plan provisions

Sec. 10. Discretionary grant provisions

Sec. 11. Conditions of assistance

Sec. 12. Accountability, Audit, Monitoring provisions

Sec. 13. Sanctions and Incentives

Sec. 14. Rulemaking power

Sec. 15. Administrative and Judicial Review Provisions
-- Administrative
-- Judicial
-- Disallowance and non-conformity

Sec. 16. Provisions for relationship to allied programs (investigations and study, inhouse activity, contract activity, regulatory activity, educational activity)

Sec. 17. Report to Congress

Sec. 18. Repealers, saving harmless, severability, sunset and miscellaneous provisions
-- Check up periodically on existing statutes

Sec. 19. Effective date.[2]

B. SPECIAL CONSIDERATIONS IN DRAFTING AMENDATORY GRANT STATUTES

C. SOME SUGGESTIONS FOR GENERAL STATUTES

These topics are discussed in this chapter in more detail.

A. OUTLINE OF A TYPICAL GRANT STATUTE

Sec. 1. Short Title

It is customary to start a major statute with a short title. Often the "short title" is not short enough to be a convenient form of citation--the principal reason for having short titles. Let your short title be descriptive but let it be short. Good short titles, for example, are:

P.L. 79-404, the Administrative Procedure Act
P.L. 88-499, the Administrative Conference Act
P.L. 99-308, the Firearm Owner's Protection Act
P.L. 99-323, the Presidential Libraries Act of 1986
P.L. 99-371, the Education of the Deaf Act of 1986
P.L. 99-372, the Handicapped Children's Protection Act of 1986
P.L. 99-398 the Klamath Indian Tribe Restoration Act
P.L. 99-399, Titles I through IV, the Diplomatic Security Act.

More questionable are:

P.L. 99-319, the Protection and Advocacy for Mentally Ill Individuals Act of 1986.
P.L. 99-554, the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.

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[2]This outline is the result of melding the structures of several grant statutes I consider well organized. Generally similar outlines, with differences of detail, are offered by *Cappalli 1.11 and by *Hirsch, p. 11 *ff.*, in both cases with discussion of each topic.

Fairly good is P.L. 99-570, the Anti-Drug Abuse Act of 1986, but Subtitle I, G has a short title of its own (Sec. 1301), the Controlled Substances Import and Export Penalties Enhancement Act of 1986, that seems unwieldy without clear necessity.

> P.L. 99-252, the Comprehensive Smokeless Tobacco Health Education Act of 1986 might have been served by amputation of several words. Perhaps Smokeless Tobacco Act would have been enough, or Smokeless Tobacco Education Act, or Smokeless Tobacco Health Act.
> P.L. 99-519, the Asbestos Hazard Emergency Response Act of 1986 should probably have been pruned. Asbestos Act, or Asbestos Hazard Act might have sufficed.

Often, as in several of the statutes cited above, the short title includes a year. Occasionally, the year is necessary in order to differentiate members of a series of laws with the same subject. In many cases, the year is not necessary and may prove confusing.[3] For example, P.L. 95-224, An Act to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes, has a short title provision "That this Act be cited as the 'Federal Grant and Cooperative Agreement Act of 1977'". It became law February 3, 1978. The reference to 1977 in the short title can only confuse. P.L. 99-264, the White Earth Reservation Land Settlement Act of 1985 provides for allotment of land and for cash grants. It became law on March 24, 1986. Several words in the short title seem inessential, including "of 1985". P.L. 99-504, the Nebraska Wilderness Act of 1985, became law on October 20, 1986. P.L. 100-259, the Civil Rights Restoration Act of 1987, became law on March 22, 1988; the over-optimistic short title does not help clarity.

Sec. 2. Table of Contents

In a complex statute, a Table of Contents is a desirable addition. This normally follows the short title.[4]

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[3]*Hirsch, p. 11, recommends both the elimination of unnecessary year references and keeping short titles short. He gives an excellent example of a puffy short title: P.L. 88-164, the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963.

[4]For example, P.L. 99-272, the Comprehensive Omnibus Budget Reconciliation Act of 1986, Section 1 includes the Short Title, followed by a Table of Contents listing 20 Titles. P.L. 99-433, the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Section 1(a) contains

Sec. 3. Findings and Purposes

Many grant statutes contain one or several provisions setting forth Congressional findings and a statement of the purposes of the legislation. When done thoughtfully, this is good practice.

-- State your sources of power explicitly

Much effort is spent by judges, advocates, agencies, grantees, speculating about whether Congress in a particular enactment was relying on the welfare clause, the commerce power, the XIVth Amendment, or some combination of those and other powers.[5] Unless there is a reason to refrain from identifying the source of power, it will add to understanding and economy to specify the source.

Early in the development of a statute affecting federal assistance, it will be useful to consider the source of power relied on and probably the desirability of stating it explicitly.[6]

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the "short title", Section 1(b), the Table of Contents identifying 48 sections, 6 titles. Incidentally, either "Goldwater-Nichols Act" or "Defense Reorganization Act" might have been enough as a short title. P.L. 99-498, the Higher Education Amendments of 1986, Section 1(a) has the Short Title, Section 1(b) explains that references to "the Act" are to the Higher Education Act of 1965, Section 1(c) identifies 43 sections, 10 titles, and 255 new or revised sections of the Act. P.L. 100-4, the Water Quality Act of 1987, Section 1(a) has the Short Title, Section 1(b), the Table of Contents identifying 72 sections and 5 titles. P.L. 100-297, the Augustus F Hawkins - Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Section 1(a) gives the "short title," 1(b) the table of contents, which runs to 10 pages of 8-point type for a statute of 301 pages of 10 point type.

[5] *E.g., Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) turned on the question whether Congress was acting under the XIVth Amendment or the spending power. The court said (at 15): "In discerning Congressional intent, we necessarily turn to the sources of Congress' power to legislate, namely, Congress' power to enforce the Fourteenth Amendment and its power under the Spending Clause to place conditions on the grant of federal funds."

[6] *See* chapter II, section E on basic constitutional principles. The tensions between the constitutional provisions conferring powers on Congress and those reserving powers to the states and the people has resulted in some recent flip-flops of the Supreme Court in adjusting that balance with respect to the commerce clause, *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976), (*but see* p. 852, n.17 on the spending power clause). *National League* overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968): Full circle in 17 years. These fluctuations have been present but have not recently been so dramatic with respect to the general welfare clause.

-- State your purposes explicitly

This helps in interpretation of language that may be unavoidably somewhat ambiguous, and steers the result in the direction the legislature may have actually intended.

Particularly is this true of statements of the substantive goals of a grant program. In addition to these substantive goals some elements of other goals may be present, and sometimes less openly avowed because of political sensitivity. Among these are the financing of a program for the ulterior purpose of getting revenues collected federally into local hands; this happens but is generally not declared except in the case of general across-the-boards revenue sharing. Sometimes a purpose of general support to an institution - minority colleges, for example - may be plainly stated (and it is useful to do so in order to avoid misunderstanding). More often it is probably part of the intention of grant programs, but not directly said. Grants normally carry conditions. These may be classified as conditions imposed to protect the substantive program to which they relate; conditions imposed to protect the federal interests necessarily involved because federal funds are being disbursed (the State and local Hatch Act to help prevent federal funds being used for partisan purposes,[7] and civil rights[8] conditions are in this class); conditions imposed for their own sake, the grant serving as a vehicle. In the third class of conditions, the grant offers a carrot to do what the recipient cannot legitimately be coerced into doing.[9]

The degree of disclosure will vary, but disclosure is generally good drafting, and a fair description of at least the substantive goal is clearly appropriate.

The meaning of a statute is to be looked for in all the parts together and in their relation to the end in view.[10] Therefore state your purposes.

The general purpose is a more important aid to the meaning than any rule which grammar or formal logic may

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[7]5 U.S.C. 1501 *et seq.*

[8]P.L. 100-259, the Civil Rights Restoration Act of 1987 (March 22, 1988), explicitly amends the principal Civil Rights Acts affecting grants.

[9]Some commentators do not regard this category as constitutionally valid. *See, e.g.*, Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981). But *see* *Current Developments, Vol. 23, No. 1, Fall 1987, p. 8, *A Right to Drive Alcoholized.*

[10]Cardozo, J., in *Duparquet v. Evans*, 297 U.S. 216, 218 (1936).

lay down.[11] Therefore, if you do not wish to be misunderstood, state your purposes openly and clearly.

There is sometimes a disposition to regard Findings and Purposes provisions as empty rhetoric. Sometimes they are, because done perfunctorily. When they are, they do little good and may do harm, because loose language carelessly included may lead to unintended views of the "legislative intent." But when they are written, as they should be, with deliberate attention, they are valuable parts of the statute. This is as true of grant statutes enacted under the welfare clause as of regulatory statutes under the commerce clause.[12]

Explicit statements of findings and purpose can be very valuable in a welfare clause statute as well as in others because they not only show the constitutional basis of the statute but show the path to the correct interpretation of its provisions. A good example of this is found in the Economic Opportunity Act of 1964, as amended. That statute, founded on the welfare clause, provided a set of anti-poverty measures. Both the Act as a whole and some of the individual titles were headed by careful findings and statements of purpose. When the question arose whether a Community Action Agency, organized to receive grants under this Act, was an armed instrumentality, or agent of the United States, whether its personnel were federal employees, its torts federal torts, its property federal property, the explicit Congressional statements, reinforced by other contemporary statements, which reflect the intended autonomy of the grantees were successfully used,

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[11]Holmes, J. in *U.S. v. Whitridge*, 197 U.S. 135, 143 (1905). Although this was written in the context of "an addition made in new circumstances to a form of words adopted many years before," it is more broadly applicable, and Frankfurter so cites it, *Some Reflections on the Reading of Statutes*, 47 COL.L.R. 527, 538 (1947).

[12]*Hirsch (p. 11) believes that

> Findings and statements of purpose may be useful, in a bill founded on the commerce clause, to bolster the constitutional validity of provisions to regulate intrastate commerce. Beyond this -- in bills based on the welfare clause, for example -- they serve no significant legal purpose.

This is one of the few points on which I disagree with Hirsch.

by government attorneys who were appropriately instructed, to resist such claims.[13]

*Cappalli 1.11 suggests that the Statement of Findings and Purpose "provides the 'spirit' with which courts and administrators should approach the difficult task of interpreting ambiguous language found within the statute and applying such language to the myriad facts of life." He adds, however, that in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, "the Supreme Court repelled an effort to create substantive rights out of such congressional oratory." In *Pennhurst*, in fact, the Court relied expressly on the "exhaustive statement of purposes" in 42 U.S.C. 6000(b)(1) (1976 ed., Supp. III), 451 U.S. at 11-12 and 18, to conclude that Congress did not intend "to require the states to fund new substantive rights." It therefore held that a separate section, then 42 U.S.C. 6010, called "Congressional findings respecting rights of developmentally disabled" did not intend to make recognition of such rights a condition of funding. It is 6010 that Cappalli refers to as congressional oratory, but any inference based on this case that congressional statement of findings and purpose (6000) are of no importance seems mistaken. [14]

Often the plan of a statute evolves during drafting and during the successive steps of clearance, hearing, redrafting that it may go through. When that happens, the thoughtful use of the findings and purposes provisions includes going back to reexamine whether they still mesh with the bill as it emerges.[15]

Sec. 4. Definitions [and herein other questions of language]

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[13]One exception, where the standard brief prepared for the purpose was not used, was *U.S. v. Orleans* in the Court of Appeals, Sixth Circuit, 509 F.2d 197 (1975). The government lost, but the case was reversed by the Supreme Court, 425 U.S. 807, 96 S.Ct. 1971 (1976), when an argument giving more stress to the statute's Statements of Purpose was developed. *See* Brief for the United States, *U.S. v. Orleans*, No. 75-328, October Term, 1975, esp. pp. 12-13. *See* *Current Trends, at p. 180, n.100.

[14]Section 6010, incidentally, has since been repealed and replaced by Section 6009, a frequent and unnecessarily confusing procedure. *See infra*, this chapter, Part B, "- Leave a track".

[15]Professor Mullins (*see* Preface, *supra*, and *see* Bibliography, Ch. IV, *infra*), has suggested in a letter to Charles Pou, Jr., ACUS, February 12, 1988, "Ideally, the 'purpose' statement should be among the last provisions finally drafted." My own preference is for drafting the purpose statement at the beginning because it guides the drafting, but this is largely a matter of taste and circumstances. Professor Mullins rightly emphasizes that in any event the drafter always should adjust the purpose statements to reflect substantial changes in substantive provisions that may have occurred.

-- Anticipate litigation

It is a chastening and often healthy experience for a person wielding power to be challenged in court. It often produces a degree of courtesy and consideration, fairness and rationality that sometimes is lacking without it. An agency head whose steel has been so tempered in early career will be stronger for it. A similar tempering is needed for the sponsor of legislation. A basic tool for the strengthening of any lawyer's work, and especially a drafter's, is the testing of the draft in litigation either in fact or, better, in a professional's anticipatory imagination.

Regulatory statutes (say, securities laws, for example) are often written under close observation by professional representatives of affected industries, and the drafters often are acutely aware that the statute may be tested in litigation. This leads to a more careful approach than would otherwise be taken, and to a bill that has undergone a kind of adversary challenge during the drafting process.

Grant statutes are often not watched as carefully nor by the same kind of professional representatives.[16] The proposers of such statutes often feel that they are proposing something that is obviously good and that will be generally approved, and they do not anticipate challenge. They may watch with care those portions of the bill that contain dollar signs, but sometimes treat other provisions of the bill as atmospheric and rhetorical and not worth sharp study. This may be a mistake. The result may be that language in the parts of the bill which have no $ sign is vague and fuzzy, possibly even contradictory of other parts, and the bill is enacted. Once enacted, the language has a life of its own and may prove mischievous.[17]

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[16]I am indebted to John Bell, a skilled craftsman in the writing of grant statutes, for emphasizing this contrast in a private conversation.

[17]Perhaps the classic case of how statutory language may have a life of its own is the provision in Title II of the Economic Opportunity Act of 1964 which defines a community action agency as one "...which is developed and conducted with the maximum feasible participation of residents of the areas and members of the groups served..." MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (The Free Press, New York, 1969), traces the substantial impact this language had on American society in the decade or so following its enactment. *See* esp. MAXIMUM, p. 97: "For this purpose [shaking things up] the all-but forgotten term 'Maximum feasible participation' was decisive". That impact was wholly foreign to the recognizable intent of the drafters (MAXIMUM, p. 87, 180) the Congress who passed it, (MAXIMUM, p. 91..."Congress made it clear to anyone who wished to take note that it did not expect the antipoverty program to be a disruptive influence".), and the President who signed it (MAXIMUM, p. 143). It entered the statute with "no public discussion" (MAXIMUM, p. 90-91).

-- Define your terms

Grant statutes often use terms that require definition. Perhaps grant statutes have somewhat more need for explicit definitions than many other kinds of statute. This is not, however, intended as encouragement for multiplying definitions beyond need. Professor Mullins comments,[18] "Felix Cohen had something worthwhile to say about definitions -- '[A] definition is useful if it insures against risks of confusion more serious than any that the definition itself contains.'"[19]

Standard questions for the drafter include what to define, where to define (beginning, end, or as you go along, alphabetically or in some other order), how to define, and what to do about definitions in a statute that amends another statute.

Hirsch and other writers give advice on this subject. *Hirsch (p. 12) has some good advice, for example, on the value of definitions that assume the dictionary meaning and clarify the penumbra - for example: "the term 'physician' includes an osteopathic practitioner as determined under the law of the state in which he is practicing". *Hirsch also warns of the danger of Pickwickian definitions -- for example: the term 'bribery' was defined in a bill (not enacted) to include all amounts received by a federal employee as compensation for any service (including his federal pay check? Yes, including his federal pay check, but another provision exempted receipt of his federal paycheck from the penalty provisions). Someone found that definition convenient and clever, but it is bad drafting.[20]

Statutes sometimes give no definition of terms that look as though they represent simple concepts but in fact give a simple appearance to very complex notions. This is illustrated by significant disputes in the medicaid program, involving the terms "expended" and "overpayment."[21]

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[18]Letter to Charles Pou, Jr., ACUS, February 12, 1988.

[19]F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L.R. 809, 836 (1935).

[20]*Mullins, p. 95, also warns against "special hazards of defining a term in a manner *too* inconsistent with conventional usage. The conventional or established usage of a term is a powerful force. The conventional meaning of a term exerts a kind of gravitational pull on the drafter, and the reader, who are constantly tugged, psychologically, toward reverting to use the term in its customary sense."

[21]Section 1903(a)(1) of the Social Security Act provides that the State is entitled for each quarter to payment of the Federal medical assistance percentage (itself defined in a very elaborate formula) "of the total amount expended during such quarter as medical assistance under the State plan."

Plausible differences of interpretation have involved many states and millions of dollars.[22] The Departmental Grant Appeals Board's results in these cases generally reflect the outcome the Congress probably would have wanted had the question come up in advance, although as a result of the poor drafting of the statute, the reasoning is somewhat forced. The lack of definition has created substantial unnecessary costs in uncertainty, delay and litigation. Assuming the intent was indeed what the Board thought it was, the Congress should have defined "expended" to show that it required an effective parting with money, and should have defined "overpayments" to show that it includes payments which the Secretary determines are in excess of the appropriate payment and should have specified that amounts recovered by the state from third parties are of course to be treated promptly as overpayments. It is true that the field is a difficult one and no statute can be written immune from cavil, but better clues to intent could have been left.

Another example: the Job Training Partnership Act refers to "recipient" in several sections. The term is not defined. Sometimes it seems to mean the State, sometimes the Governor of the State, sometimes a sub-grantee. There are sections where within a single section the term seems to

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"Medical assistance" is defined in Section 1905(a) as "payment of part or all of the cost of covered care and services."

The term "expended" in 1903(a)(1) is not defined.

Section 1903(d)(2) provides that payments, based on estimated quarterly expenditures, shall be reduced "to the extent of any overpayment . . . which the Secretary determines was made . . . for any prior quarter . . ."

The term "overpayment" in 1902(d)(2) is not defined unless 1903(d)(3) is an implicit definition. Section 1903(d)(3) provides: "The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection."

[22]*See* GAO, States Should Intensify Efforts to Promptly Identify and Recover Medicaid Overpayments and Return the Federal Share, HRD-80-77. California Department of Health Services, HHS DGAB Decision No. 244, December 31, 1981 (appealing $18,000,000 disallowance in federal financial participation, "FFP"); California Department of Health Services, HHS DGAB Decision No. 619, January 28, 1985 ($6,746,437 of FFP). At least nine states have had substantial problems. Other states involved in appeals of more than a million dollars each include Massachusetts (No. 262) New York (Decisions Nos. 261 and 311), Arkansas (No. 423). At least five such disputes have gone to court.

have different meanings.[23] Was this shifting usage intentional? Probably not. Would the problem have been cured by a definition of "recipient." Probably yes.

-- Plain language can be a trap

It seems to be an obvious value that statutes (and rules) should be written in plain language the man in the street can understand. But when you deal with a complex idea and shirk the complexities because your language will then not be "plain" you are not solving your problem, nor the Administrator's problem, nor the problem of the affected public.

*Hirsch correctly says (p. 32):

> There is a limit to how simply a complex idea can be expressed. That a statute is hard to understand is not always a compelling criticism; what shames the draftsman is a statute that he has made unnecessarily hard to understand.

"Plain writing" has become so much an approved goal that it has fallen into the classic trap of promoting language that seems plain by Flesch index (simple, straightforward sentences, no long or obscure words) but fails to communicate. Drafters, seeking to write plain, too often suppress the complicating detail that is essential to real working clarity.[24]

-- Borrowed language and borrowed provisions

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[23] *See*, for example, Sections 164(a)(2); (d); (e)(1); (2), and (3); 165 (a)(1); and 166(a). Cited in *Current Developments, Vol. 21, No. 2, Winter 1986, p. 14.

[24] In drafting government definitions of poverty levels, for example, OEO, ordinarily outstanding in its effort and success in communication, wilfully suppressed a statement as to whether income levels were meant to be gross or net, and if net, net of what, whether capital transactions counted or did not, whether the value of services received counted or did not count, and so on. This was done to avoid cluttering up the regulation with what would be perceived as complexity. Thus, what was unspoken often exceeded in significance what was spoken, and a particular income level was defined, in effect, as $3,750 plus or minus an undefined amount that may be more than $3,750. That may be plain writing, but it is also plain foolishness. This example is taken from *Grant Rulemaking, pp. 51-52. The problem is also noted in the Grant Rulemaking field in *Current Developments, Vol. 16, No. 12 January 1985, p. 5.

Take advantage of language which has been interpreted by the courts and administrative tribunals.[25]

When words have acquired traditional meanings, to use them in a distinctively different sense is dangerous, but invention of new terminology may be puzzling. These are common problems, particularly troublesome in the grant field.

New words sometimes have value when it is deliberately intended to create a new concept and to dramatize it by giving it a new name.

-- A danger in cut and paste

"Borrowed language" must not be confused with an unthinking exercise in cut-and-paste. To borrow language from another statute is acceptable if indeed the implications of same structure, same intent, same background, are really intended. Too often, however, the borrowed language is chosen on a very hasty and superficial impression that "that language seems to have something to do with what we want to do, and it has been used before: so let's use it." This can be harmful. An area in which it seems to be common is in the drafting of maintenance of effort provisions.[26]

*Mullins (p. 11) correctly notes: "THE DRAFTER SHOULD NEVER MINDLESSLY COPY THE MODEL. THE DRAFTER SHOULD APPROACH THE MODEL AS IF IT WERE A FIRST DRAFT WHICH NEEDS REVISION. (Usually, it does.)"

-- Standardization

Several writers have pointed out that the language of grant statutes varies immensely from statute to statute, apparently without any intention that the difference of language convey a corresponding difference of meaning.[27]

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[25]*Dembling, p. 305.

[26]*See* discussion of maintenance of effort, Ch. II, Section L.

[27]*Dembling, for example, says, p. 305:

> Each program is authorized by a statute which uses its own language. No common set of definitions has emerged. Such basic terms as "grant," "grant-in-aid," "grant agreement," "subsidy," are used in different ways in different statutes. One statute bears little resemblance to another statute which may encompass similar conditions. Advantage is not taken by using language which has been interpreted by the courts and administrative tribunals. Variations in assistance programs occur because of a lack of uniformity in drafting standards, not

Reed Dickerson, one of the leading authorities on the drafting of laws, has said[28]

> The cardinal rule of all drafting, sometimes called 'the draftsman's golden rule,' can be stated in four words: Use your terms consistently. For one thing, don't vary your terminology when referring to the same thing.*** And don't do the converse. Don't use the same term to refer to different things.*** Consistency is a *sine qua non* of all effective communication.[29]

Grant statutes, both individually and especially taken as a group, often violate both branches of this golden rule: they use different words to mean the same thing and the same word to mean different things.[30]

The time has come for greater uniformity and standardization. Perhaps the best way to do this is to enact one or more general statutes providing definitions and a framework which other grant statutes thereafter should incorporate or treat as incorporated and should depart from only upon a clear showing of a need for different definitions and a different framework. Such general statutes will accomplish a great simplification and clarification of the grant field.[31] Even before this objective is achieved the discussions involved in attempting it will be valuable in directing draftsmen towards the goals of simplification, clarification and elimination of unnecessary variations.

> -- *Remember that your proposed statute is intended to affect live people*

When statutes get too abstract and too complex it is easy to lose the sense that people bleed when cut. An example:

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necessarily because of congressional intent." *Cf.* *Cappalli, 1.11.

[28]Dickerson, *How to Write a Law*, 31 NOTRE DAME LAW. 14, 24 (1955).

[29]Quoted in Ray Forrester, *Truth in Judging: Supreme Court Opinions As Legislative Drafting*, 38 VANDERBILT L.R. 463, 467-8 (1985).

[30]A thesaurus of words are used in various statutes and occasionally in the same statute to mean "grant": "assistance," "award," "pay," "federal participation," "agreement," "contract," "support." For an example of the same word used to mean different things, *see* Job Training Partnership Act, *supra*, at n.23.

[31]*See* discussion of general statutes, *infra*, C. Some Suggestions for General Grant Statutes.

42 U.S.C. 1396a (Medicaid): State plans for medical assistance.

(a) Contents. A State plan for medical assistance must--***

(1) ...
(2) ...
(3) ...
(4) ...
(5) ...
(6) ...
(7) ...
(8) ...
(9) ...
(10) provide--***
(a) ...
(b) ...
(c) that if medical assistance is included for any group of individuals described in section 1905(a) who are not described in subparagraph (A), then--***
(i) ...
(ii) ...
(iii) ...
(iv) if such medical assistance includes services in institutions for mental diseases or intermediate care facilities for the mentally retarded (or both) for any such group, it also must include for all groups covered at least the care and services listed in paragraphs (1) through (5) and (17) of section 1905(a) or the care and services listed in any 7 of the paragraphs numbered (1) through (17) of such section;***
except that (I) the making available of the services described in paragraph (4), (14), or (16) of section 1905(a) to individuals meeting the age requirements prescribed therein shall not, by reason of this paragraph (10) require the making available of any such services, or the making available of such services of the same amount, duration, and scope to individuals of any other ages,..."[32]

In a statute which governs the lives of people who are old, sick, poor, and mentally retarded, as this does, this draftsmanship reinforces unnecessarily and unwisely a

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[32]The first sentence of this statute takes 14 1/2 pages as printed in USCS and includes 140 numbered or lettered sub-, subsub-, and subsubsub-clauses.

tendency to abstract, artificial, dispositions of the living people affected.[33]

Sec. 5. Establishment of administering office

Often, but not always, the administration of a grant program is conferred by statute on a particular administrative agency with authority to make rules. The agency may be independent or established within an existing agency.

In principle, authorization to make grants could be given to the President, who would delegate. More commonly, it is made to the head of a Department or independent agency, who will usually delegate it. When a special office is created, the grant-making and rule-making powers are likely to be lodged in the new office.

Provisions for the establishment of agencies vary greatly according to their purpose and situation. Much of the variation, however, comes from a lack of a standard model. Good patterns are hard to find. The drafter may wish to explore Title 5 U.S.C. generally, and a sample agency such as the Department of Housing and Urban Development, 42 U.S.C. 3531-3541, or the National Science Foundation, 42 U.S.C. 1861 ff. for suggestions. Perhaps the best thought out pattern is that of the Office of Economic Opportunity, P.L. 88-452, 78 Stat. 508. Although the agency is no longer alive and the statute is old enough to create a risk of anachronism, it provides nevertheless a useful checklist of items to consider.[34]

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[33]Contrast *Bell, p. 4, "According to Congress itself in a law enacted many years ago, statutes are to be divided into basic units called sections, each of which "shall contain, as nearly as may be, a single proposition of enactment." *See* 1 U.S.C. 104, Act of July 30, 1947, Ch. 388, 61 Stat. 634. The provisions of 42 U.S.C. 1396a, of which a fairly typical excerpt is quoted in the text, and in particular the provisions relating to institutions for mental institutions and intermediate care facilities for the mentally retarded, have given rise to a substantial amount of dispute and litigation. It is difficult to say with certainty that the Internal Revenue Code style is the cause of the disputes but I believe it has contributed to them.

[34]The personnel employment provisions, for example, were written before major revisions of the federal personnel laws. The provision for advisory committees was written before the Advisory Committee Act. For such reasons, it is not recommended that this statute be parroted, but that it be used to suggest topics for inclusion. The following is a list of catch phrases to indicate the contents of the Act: Sec. 601. Office of Economic Opportunity. There is hereby established in the Executive Office of the President the Office of Economic Opportunity -- headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. -- Deputy -- three Assistant Directors. -- Provision for transfer of the Office elsewhere in the executive branch -- compensation. Sec. 602.

-- A trap: Who's the boss?

The drafter must consider this carefully: To what extent is it intended that the officer who directly receives grant authority shall have a discretion free of the normal agency supervision? This question, if not answered, can cause confusion or unnecessary tensions within the agency. If such discretion is intended, it should be given with care and thoughtful attention to these problems.

An example may be the Food and Drug Administrator who sometimes seems to rule a palatinate largely independent and disdainful of the Secretary of Health and Human Services.[35] Another example may be the

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Authority of Director -- (a) to appoint personnel -- (b) employ experts -- (c) appoint advisory committees -- (d) with the approval of the President, arrange with and reimburse the heads of other Federal agencies for the performance of any of his functions, delegate and authorize redelegation -- (e) utilize, with their consent, the services and facilities of Federal agencies without reimbursement, and of State agencies -- (f) accept money or property by gift -- (g) accept voluntary and uncompensated services -- (h) allocate and expend, or transfer to other Federal agencies for expenditure, funds available -- (i) disseminate data and information -- (j) adopt an official seal which shall be judicially noticed -- (k) deal with, complete, rent, renovate, sell, properties acquired -- (l) collect or compromise all obligations -- (m) expend funds for printing and binding, for rent -- (n) establish such policies, standards, criteria, and procedures, prescribe such rules and regulations, enter into contracts, make payments in advance or by way of reimbursement, with necessary adjustments on account of overpayment or underpayments, and generally perform such functions and take such steps as he may deem to be necessary and appropriate to carry out the provisions of the Act. Sec. 604. Economic Opportunity Council (of agency heads). Sec. 605. National Advisory Council (public representatives). Sec. 611. Coordination of related programs.

[35]Commissioner Frank Young assures me that if this comment about FDA was correct at one time, as I believe it was, it no longer is. He says

> We are and do function as part of HHS. The confusion results from the fact that certain functions are delegated from the Secretary to the Commissioner. In our most recent administrative plan (Action Plan Phase III), we focus even more closely on our Health Function. We are now viewing our responsibilities as (1) Public Health Problem Prevention, (2) Public Health Problem Identification and (3) Public Health Problem Resolution. In my tenure as a Commissioner I have kept the Department informed and as required fully involved in decisions. Therefore, I would reject the concept that we function outside of the Department. Particularly important delegated functions include product evaluation and enforcement.

Commissioner of Social Security.[36] These are necessarily subjective judgments, but come from long and fairly close observation. Drafters should be aware that this generally unintended distortion of agency relationships happens, and should prefer (unless otherwise instructed) to name the head of the Department as the authority for grants.

-- The problem of micro management

Administration of a grant program involves a natural tension between legislature and executive and between both and the recipients. Grant programs are often complex in their technical nature (consider, for example, a project of basic scientific research, or one of research on the effect on the liver of certain blood components, or for the provision of medical services in a poverty area, or for supplying school lunches to school children). They are often affected by complex and controversial scientific or economic or social

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[36] *See* Chapter II, sec. G, If a program is to be a grant program, who should administer it? *See* Smith, *Judicialization: The Twilight of Administrative Law*, 85 DUKE L.J. 427, 448 (1985), commenting on the semi-autonomy of such organizations as FDA and SSA.

At the swearing-in of a new Commissioner of Social Security, the new Commissioner, who had been an Assistant Secretary of Health, Education, and Welfare, gracefully accepted words of praise from the Secretary and added that he felt a sense of loss in leaving the Department. How much effect on practical problems this sense that the Social Security Administration was not part of the Department would have, is hard to determine, but there seems litle doubt that it had some and may have helped explain some of the frictions encountered between headquarters staff and Administration staff. The draftsmanship of the Social Security Act is not at fault here; it clearly gives the operating power to the Secretary. Congress has been concerned for many years about the independence of the Commissioner on Aging and the Administration on Aging within the HEW (now HHS). It has provided that the Commissioner shall report to the Office of the Secretary (why not to the Secretary? perhaps to allow for action by the Undersecretary, but "Office" opens the door wider), but shall administer his functions through the Administration on Aging (42 U.S.C. 3011, 3030bb, 3058b, 3058c(c)). The Secretary shall not approve or require any delegation of the functions of the Commissioner to any other officer not directly responsible to the Commissioner. The continuing struggle may explain the following amendment which plainly goes overboard. P.L. 98-459, the Older Americans Act Amendments of 1984, 413, adding new 433 to the Older Americans Act of 1965 [42 U.S.C. 3037b] "(a) The Commissioner shall be responsible for the administration, implementation, and making of grants and contracts under this title and shall not delegate authority under this title to any individual, agency, or organization." The Commissioner has a large staff. He must and does delegate. Is it possible to believe that Congress meant what Congress said? When consulted about this provision, Dr. Samuel Johnson replied, "I would never listen to it, if it made me such a fool."

or political factors. It is difficult or impossible to spell out in advance by legislative directive how they are to be conducted. Not surprisingly, the Congress often finds itself disappointed in the actual conduct of programs that it (somewhat vaguely perhaps) had anticipated would operate otherwise.[37]

A frequent response to such disappointment is to spell out, in an amendment to an existing statute, or in future statutes, more detailed and positive directions, or in other ways to attempt to control the Executive's discretion or the recipient's autonomy.[38]

Such efforts are often self-defeating. The effective administration of a grant program may require executive discretion, including discretion to be wrong. The achievement of grant goals calls for recipient independence including the right to be wrong. Too vigorous an effort by the legislature to engage in micro-management often runs

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[37]*See Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555 (1985), and discussion, *Current Developments, Vol. 20, No. 4, Summer 1985; Ohio Department of Public Welfare, DGAB Docket No. 78-50-OH-HC, Decision No. 66, October 10, 1979.

Edith Green, then an influential Congress Member (Member of the 84th through 93rd Congresses, 3rd Oregon District, member of appropriation, and education and labor committees), insisted successfully on including in the Economic Opportunity Act of 1964, as amended, a provision giving first option to local governments as grantees of community action grants. A year later she was bitterly outraged to find that local governments had not received the large flow of community action grants she had anticipated. The reasons were simple. Where community action programs existed, the vast majority of local governments had already painfully worked out compromises that they did not wish to reopen. It is, moreover, rare that local governments have, under their own state laws, the powers that were required under the Act to qualify as a community action agency. Local governments' counsel knew it and knew that they could not sign the required certification that their governments were qualified, so local governments generally did not apply, notwithstanding Representative Green's insistence that they were to have priority. Representative Green was disappointed, but she need not have been. This example is not unique but is unusually clear. At the time of this development I was a member of General Counsel's staff of OEO. I have checked my recollection with Donald Baker, then General Counsel, later Counsel for Employment and Training, Health & Safety, Human Resources, Labor-Management Relations, Pensions, House Committee on Education and Labor. *See* 210(d), added in 1967 Amendments to the Economic Opportunity Act: Director may designate if State or political subdivisions are not willing to be designated. Powers required of a community agency are in 210, 211, 212.

[38]*See* n.37, *supra*, *Bennett* case, *Ohio* case.

aground in the real world in which grant programs must operate.[39]

In the grant field, micro-management is wrong in principle because it seeks to delimit the discretions and autonomy that are essential to a well-organized grant program. It has a special adverse effect in that an executive agency, faced with overly specific directives from the Congress, often protects itself by blind and rigid application of the rules imposed on it.[40] The result is typically a program that is less effective, less fair and unnecessarily expensive.

-- Over-demanding rules

Is there room for common sense in grant administration? One might think the answer would be "yes, of course". Yet there are valid reasons why common sense must be confined. Common sense is not in fact very common and rules that control free floating common sense are introduced to assure regularity, visible even-handedness, and objectivity. There is a legitimate tension between the appropriate respect for those rules and the appropriate recognition that there are situations where rules must bend for extraordinary circumstances and extreme cases.[41]

It is not possible to state general rules of law with the absolute precision that would justify a totally rigid enforcement. A general statute must necessarily be read with at least a minimum element of common sense that recognizes extraordinary circumstances and extreme cases to which it does not apply. Where the reason for the rule stops, an ancient legal maxim teaches us, the rule stops.[42]

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[39]*See* *Current Trends, XV, *Increasing Legislative Oversight and Legislative Tinkering*, 35 FED. BAR J. 163, 186 and esp. 187 n.124, with several examples.

[40]*See* *Current Developments, Vol. 20, No. 4, Summer 1985, p. 15 "Who will educate the educators." This reaction is probably more common in the grant field than aggressive defiance or stubborn evasion.

[41]An example, fairly typical of many, is this: a state, grantee under the Medicaid program is required to inspect regularly the facilities that supply services (hospitals, nursing homes). Finding laxity in the agency's enforcement of this inspection program, Congress directed a specific schedule of annual inspections, with sanctions for non-compliance. What happens in the event of severe storms, creating a state of emergency, making road travel impossible, if some inspections are thereby delayed a month? HEW thought it was required by law to impose a sanction. *See* HEW DGAB, Ohio Department of Public Welfare, Docket No. 78-50-OH-HC, Decision No. 66, October 10, 1979, pp. 3-5.

[42]The need to give recognition to appropriate exceptions is often stated, but unfortunately often overlooked and should therefore be emphasized. As

In general, statutory directions, particularly those addressed to administrative agencies, are intended to be construed reasonably in light of their purpose; the authority of the agency to make (with thoughtful care) common sense adjustments to extreme and oppressive instances is normally to be assumed.

This is one of the most difficult areas for statutory drafters to deal with. When broad and loose guidance is given it may lead to creative government but it may lead to discretion run riot. When tight, narrow direction is given, it may lead to a foolish or willful rigidity such as both HEW and the Office of Education (now Department of Education) often exhibited in the past.[43]

A way out is difficult to find but elements of the solution may include

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Harlan, J. stated the matter in *Amalgamated Assn. of St. E. R. & M. C. Emp. v. Lockridge*, 403 U.S. 274 (1971), with respect to the preemption doctrine, that doctrine "is, like any other purposefully administered legal principle, not without exception." 403 U.S. 274, 297.

Douglas, J. dissenting in *NLRB v. Seven-Up Bottling Company*, 344 U.S. 344, (1953) noted: "There are exceptions to most general rules; and the Board [NLRB] should be the guardian of the exceptions as well as the formula itself." 344 U.S. 344, 353. The majority agreed with the dissenters on the importance of recognizing exceptions where circumstances make application of a general rule to a particular situation "oppressive and therefore not calculated to effectuate a policy of the Act". 344 U.S. 344, 349.

Judge Leventhal emphasized in a thoughtful decision:

> The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Cf. Gulf Oil Corporation v. Hickel, 435 F.2d 440, 447 (D.C. Cir. 1970). *Cf. also National Broadcasting Company v. United States*, 319 U.S. 190, 207, 225 (1943); *United States v. Storer Broadcasting Company*, 351 U.S. 192, 204-5 (1956).

See also Davis, Discretionary Justice, pp. 25-26:

> Rules alone untempered by discretion, cannot cope with the complexities of modern government and of modern justice.

Cf. Gardner, *The Procedures by which Informal Action is Taken*, 24 AD.L.R. 155, 159-160, 165 (1972),

> ...no man is wise enough to devise any rule, however narrow its scope and rich its obvious appeal, which can uniformly be applied...

[43]*See* *Current Developments, Vol. 20, No. 4, Summer 1985, at 15, *Who will educate the educators*, and 17, *Education Again.*

- avoidance by drafters of micro-management that is not really necessary,

- coupled with explicit recognition in drafting of elbow-room for discretion (by responsible officials),

- coupled with a freer and better oversight process that creates more two-way communication between Congress and the Executive; the legislative veto was never a solution because it worked as a club not a telephone.

Sec. 6. Authorization of appropriations

It is customary for grant statutes (and often other statutes as well) to contain an authorization of appropriations.[44] There is no constitutional requirement for this, and its absence from an enacted statute does no harm. The provision represents a customary adjustment between the interests of the Congressional committees that have jurisdiction over the substance of the statute and those that have jurisdiction over appropriations. To permit the substantive committees to have their say on the size of appropriations and to hold hearings on that question if they should wish, the custom is to include an authorization of appropriations, setting, presumably, a ceiling and a suggested amount, but not authorizing expenditures until an appropriation has been enacted. An appropriation made without an authorization would be perfectly valid but may

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[44] *E.g.*, P.L. 99-519, the Asbestos Hazard Emergency Response Act of 1986, Sec. 4(a) amending section 512 of the Asbestos School Hazard Abatement Act of 1984 (P.L. 98-377; 20 U.S.C. 4011 *et seq.*): "In addition, for such purposes there are authorized to be appropriated out of the Asbestos Trust Fund established by Section 5 of the Asbestos Hazard Emergency Response Act of 1986 $25,000,000 for each of fiscal years 1987, 1988, 1989, and 1990."

P.L. 99-551, the Domestic Volunteer Service Act Amendments of 1986, amends the Domestic Volunteer Service Act of 1973 by adding: "(1) There is authorized to be appropriated to carry out part A of title I (except section 109) $25,000,000 for fiscal year 1989. (2) There is authorized to be appropriated to carry out section 109(c)...." etc

P.L. 99-590, Title I, amends the Wild and Scenic Rivers Act (16 U.S.C. 1274), providing (sec. 103(a)), grants to the city of Fort Collins for a study, and specifying (d) "FUNDING--There are hereby authorized to be appropriated up to $150,000 to carry out the provisions of this section."

be delayed by a point of order.[45] Often, the authorization of appropriation is reduced to a gesture:

> "There are hereby authorized to be appropriated such sums as are necessary to carry out this Act."[46]

Drafting techniques are, of course, influenced by the complexities of the current budget process. Although this is an important technical matter, it is beyond the scope of this book. It is desirable, however, that the drafter of grant statutes be alerted to the importance of these complexities.[47]

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[45]*See* House Rule XXI.2(a), Rules of the House of Representatives, House Doc. No. 98-277 (98th Cong. 2d Sess.); Senate Rule XVI, Senate Manual, Sen. Doc. 98-1(98th Cong. 2d Sess.).

[46]*E.g.*, P.L. 99-576, the Veterans Benefits Improvement and Health-Care Authorization Act of 1986, Sec. 224 (Revision of State Home Construction Grant Program) (a) amends 38 U.S.C. 5033(a) to read: "There are hereby authorized to be appropriated such sums as are necessary to carry out this subchapter through September 30, 1989."

[47]Donald Hirsch (*see* Bibliography) in a letter to Charles Pou, Jr., ACUS, January 18, 1988, calls attention to this:

> "Particularly since the enactment of the Congressional Budget Act of 1974, the selection (or replacement) of funding mechanisms has been among the more sensitive issues in the development (or amendment) of financial assistance programs. A draftsman must be prepared, today, to explain to the policymaker the fiscal and tactical implications of this selection....
>
> "To take a simple example, consider a federal loan guaranty program, such as the Guaranteed Student Loan Program in title IV-B of the Higher Education Act of 1965.
>
> "The draftsman must be aware that a loan guaranty program is "credit authority" within the meaning of section 3(10) of the Congressional Budget Act of 1974. Therefore the draft bill must contain language to provide that the program may be "effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts." Section 402(a) of the CBA. If it fails to contain this language, the bill may be struck down by a point of order on the floor of either House.
>
> "It might be useful if the draftsman knew that the amount of a loan guaranty is not "budget authority," as that term is used in the annual Budget of the United States. In discussing the desirability of a limit on outstanding guarantees (for example, in meetings with OMB), the draftsman may point out that the volume of such guarantees does not inflate the budget numbers.

"Finally, although this may seem a bit arcane, for purposes of sequestration under Gramm-Rudman-Hollings a loan guaranty ceiling will be reduced by the uniform percentage applied to the sequesterable outlay base. BUT if the program has NO ceiling (for example, the status of the VA Guaranteed Home Loan Program in 1986) then OMB will administratively IMPOSE a ceiling for purposes of sequestration. If the imposed ceiling is too low, the administering agency will then have to propose legislation to increase it. [FN. The OMB ceiling imposed on the VA Guaranteed Home Loan Program for purposes of fiscal 1986 sequestration was $6 billion too low and had to be raised legislatively.] This peculiarity bears on the desirability and size of the ceiling for a new guaranty program. Alerting policy officials engaged in the development or amendment of a guaranty program to this issue is the responsibility of the draftsman.

"Let's take the more complicated example of an appropriated entitle-ment, such as Medicaid or AFDC. To draft such a program, or speak to its formulation, the draftsman must keep in mind a few fundamentals:

"Unlike a true entitlement, such as the Old-Age, Survivors, and Disability Insurance Program ("social security"), an appropriated entitlement must be funded annually. But unlike a non-entitlement formula grant program (*e.g.*, the Community Services Block Grant Act, where the formula allocates only the amount appropriated) the appropriation for an appropriated entitlement is much like an estimate. That is, the grantee state is legally entitled to reimbursement without regard to the size of the appropriation. Of course, nothing is paid unless it is appropriated. Consequently, should the amount that the United States owes to a state exceed the available appropriation, the United States would be compelled to default. In its turn, the grantee state might find itself forced to curtail assistance to the ultimate program beneficiary. For these reasons the draftsman should write the bill to anticipate, and perhaps facilitate, the use (in later-enacted implementing appropriations bills) of language to avoid an appropriations short-fall. [F.N. For example, he might draft a provision authorizing advance appropriations or advance funding, or both. Although such provisions are not technically required under congressional rules, appropriations committees act as though they are. In other words, they are unwilling to employ such devices to fund new statutes in the absence of authorizing language in the statute.]

"The executive branch policy maker must be informed that the size of the program, when enacted, will not be controllable through the appropriations process (exclusive of the special case of Gramm- Rudman-Hollings sequestration).

"Congressional consideration of legislation proposing new appropriated entitlements is subject to various rules contained in section 401 of the Budget Act ("Bills Providing New Spending

Sec. 7. Authorization of assistance

This is the heart of a grant statute. The structure of the assistance program itself is discussed above in Chapter II. When mandatory programs are intended, the provision typically reads: "The Secretary [or the Administrator] shall make grants..." [or "shall pay", or "is authorized and directed"].[48] When discretionary programs are intended, the provision typically reads: "The Secretary may make grants...".[49] Of course, sometimes "shall" is used where

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Authority"), including a rule as to when such a program may go into effect. [FN. The treatment of appropriated entitlements as meeting the Congressional Budget Act's section 401(c)(2) definition of "spending authority", although universally accepted, has given OMB hemorrhoids under Gramm-Rudman. The reason: if a program creates spending authority, GRH-mandated procedures (the so-called "Gradison baseline") for estimating program outlays for a fiscal year (in anticipation of sequestration) generate a significantly larger number than if the program did not create spending authority. Therefore, in the FY 1987 joint OMB/CBO sequestration report, in the face of a CBO dissent (not to mention OMB's own acceptance of appropriated entitlements as spending authority in the FY 1986 sequestration report), OMB chose to reinterpret the CBA to exclude appropriated entitlements from the CBA definition of "spending authority". Congress responded with a "Clarifying Amendment Respecting Appropriated Entitlements", section 101(b)(6) of the recent Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, specifically including appropriated entitlements in section 401(c)(2), at least for purposes of GRH references. There is no question that the Parliamentarian of either House would rule that section 401 of the CBA applies to appropriated entitlements.]

"For purposes of reconciliation, the budget resolution will instruct the pertinent authorizing committees rather than the appropriations committees (contrary to the situation vis-a-vis discretionary grant programs). This is a matter of interest to agency legislative liaison.

"Some of this may seem like esoterica, but it is the bread and butter of people who make a living out of the drafting of grant programs (or, more commonly these days, the amending of grant programs)."

[48]P.L. 100-4, the Water Quality Act of 1987, Sec. 212(a). Subject to the provisions of this title, the Administrator shall make capitalization grants to each State for the purpose of establishing a water pollution control revolving fund.

[49]P.L. 100-4, the Water Quality Act of 1987, Sec. 406(g)(1). The Administrator is authorized to conduct or initiate scientific studies, demonstration projects, and public information projects... For the purposes of carrying out this subsection, the Administrator may make

"may" is meant.[50] That is an old problem. It is not desirable, but may have recently found some apparent justification in concerns about impoundments. Assuming that some part of the program is intended to be of the mandatory, formula, state plan type, the statute will normally include a section providing an allotment formula and a section stating the state plan requirements.[51] Where some part of the program is of the discretionary type, there is likely to be a separate section or several for discretionary grant provisions.[52] Major programs, of course, often include both kinds of grants.

> -- *Do not unnecessarily or inadvertently direct state or local governments or private bodies to act through structures or particular officers that the state (or local government or private body) would not choose for itself.*

Grant statutes often assume, or require, or exert pressure towards particular arrangements within state or local governments. For example, they may call on the governor of the state or a mayor to take certain action which from a state point of view may belong more appropriately to the legislature or to an agency within the state designated by state (or local) legislation. They may require certain functions to be placed within a particular agency - a "single state agency," the Health Department, the State Administration on Aging - while the state may consider a different allocation of powers appropriate.[53] Sometimes

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grants to State water pollution control agencies, institutions, organizations, and individuals.

[50]P.L. 99-158, the Health Research Extension Act of 1985 revises Sections 472-476 of the Public Health Service Act, using the word "shall", to provide grants to individuals to enable them to accept traineeships and fellowships; to physicians; to appropriate public or private nonprofit medical libraries; to existing public or private nonprofit medical libraries; to public or private nonprofit institutions of higher education and individual scientists. In most of these cases it seems highly unlikely that "shall" was used wittingly. For example, Sec. 475(a). The Secretary, with the advice of the Board [of Regents of the National Library of Medicine] *shall make grants to and enter into contracts with* existing public or private nonprofit medical libraries...[emphasis added]. It cannot have been intended that existing libraries have an entitlement nor that they are to receive both grants and contracts. In all probability "may" or "is authorized to" would have expressed this better.

[51]*See* sections 8 and 9, *infra.*

[52]*See* section 10, *infra.*

[53]*See* text *infra* at n.57.

such provisions raise federal constitutional questions; more often, the Congressional power may be clear but the wisdom of this federal disturbance of state arrangements may be less clear. Such provisions may clash with state constitutional provisions or interpretations but on such issues the state must yield (assuming that the federal grant program is a valid exercise of the general welfare power and the conditions appropriately clear and that other provisions of the federal constitution are not an independent bar).[54]

-- Be explicit about eligibility

> Executive agencies should not have to address highly political issues such as who is eligible to receive funds from a certain program. The Congress should be explicit on eligibility. In the absence of adequate definitions of eligibility in a statute, there should be a clear understanding as to the range of administrative discretion to include or exclude categories of recipients.[55]

This is good advice, often not followed.

-- Be explicit about intended beneficiaries

This includes explicitness about eligibility, but it goes further. Grant funds given to eligible recipients often are intended to benefit primarily certain classes of non-recipients. For example, funds granted to a health center may be intended primarily to benefit the community, the sick of the community, or the poor of the community. This is often worth defining. If the health center in fact emphasizes its training function, which primarily benefits, in the first instance, a medical school and its young physicians rather than service to the community, that may be contrary to the Congressional intent. In the short run, the training or service emphasis can be quite different. What is best in the long run calls for difficult judgments Congress may not have intended to leave to the parochial judgment of this grantee. Again, the center may turn out to

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[54]State of N.C. *ex rel. Morrow v. Califano*, 445 F.Supp 532 (1977), *aff'd.* 435 U.S. 962, 98 S.Ct. 1597 (1978), where the State claimed that to comply with federal grant conditions requiring a certificate of need for the construction of hospitals would violate the State constitution. *Cf. South Dakota v. Dole*, _U.S._, 107 S.Ct. 2793, 2796 (1987).

[55]Dembling, p. 305. *See also*, Chapter II, Section 10, What is the intended class of recipients?

serve primarily the sick in a sub-community who are not poor rather than the entire community or the sick in the poorer sub-community. Did Congress intend to leave this to grantee's choice? A statute can give a strong or weak indication of intent on those matters.

When identifying the intended beneficiaries, drafters should also consider the extent of the rights intended to be conferred. Are they to have a right to be consulted? A right to a hearing if dissatisfied? And to a court appeal? A right to be heard in opposition to benefits given to others? Those things need not always be spelled out, but if they are not, the sponsors of the legislation may be surprised by the outcome in the courts and will have only the drafter to blame.[56]

-- Think about flow-through of grant rules to subgrantees and contractors under grants

When grants are made to eligible recipients, many conditions may be imposed on the recipient. The recipient is often expected or permitted to make subgrants or contracts to perform part of the grant work. Which of the conditions imposed on the grantee must be complied with by the subgrantee or by the contractor under a grant? And who decides? If the grantee is required to make reports to the grantor in a specified format, must the subgrantee make parallel reports to the grantee in the same format? May the grantee decide what reports it wants from the subgrantee in order to meet the requirements of the grant? This is the flow-through problem. It is a difficult one. It has in the past been subject to OMB guidance. For a number of reasons,

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[56]*See* Section 15, *infra*, Administrative and Judicial Review provisions.

the OMB guidance was unsatisfactory. OMB recognizes this and is in the process of making a comprehensive revision.[57]

The drafter of a grant statute may reasonably leave this matter to OMB. This will have the virtue of reinforcing an effort at uniformity. The OMB approach, however, whether good or bad, is necessarily somewhat abstract. It pursues a goal of a particular kind of uniformity and a goal of devolution of authority to States, in an across the board manner that reflects little of the variations of grant structures and purposes.

The drafter of a grant program should be aware that this is a currently controversial problem and should make an informed judgment as to whether flow-through problems should be left to the current and the evolving rules or need guidance in a particular direction.

-- Administrative discretion

A theoretical pattern of government calls for basic policy to be set by legislation, but executed by an administrative agency with broad discretion to set the detailed rules that are only adumbrated by the legislative policy. That discretion includes a discretion to recognize exceptions to general rules that often cannot be anticipated at the point of legislation but are essential to the achievement of reasonable results.

For example, many federal grant statutes require grantee states to perform the grant under a single State agency.[58]

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[57]OMB Circular A-102 (State and local Governments) has been revised; A-110 (Non-profit institutions) par. 5, is now being revised. *See* OMB Notice of Review of A-102, 49 Fed. Reg. No. 118 (June 18, 1984); Lasker, *OMB Circular A-102: Has Its Time Passed*, 2 ASSISTANCE MANAGEMENT No. 1, December 1983, p. 3; *Symposium, "Rethinking A-102."* 2 ASSISTANCE MANAGEMENT No. 2, June 1984. OMB seeks to foster a particular concept of federalism by improving the authority and flexibility of states, although some grant programs may represent efforts by the federal government to strengthen the authority and flexibility of units of government below the State level. The OMB approach is certainly defensible and may be desirable, but it is not the only rational approach to these problems. *See* Circular A-102, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 53 Fed. Reg. 8034 (March 11, 1988), Preamble at 8035, "flow-down", Common Rule at 8087.

[58]*See* discussion *supra*, text at n.53. An example is 42 U.S.C. 602. State plans for aid and services to needy families with children;

> (a) Contents. A State plan for aid and services to needy families with children must--...
>
> (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the

If the Congress determine that the single State agency approach is sound, it should also recognize that there are circumstances where a single State agency requirement may become a strait jacket and where the purposes of the single State agency requirement can be achieved as well or better without enforcing the requirement. In such circumstances, the federal grant-making agency should be authorized to waive the requirement upon a convincing showing of the desirability of a waiver. That waiver power should either be implicit in the structure of the statute or should be explicit. In fact, single State agency requirements are generally subject to an explicit waiver authority.[59]

-- Provide explicitly for discretion

This pattern is one that should be considered whenever a grant-making agency is given instructions that are mandatory in form: discretion is likely to be desirable. Authority to grant waivers, exemptions, deviations, is apt to be needed. Where there is doubt, it should ordinarily be considered implicit, but explicit authority should be considered by the drafter.[60]

-- Deal explicitly with questions of federal preemption

Preemption by federal law is, of course, something that occurs in many fields, and causes doubts and problems often. It is a problem of special difficulty in the grant field

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establishment or designation of a single State agency to supervise the administration of the plan;....

[59]31 U.S.C. 6404. Use of existing State or multimember agency to administer grant programs

Notwithstanding a law of the United States providing that one State agency or multimember agency must be established or designated to carry out or supervise the administration of a grant program, the head of the executive agency carrying out the program may, when requested by the executive or legislative authority of the State responsible for the organizational structure of a State government --

(1) waive the one State agency or multimember agency provision on an adequate showing that the provision prevents the establishment of the most effective and efficient organizational arrangement within the State government; and

(2) approve another State administrative structure or arrangement after deciding that the objectives of the law authorizing the grant program will not be endangered by using another State structure or arrangement. (Sept. 13, 1982, P. L. 97-258, 1, 96 Stat. 1007).

[60]*See also* Chapter II, Section H, How much discretion should be left to the Executive?

because of two factors. (1) Grants contemplate recipient autonomy and preemption should therefore not be too readily assumed[61] and (2) grant statutes are often not clearly drafted.

In *King v. Smith*,[62] Alabama's "substitute father" regulation was held invalid on the ground that it defines "parent" in a manner inconsistent with 406(a) of the Social Security Act.

In *Rosada v. Wyman*,[63] the Supreme Court, with some complaint about the uncertainty of the federal statute[64] held New York's standard of need in the Aid to Families with Dependent Children program to be invalid because of conflict with the federal statute.

The Administrative Conference has recommended:[65]

> "1. Congress should address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct...."

That is good advice for grant statute drafters as well.

-- Be explicit about last dollar provisions

Grant programs are sometimes intended to provide safety-net funding supplementing other sources of funding. In some health programs, for example, if the patient has a medical insurance, the grant is to be used to pay costs beyond what the insurance will pay. The grant is intended

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[61] *See* •Current Trends, 35 FED. BAR. J. 163, at 178, VIII. Irradiation of the Supremacy Clause.

[62] 392 U.S. 309 (1968), esp. at 333, 88 S.Ct. 2128, 2141, n.34: "There is of course no question that...any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." Although HEW, charged with administering the Act, had objected to the Alabama regulation, the grounds of its objection were not those that made the regulation objectionable to the Court. *See Douglas, J.*, concurring, *ibid.* at 335.

[63] 397 U.S. 397, 90 S.Ct. 1207 (1970).

[64] 397 U.S. at 412; 90 S.Ct. at 1218.

[65] ACUS Rec. 84-5, Preemption of State Regulation by Federal Agencies, 1984 ACUS 27, and background report by Richard J. Pierce, Jr., at 517. *See also* 14 (ACIR) INTERGOVERNMENTAL PERSPECTIVE, Vol. 14, No. 1, Winter 1988, p. 23, Federal Preemption of State and Local Authority.

to be the "last dollar".[66] This is in contrast with Medicare, for example, (not a grant program) which in some cases pays the first dollar and is then supplemented by any private insurance.

This is a complex issue and Congressional intent is not always clear. It is useful for the drafter to seek or make an articulate decision on the intent or a deliberate decision to leave the decision to the administering agency.

-- Autonomy

It has been stated earlier that the essence of the grant relationship is the autonomy of the grantee on substantive essentials.[67]

This does not mean that there are not many and important qualifications, conditions that crimp the grantee's autonomy. There are. Autonomy is not perfect and cannot be. A complex set of intergovernmental and other tensions in our system must be accommodated. Nevertheless, autonomy is at the heart of the relationship and when grant

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[66]Example: 42 U.S.C. 1396(a) State plans for medical assistance [Medicaid] (a) A State plan for medical assistance must---...(25) provide (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties to pay for care and services... (b)...treat such a legal liaiblity as a resource...and (c)... where such a legal liability is found to exist after medical assistance...seek reimbursement for such assistance to the extent of such legal liability;...

Another example: 42 U.S.C. 254c Community Health Centers--(e) (2) Except as provided in subsection (d)(1)(B), the Secretary may not approve an application for a grant under subsection (d) unless the Secretary determines...that (E) the center has made or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing health services to persons who are entitled to insurance benefits under title XVIII of the Social Security Act, to medical assistance under a State plan approved under title XIX of such Act, or to assistance for medical expenses under any public assistance program or private health insurance program...

[67]*See* Chapter I, Who should be interested in grant statute drafting problems, and II, 1. The choice of instrument. This has been recognized in legislation, such as the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6304; by the executive, for example, when food stamps were reclassified by OMB from grants to benefits because the federal control had increased (The Budget, FY1977, Special Analyses, p. 260, *see also* Catalog 10.551); by the courts, *see, e.g., Forsham v. Califano*, 587 F.2d 1128, esp. at 1138. "The reference to 'an *autonomous* grantee' is a core concept" (1978), *aff'd.* sub. nom. *Forsham v. Harris*, 455 U.S. 169, esp. at 180 (1980),"reflecting the same regard for the autonomy of the grantee's records as for the grantee itself", *U.S. v. Orleans*, 425 U.S. 807 (1976); and by writers, *see e.g.*, *Cappalli, 1.07; *Current Trends, 35 FED. BAR J. 163, 166, *I. The Black Letter Law.*

statutes are written, it is well to ask of each provision that impairs autonomy: is this necessary, worth the cost, and consistent with the basic intention of the program?

Sec. 8. Allotment formula

Allotments are instructions for the distribution of available funds to the several states or other recipients. Among the purposes of such allotments are to provide assurance against undue concentration of grants to particular states or regions because of favoritism (or somewhat less reprehensible reasons such as ease of administration) and "to alleviate disparities in the fiscal resources at the state and local levels."[68]

The term "allotment" has a fairly clear meaning. So does "distribution" or "distributing." This process is also sometimes called "allocation" or "apportionment." These terms are often used seemingly interchangeably by statutes and agencies. It might be desirable to standardize them and use them consistently.[69] "Allocation" is often used to identify distributions of authority to obligate funds within an agency and distribution of funds to classes of activity (so much to educational services, so much to research) rather than distribution of funds to recipients. "Apportionment" is often used to identify distribution of authority to obligate funds over time (for example, by quarters) notably by OMB under the Antideficiency Act. For that reason, this text prefers the term "allotment" for the distribution of funds to states and other recipients. Whether this particular usage or another should be adopted, however, is less important

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[68]GAO, Grant Formulas, a Catalog of Federal Aid to States and Localities (GAO/HRD-87-28) p. 12.

[69]GAO, Grant Formulas, n.68, *supra*, at p. 413 has a glossary which defines Allotment: An amount of funds received by a grant recipient;

Allocation: A distribution of funds among grant recipients, arrived at by applying a formula to specific program funds available;

Apportionment: A division of available funds, among activities, projects, or objects (or a combination thereof), based on a formula.

A footnote comments that the Federal Highway Administration uses the terms differently.

GAO, although giving the terms specific meanings in the glossary, uses them more loosely in its text (*e.g.*, "allocations" and "allotments," pp. 45, 86, 98, 100, 282, 354; "apportioned" p. 176, 210, 232. Of course, this usage is influenced by the fact that the statutes use the terms inconsistently and the agencies from which GAO gathered its information did so too. GAO's earlier A Glossary Of Terms Used In The Federal Budget Process (March 1981) at pp. 33-35 gives quite different definitions for these terms. Statutes use them without definition, again with apparently different meanings.

than the recognition that inconsistency now prevails and could be reduced.

In mandatory grant statutes, the entitlement of each state or other recipient may be specified by dollar amount[70] or by a statutory fraction of the amount that becomes available.[71] These formulas are sometimes very complex.[72]

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[70]*Cf.* P.L. 97-328 (Mary McLeod Bethune Council House), a single recipient assistance statute:

> Sec. 3...the Secretary of the Interior is authorized and directed to enter into cooperative agreements with the National Council of Negro Women... Sec. 5...there are authorized to be appropriated $100,000 to provide financial assistance under section 3.....

See also P.L. 99-590, amending the Wild and Scenic Rivers Act (16 U.S.C. 1274), providing grants and technical assistance to the city of Fort Collins, and authorizing $150,000 to be appropriated for that purpose.

[71]For example, P.L. 1004, the Water Quality Act of 1987, sec. 206, amending sec. 205(c) of the Federal Water Pollution Control Act: "...Sums authorized for such fiscal years shall be allotted in accordance with the following table:

'States
Alabama..... .011309
....
Virgin Islands..... .000527'"

[72]GAO, GRANT FORMULAS, *supra* note 68, has a valuable survey of formulas used in allotments in 142 programs representing 87 per cent of all federal grants-in-aid. GAO sought to use a common terminology across programs and translated the gist of the process into algebraic terms. One example: p. 158, Solar Energy and Energy Conservation Bank (CFDA 14.550) (12 U.S.C. 3614 and 3615): Allocations are made to states. Each state's allotment is made in proportion to (FY 1985) the product of a need indicator and an incentive factor.

Allocations to states that are new to the program are raised to a minimum of $120,000 if the initial formula allotment is below that amount. Other participating states are guaranteed a $20,000 minimum.

Mathematical Structure:

STATE SHARE = (NEED*INCENT)/SUM OF NUMERATOR

where,

NEED = .50* (.50* LOINCHH+.30* MODINCHH+.20* HIINCHH)+ .50*ENERGY

INCENT = 1.0+[P*(.10*BTUSAVE+.10*INVEST+.50*EXPEND+ .30*COMMIT)]

Definitions:

All data elements in the need factor are expressed as a percent of the largest state (i.e., largest state = 100 percent):

LOINCHH = number of households in each state with incomes 80 percent or less of state median income MODINCHH = number of households in each state with incomes between 80 and 150 percent of state median HIINCHH = number of households in each state with incomes above

Typical allotment provisions take account of such things as the population of the states, the number of poor persons or of children of poor families attending school or of miles of highway or of passengers emplaning at a particular airport. They often provide for a minimum grant or for a save-harmless provision if a State would receive under the formula less than it had been receiving.[73]

Sometimes the formula is left to be worked out by the agency, with Congress giving only an indication of elements to be considered.[74]

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150 percent of state median ENERGY = amount of energy consumed per household in a state, in BTUs

All data elements in the incentive factor (INCENT) are rated on a scale from 0 to 5:

BTUSAVE = BTU savings as a percent of grant subsidy in prior 24 months (in each state)

INVEST = dollars invested in subsidized projects as a percent of grant subsidies in prior 24 months (in each state)

EXPEND = proportion of obligated grant funds expended in prior 24 months

COMMIT = state's proportionate share of grant funds expended in the prior 24 months

P = penalty factor, where the incentive factor is reduced by 5 percent for every 10 percent of other federal funds used to subsidize the matching requirement for this program. The minimum penalty is 5 percent; the maximum is 50 percent. (P = 1.0 if no other federal funds are used).

[73]*See* Solar Energy and Energy Conservation Bank, *supra*, n.58. Vocational Education State Planning and Evaluation (CFDA 84.121), 20 U.S.C. 2306-2309, 2311, hold harmless through FY 1984, minimum allotment of 40%, maximum 60%. Local Rail Service Assistance (CFDA 20.308, 49.1654(h)), no state gets less than 1%. Alcohol and Drug Abuse and Mental Health Services Block Grant (CFDA 13-992), 42 U.S.C. 300x-1a, all states held harmless at 1984 level. Older Americans Program: Planning Coordination Evaluation and Administration of State Plan (CFDA 13.633A), 42 U.S.C. 3028(b), minimum allotment for the states, District of Columbia and Puerto Rico is 1/2% or $300,000 or FY 75 allocation, whichever was greater.

[74]*E.g.*, 16 U.S.C. 1456a(c)(3)(A) The Secretary shall make grants to any coastal state to enable such state to prevent, reduce, or ameliorate any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource, if such loss results from the transportation, transfer or storage of coal or from alternative ocean energy activities.

(B) Such grants shall be allocated to any such state based on rules and regulations promulgated by the Secretary which shall take into account the number of coal or alternative ocean energy facilities, the nature of their impacts, and such other relevant factors deemed appropriate by the Secretary.

42 U.S.C. 300 j--2(a)(4) "...the Administrator shall, in accordance with regulations, allot the sums appropriated...among the states on the basis of population, geographical area, number of public water systems, and other

Allotments are sometimes also established for discretionary project grants with the intention of steering the selection of grantees so that there is a fair distribution among the states.[75]

In drafting allotments, here are some questions to be considered:

> Will the proposed formula tend to produce the intended results?
>
> Does the proposed formula treat similarly those similarly situated?
>
> Does it treat differently those differently situated? Does it, for example, give more to those who have more need and less to those who have less need? Does it give more to those who furnish a greater effort? Does it give less to those less likely to benefit?

No rule of appropriate action is being offered here: These are questions that it is often useful for technicians to ask. The policy answers are for the policy makers.

How do you estimate the total expected program costs? For a medical program do you look to statistics of illnesses? Or do you count total population on the assumption that illnesses will run in proportion, or poverty, on the assumption that with poverty, illnesses and need for treatment increase? If the program deals with homelessness, if reliable measures are lacking, what do you use as a measure for distributing funds?

Are the factors that are used really relevant to the distribution that is wanted or valid surrogates for relevant factors?

Is the formula unnecessarily complicated? Many seem to be.

Would there be administrative economy in adopting formula elements already used in other statutes rather than requiring the gathering of a new set of data only slightly different from those already being gathered? An imaginary example: If one agency gathers data on the number of houses that are substandard in any of three ways (no running water, no hot water, no sewage system), should another agency be directed to get data on the number of homes that lack running water? Perhaps yes, if the fact of running water is essentially significant, but perhaps no, if the existing data will probably give closely the same result.

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relevant factors...." *cf.* Catalog, *supra*, p. 287 State Public Water System Supervision Program Grants (66.432).

[75]Head Start (CFDA 13.600) , 42 U.S.C. 9853(b).

Are the data needed to apply the formula available and clearly identified? Will they be available on time to be used when they are needed? Formulas based on census data have sometimes run into trouble because the census data were, perhaps unavoidably, delayed.[76]

Will the data elements used withstand litigation challenge? (Formulas based on census data recently ran into trouble because minority group spokesmen claimed their number had been undercounted, affecting the amount of grants their areas would receive.)[77]

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[76]GAO/HRD-87-109 BR, BLOCK GRANTS, PROPOSED FORMULAS FOR SUBSTANCE ABUSE, MENTAL HEALTH PROVIDE MORE EQUITY, is an example of specific analysis of a proposed formula. The GAO catalog *supra*, gives not only examples but surveys of the kinds of data sources looked to. Cf. for example of congressional concern, 1980 CQ ALMANAC 229 ("Congressional Reapportionment") on the use of the 1980 census for computing congressional representation - objection to the counting of aliens in the state populations. Use of the census for allotting grant funds was not at that point objected to but was objected to elsewhere by minority representatives. *See* GAO/GGD-87-99FS, July 1987, DECENNIAL CENSUS, COVERAGE EVALUATION AND ADJUSTMENT ACTIVITIES.

[77]MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING, *supra*, n.17, comments, p. 198:

> The Bureau of the Census, one of the truly noble institutions of the Federal government, has quietly been transforming its decennial survey into a continuous measurement process. Much room remains for improvement. (In 1960, some 10 percent of the nonwhite population was missed, with proportions twice that and more among young adult males.)

The 1980 Census was challenged by nearly two dozen lawsuits claiming that the census severely undercounted urban blacks and Hispanic populations. New York City, for example, believed the undercount costs it $26 to $52 million a year in federal grant money and a U.S. House seat. Seven years later, these lawsuits were unresolved. For the 1990 Census, OMB questions the inclusion of about half of the 70 long-form questions involving housing, work, and fertility. The Census Bureau, some grant-making agencies, housing groups and others have protested. OMB "labeled as 'nonsense" implications by some critics that OMB has an ideological motive for its objections--a desire to reduce the scope of housing programs, for example, by reducing data on housing." Washington Post, *Census Bureau Looks to 1990 As Lawsuits Over 1980 Linger*, Wednesday, August 19, 1987 (Federal Page). Expert on Undercount [Dr. Barbara Bailar] Quits Census Bureau [hearsay that she believed that political factors may have entered into an October 30 decision by the Commerce Department that forbids an undercount adjustment of 1990 census figures]. Washington Post, The Federal Page, December 18, 1987. *Cf.* OMB WATCH, Action Alert, July 1988, "1990 Census Housing Information Still at Risk". *Cf. also*, OMB WATCH, Monthly Review, Vol. 4, No. 6, June 30, 1988, OIRA Puts the Brake On Bus Industry Census. No opinion is expressed here on the propriety or wisdom of these OMB decisions: what is relevant is that the drafter should not too readily assume that statistics needed for a formula will be available.

Sec. 9. State plan provisions

Many mandatory grant programs require States to submit for approval a State plan setting forth how the State proposes to conduct the program. The typical condition for approval is compliance of the plan with specified requirements. Ordinarily, there will be opportunity for States to obtain review if their plans are turned down.

The "Medicaid" statute may be taken as a sample (not a model) State plan statute. It illustrates a pattern of state plan provisions duplicated in several other similar statutes. It also reflects some common defects in the drafting of such provisions, including inordinate length and complexity and additional difficulty resulting from incorporation by reference of provisions from other statutes which add up to a lack of clarity.

Paraphrased and sharply cut, 42 U.S.C. 1396a can be outlined as follows: It requires a State plan for medical assistance (Medicaid) to cover in an approved way these topics:

(a) 1. application to all parts of the State (plans that serve only "downstate", for instance, are not acceptable)

2. State financial participation. (This must not be prejudiced by local inabilities to carry part of the burden)

3. hearing for those denied assistance

4. personnel practices (merit basis, training, protection against conflict of interest by major employees)

5. single state agency

6. reports to the Secretary

7. safeguards against disclosure of confidential information

8. accessibility of assistance to applicants

9. maintenance of standards

10. eligibility of individuals and required categories of service

11. cooperative agreements with state agencies

12. examination to determine whether an individual is blind

13. payment rates

14. non-imposition of enrollment fees

15. coordination with medicare

16. availability of assistance to residents when out of state

17. income standards for eligibility

18. compliance with 42 U.S.C. 1396p with respect to liens

19. safeguards for simplicity of administration and best interests of recipients.

20. special provisions for patients over 65 in mental institutions

21. special provision for patients over 65 in public mental institutions

22. staff standards

23. patients' freedom of choice of provider

24. consultative services

25. third party liability (last dollar)

26. special provisions for inpatient mental hospital services

27. agreements for record keeping

28. special provision for skilled nursing facilities

29. licensing of administrators

30. utilization review (to assure economy)

31. written plan of care and periodic inspections in skilled nursing facilities

32. direct payment to patient, with exceptions

33. review of plans of care

34. provision for certain services before application

35. disclosure of ownership of providers

36. publicity for surveys of facilities

37. prompt payment procedures

38. disclosure of subcontractors

39. barring of persons involved in false provider claims

40. use of uniform reporting system

41. notification by State of actions to terminate providers

42. audit

43. notification of availability of screening services

44. certification of need for inpatient services

45. mandatory assignment of rights of medical support owed to recipient

46. income and eligibility verification [some "notwithstanding" clauses]

(b) plan shall not be approved if it contains an age requirement of more than 65 years, a resident requirement excluding any resident of the State, or a citizenship requirement excluding any citizen of the United States.

(c) nor if it will reduce aid under State plans under Titles I, X, XIV, or XVI.

(d) performance of medical and utilization review services by delegation
(e) grandfather clause for family eligibility
(f) effective date of plan
(g) [repealed]
(h) [repealed]
(i) termination of certification of facilities
(j) waiver in American Samoa

The whole of this takes over 19 pages as printed in USCS. A single subsection (10) alone occupies 3 pages. Whether this is too long depends of course on whether the content is really appropriate and necessary and cannot be expressed clearly in less space.

Some of these provisions serve a valid purpose in permitting each State to shape its own program its own way, within broad federally-imposed limits. That is consistent with the basic function of grant programs. For example, under (2), a State may elect to pay all of the non-federal share of the costs of the program from its own funds. The State, if it chooses to pay less than all, may require cities or counties to contribute, but it must still pay at least 40 percent of the non-Federal share itself. In addition, it must provide for a distribution of funds from both Federal and State sources for carrying out the State plan on an equalization or other basis which will assure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope or quality of care and services under the plan. This serves a federal goal of uniformity of services throughout the State, but leaves to the State substantial room for devising its own fiscal arrangements.

In contrast, under (12), if it is necessary to determine whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select. There is no room here for variation in plans from state to state as there is in (2). Why is it part of a state plan? This may be a sensible requirement but, as state plan boilerplate, it surreptitiously introduces a federal legislative requirement that belongs elsewhere in the statute.

Similarly (35) requires that the State plan "provide that any disclosing entity (as defined in section 1124(a)(2) receiving payments under such plan complies with the requirements of section 1124". Read by itself this is wholly uncommunicative. Referring to section 1124, we find a requirement to be imposed by regulation or contract of certain disclosures of ownerships by "disclosing entities". That term is defined in a passage that takes almost a full

page and involves eight further incorporations by reference, including several back to Title XIX (Medicaid). The section is probably intelligible with effort, but the effort required seems excessive. Is it necessary? In any case, since the requirement is to be imposed by the Secretary and the State has no room for tailoring a plan in this respect to local preferences, why is it in a State plan section?

It may be felt that requiring the inclusion of certain provisions in a plan that is nominally the State's own plan and signed by its officers discourages State evasion, but it is very doubtful that either the States or the courts consider a clause more binding in honor because the State is required to say it than if it were merely imposed by federal law. If desired, a State could be asked to certify that it is aware of Sections -- through -- and will comply with them. In any case, simpler and clearer drafting can be achieved by breaking out these substantive requirements that are imposed by federal law without room for State variation.

Some considerations in the drafting of State plan provisions:

(1) The multipage single sentence style is neither necessary nor desirable. It can be done more simply: Along these lines, for example:

> "Sec. 100. A State plan shall comply with the standards of Sections 120 through 150.
>
> Sec. 101. A State plan shall expressly refer to and incorporate expressly or by reference the standards of Sections 170 through 190.
>
> Sec. 120. A State shall pay out of its own funds not less than 40% of the non-Federal share of the costs of the programs.
>
> Sec. 121. If the State requires contribution to the costs of the program from local sources, it shall nevertheless assure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services under the plan. For this purpose, in the event that the State requires such contribution, it shall provide for a distribution of funds from both Federal and State sources for carrying out the state plan on an equalization or other basis which will provide this assurance."

(2) Surreptitious substantive law should come out of the closet. Subsections (12) and (35) discussed above are examples of such surreptitious substantive law.

(3) Are we sure we need State plans at all? To the extent that significantly different approaches by the several states are desired, yes - let the State set out its plan. But boilerplate? Let it be imposed by fiat or, if thought necessary, adopted by explicit reference.

Sec. 10. Discretionary grant provisions

A discretionary grant provision will usually read something like: "The Secretary may make grants..." Of course, "shall" is sometimes used for "may"; but, in general, should not be.[78] The characteristic of a discretionary grant program is normally that the agency has discretion both as to whether to make a grant to the applicant or not and, if so, for how much (within the limits of appropriations, allotments, apportionments).

The process leading up to the award of a grant need not be spelled out, but it sometimes is. Congressional guidance may touch, for example, on any of the following points:

-- Preliminary public participation in the shaping of programs and priorities.[79]

-- Announcement of availability, award process, priorities.[80]

-- Review of applications. Some agencies use referees or peer review panels.[81] These are sometimes required by statute.

-- Competition. The amount of available funds is limited. Grants will be made to a selected group, normally much fewer than the total number of applicants. It is desirable that all potential grantees be given fair notice of the availability of the grants and of their opportunity to apply and that the applications be evaluated in an objective, competent manner.[82] This may be called competition but it is quite different from

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[78] *See supra*, text at n.50.

[79] ACUS Rec. 71-4 Minimum Procedures for Agencies Administering Discretionary Grant Programs, para. 2, Development of Criteria by Rulemaking, and supporting study by Kurzman, 2 ACUS 181, 185.

[80] ACUS Rec. 71-3 Articulation of Agency Policies, and supporting report, 2 ACUS 175; Rec. 71-4 *supra*, n.65, para. 1, Public Notice; Rec 74-2, Procedures for Discretionary Distribution of Federal Assistance, and supporting study by Gilhooley, 3 ACUS 422.

[81] ACUS Rec. 71-4, *supra*, n.79, para. 3, Avoidance of Conflict of Interest; *Settle and Yamada, The Award Process, 59, 66.

[82] *See* ACUS Rec. 71-4, *supra*, n.79.

the usual federal procurement competition which requires that the lowest price bid by a responsive responsible bidder be accepted.[83] Grant goals are not necessarily best served by market competition as to price. The identity of the applicant, its need sometimes more than its ability, the importance of its acquisition of capacity that it does not have, its creativeness, its enthusiasm, and other factors may be more important then its ability to underbid rivals.

-- Award. Technical questions of appropriations law and of revocability may attend the question of precisely when, or by what act, a grant is made. It is rare that this question is directly considered by Congress and it is not essential that it be considered. Confusion may, however, result from inadvertent tampering with the process.

-- Renewal. Once a grant has been made, there may be some expectation of renewed awards, perhaps some equity of renewal. There is a general trend toward recognizing, at least by favorable procedural treatment, the expectation of renewal. Congress has sometimes reflected this trend. In some instances, Congress has explicitly denied an expectation of renewal. In any case, it is well for drafters to inform themselves of the pattern of grant-making that exists in practice in the particular field. For example, in medical research it is common to anticipate three, five, or seven years of renewals as normal for a major undertaking. For technical considerations of appropriations law (an agency is generally forbidden to make a commitment of future appropriations), the agency makes as clear as it can that while it contemplates future awards to permit say a seven year project to be completed (assuming the availability of funds, satisfaction with grantee's effort, and no serious change of circumstance) it does not make a present commitment to make further awards. This is a difficult line to walk gracefully. Courts have not always understood.[84] An occasional error on the

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[83]The Job Training Partnership Act, Sec. 402, dealing with migrant and seasonal farmworker programs calls for procedures consistent with standard competitive government procurement policies. This appears to reflect a misunderstanding of the considerations referred to in the text. *See* *Current Developments, Vol. 21, no. 2, Winter 1986 at p. 14.

[84]An instance of such failure of a court to understand is *Southern Mutual Health Association v. Califano*, 574 F.2d 518 (D.C. Cir. 1977). Contrast *Missouri Health and Medical Association v. United States*, 641 F.2d 870 (Ct. Cl. 1981). For detailed discussion of the problem, *see* Missouri Health and Medical Organization, HEW DGAB Docket No. 77-24, Rejection

part of the agency has helped to reinforce misunderstanding. If statutes are not to create or increase confusion, it is desirable that drafters writing statutes in this field be aware of the mechanics of the system.

It is well to consider, in planning a grant statute significant differences in the style of activity intended. Grant statutes that contemplate construction of facilities will be and should be different from those offering services to a specified population. Grant statutes encouraging basic research, applied research, social research demonstration projects, or providing general support to institutions, or other activities will all be different. The more the drafter understands of the structure and practices in the field in which the grant is made, the better the draft is likely to be, even if there should be no explicit incorporation of such knowledge. Sometimes knowledge aids a drafter in not thinking that knowledge isn't needed.

Sec. 11. Conditions of assistance

Most conditions of assistance are imposed by agency regulations but a number are set forth by statute, particularly those that are called "cross-cutting" conditions which apply to all grants or broad classes of grants. An example of a condition framed to fit a particular grant program is the Nurse Education provision for recapture of funds granted for construction of facilities which then cease to be used for the training purposes for which they were intended, or are then used for sectarian instruction or religious worship, or cease to be owned by a public or nonprofit school.[85]

In the case of foreign assistance, it is not considered possible or not considered tactful to impose conditions explicitly on foreign independent sovereigns. Accordingly, a virtual condition is imposed: the result is sought to be reached in a more round-about way by directing the

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of Appeal, June 21, 1978, pp. 5-6 and 8-9; Group Health Association of Northeastern Minnesota, HEW DGAB Docket No. 79-62, Rejection of Appeal, September 7, 1979, pp. 3, 7-9; Southeast Philadelphia Community Corporation, HEW DBAG Docket No. 79-75, Rejection of Appeal, September 24, 1979, pp. 2-5; Mason and Dembling, *Federal Grant Litigation*, 30 THE PRACTICAL LAWYER No. 7, October 15, 1985, pp. 55, 57-59. To avoid possible misunderstanding, I wish to note that I was not a member of the DGAB when its Chairman made the decision reversed in Southern Mutual Health, nor did I draft the regulation there misconstrued by the Court.

[85]P.L. 99-92, the Nurse Education Amendments of 1985, Title VIII, amending 42 U.S.C. 296c.

President or the Secretary of State to assure that the foreign government complies with the intended condition, without expressly imposing a condition on the recipient.[86]

Cross-cutting conditions, applying to all grants or some wide category of grants cover such matters as public employee standards (the Hatch Act on partisan political activity was an early example of a cross-cutting condition),[87] availability of records, labor standards, environmental protection, and rules against discrimination in programs funded in part by federal grants.[88]

Conditions imposed by statute are often reinforced by requiring the grantee to sign an "assurance" of compliance. This may serve the purpose of compelling articulate awareness of the condition, but may also create some

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[86]*E.g.* P.L. 99-8, The African Famine Relief and Recovery Act of 1985, provides for grants to private and voluntary organizations and international organizations for famine relief. Sec. 5(c) is what I call a virtual condition that the foreign government of the countries to which aid is directed shall not allow assistance to be diverted to other purposes or other population groups than those intended. This is expressed by a requirement: "That the President shall ensure that adequate procedures have been established so that assistance pursuant to this Act is provided to the famine victims for whom it is intended." *Cf.* 22 U.S.C. 2394a: a virtual condition that the officials of the recipient country shall not extort or receive improper payments. If they do, the President when he learns of it is to report the fact to Congress with "a recommendation...as to whether the United States should continue a security assistance program for that country." *Cf. also* 22 U.S.C. 2370(c), no assistance to a country that does not pay its debts to a United States person (unless the President finds otherwise on national security grounds); (e) suspension of assistance to nations that nationalize or expropriate American property, repudiate American contracts or impose discriminatory taxes or exactions or conditions (unless the President grants a waiver for reasons of American national interest); (h) foreign aid not to be used to assist Communist-bloc activities; (i) or preparing for aggressive military efforts; (j) the President shall consider terminating assistance where there is destruction of United States property; (o) consideration to excluding countries which seize or impose sanctions against United States fishing vessels fishing in international waters; (q) or default in principal or interest payments on loans (unless the President decides otherwise on national interest grounds); Sec. 2371, the President shall terminate assistance to any government which grants sanctuary to international terrorists (unless he finds national security to require otherwise).

[87]*Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1942).

[88]An inventory of cross-cutting requirements, including both statutory and non-statutory provisions, is set out in OMB, Managing Federal Assistance in the 1980s (Report pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (P.L. 95-224) p. 20 ff. This inventory is also set out in *Cappalli, App. 11-B, following his discussion of grant conditions.

ambiguity about the source of authority for enforcement--is it the underlying statutory conditions or the assurance.[89]

Some questions to be considered in drafting statutory provisions for grant conditions:

-- Is a statutory provision necessary? Is the matter not one that can be safely and more efficiently left to agency rule-making?

-- Is the matter not already covered by a general statute? For example, there is a general statute against discrimination in grant programs on grounds of race, color, or national origin.[90] If a new grant statute provides its own provision on the subject (more than a mere incorporation of the general rule by reference) it runs the danger of implying that the general rule does not apply. The specific provision will often be less detailed, less balanced by necessary qualifications. Its presence in the statute may thus defeat its own purpose.[91]

Sec. 12. Accountability, audit, monitoring provisions

When monies of the United States go to grantees for the purposes of a grant program, it is a legitimate concern of the Congress that they be used for the intended grant purposes, not diverted to other improper purposes, nor even diverted to purposes proper in themselves but different from those contemplated by the grant conditions.[92]

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[89] *See* *Cappalli 11.22 "-- Coutu-Type Grant Strings." *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981), held that Davis-Bacon Act does not confer upon an employee a private right of action for back wages under a contract that has been administratively determined not to call for Davis-Bacon work and which therefore does not contain a prevailing wage stipulation. Reading the case very broadly, *Cappalli uses the expression"-- Coutu-Type Grant Strings" to refer to grant conditions which are not enforceable unless expressly included in the grant documents, in contrast with conditions that are enforceable by strength of the statute imposing them.

[90] P.L. 88-352, Title VI, 42 U.S.C. 2000d *et seq.*

[91] The Job Training Partnership Act is an example of this danger. *See* *Current Developments, Vol. 21, No. 2, Winter 1986, pp. 13-14 and Vol. 23, No. 1, Fall 1987, pp. 8, 19-20. *Cf.* *Grant Rulemaking, pp. 48-49 on the "Pucinski" amendment, which created problems for the same reason: displacement of a well-constructed general statute (the APA) by an incompletely thought out provision covering some of the same ground.

[92] Grantees charged with improper expenditures often argue that the money, although diverted, was nevertheless used for good purposes broadly consistent with the policies of the statute. Although this argument may be heeded in a doubtful case, and may moderate the sanction, it is generally unavailing as a defense where the violation is clear. In State of Minnesota

In order to protect the integrity of such grant expenditures, there are general statutes assuring the maintenance of appropriate records (while discouraging excessive record keeping requirements), and access of appropriate government representatives (the Comptroller General, and the various agency Inspectors General), and requiring audits and inspections and reports to be made and submitted by certain major grantees.[93] In addition, specific grant programs often have provisions calling for similar or specially tailored audit and monitoring procedures.[94] Self-auditing and self-evaluation are often used in grant programs.[95] This is a useful device. Drafters should be aware, however, that too often reports are required but never used.[96]

Some considerations in drafting accountability provisions:

Department of Public Welfare, HEW DGAB Docket No. 75-15, Decision No. 26, August 17, 1976, the State conceded that funds awarded under the Crippled Children's Services Program for Year B were expended for Year A services in violation of the Federal Health Grants Manual incorporated by reference in the grant. The State argued, however, that all grant monies were used for Crippled Children's Services expenses. The Board rejected this argument, noting that the requirements

> relating to the use of current year grant funds for current year services are not arbitrary bureaucratic devices for Federal meddling in state service programs. The purpose of this requirement, simply stated, is to try to insure, in a world in which there are simply not enough funds available to provide all necessary services to all children or other persons in need, a rational process by which funds which are available are allocated to priority needs as identified by the grantee agencies... A failure by a grantee to plan and monitor its projected expenditures by reference to a set of articulated priorities within fiscal year limitations as to available funds will likely lead to expenditures benefitting some with lesser needs at the expense of others with greater needs.

[93] 31 U.S.C. 6503 (b) (records of grants to States); former 7107(c) and (d) (joint management funds, expired February 3, 1985 pursuant to 7112); 7304 (availability of records - block grants; P.L. 95-452, the Inspector General Act of 1978, as amended, 5 U.S.C. App. 6; the Single Audit Act of 1984, 31 U.S.C. 7501 *et seq.*; OMB Circular A-128 (1985); *see* Paperwork Reduction Act, P.L. 96-511, as amended, 44 U.S.C. 3501-3520 (1982), esp. 3502(4) and (16), and 3504, ACUS, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (1985) 771 *ff.*

[94] *E.g.*, 42 U.S.C. 1785 (Child Nutrition, participating institutions shall keep accounts and records which shall be available for inspection); 42 U.S.C. 4592 (Alcohol Abuse, recipients shall keep records which shall be available to the Secretary and the Comptroller General).

[95] *See* *Current Trends, 35 FED. BAR J. at 185 (XIII. Increasing Use of Grantee Self-Evaluation).

[96] *See* *Monitoring Grantee Performance, 84 n.15, 16.

(1) If a general statute covers the matter, enacting a specific provision in a specific grant program may be undesirable. If there is an applicable Single Audit Act, why put an audit provision in a statute providing grants to States? The result may be confusion. There may be an implication that the general Single Audit Act does not apply. The specific provision may lack balancing qualifications that the Single Audit Act worked out.

(2) Is the matter not safely left to agency rule making?

(3) If a provision is desirable in spite of the preceding points, is it written with a realistic understanding of the practices of the field and of what is obtainable and necessary from grantees that have well-established accounting systems of their own or well-established disdain or lack of competence for otherwise normal record-keeping.[98]

Sec. 13. Sanctions and incentives

When monitoring of grant performance shows violations of grant terms, there is a panoply of possible response to use. A grant statute may direct some of these or may encourage flexible response by the agency. The drafter should be aware of possible alternatives.

A first response should often be the offering of help by the agency to the grantee to help grantee set its house in order. This may be very informal. When it is more formal it is sometimes called technical assistance and sometimes capacity building. Authorization of such assistance is often desirable.

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[97]P.L. 98-502, the Single Audit Act of 1984, 31 U.S.C. 7501 *ff.* requires states and local governments receiving sufficiently large grants to have an audit made meeting certain standards.

[98]The academic world, for example, finds it very artificial to make records that purport to distribute the time of a researcher to specific projects. Creative work does not readily fall into specific boxes of time. A researcher working on ten projects does not dream and let his imagination range from 9:15 to 10 A.M., prepare to teach from 10:15 to 11, work on project A from 11:15 to 12, teach from 1:15 to 2 and work on project B from 2:15 to 3. Efforts to make the researcher report his time in such units create friction and do not work. OMB Circular A-21, in its earlier form especially, has lead to much academic protest. *See, e.g.*, *Barnes & Cattell, Grants to Educational Institutions, 245, esp. at 257, Impact of Federal Grant-Related Regulations on the Recipient Institutions; Thomas, *Reporting of Faculty Time: An Accounting Perspective*, 215 Science (January 1982) 27. Physicians, similarly, are often accustomed to instructing nurses to make certain file entries. It is difficult to discipline them into making the entries by their own hand.

Further informal enforcement techniques include reproof and warning. These generally do not require explicit statutory authorization. A further step might be public disclosure of deficiencies and of appropriate corrective action.[99]

More formal action includes:

-- disallowance of costs improperly incurred may be imposed and the funds involved withheld or recovered.[100] A form of sanction peculiarly suited to grants that are normally renewed is an adjustment of next year's grant to take account of improper spending in this year's grant.[101]

-- additional reporting requirements or other grant conditions on the grant may be imposed, for example, the requirement of a countersignature on checks, or a limitation on the rate of withdrawal of funds. Such additional grant conditions may not generally be imposed on a current grant without grantee's consent unless the power to do so has been expressly reserved in the original grant or is expressly conferred by

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[99]ACUS Rec. 71-9, Enforcement of Standards in Federal Grant-in-aid programs, D. Range of Sanctions, and supporting study by Professors Tomlinson and Mashaw, 2 ACUS 531. But note Rec. 73-1 urging restraint and caution in the use of adverse agency publicity, and supporting study by Professor E. Gellhorn, 3 ACUS 17, 67.

[100]This should be obvious but it has been controversial at least until the Debt Collection Act, P.L. 97-365, P.L. 98-167, ACUS, Federal Administrative Procedure Sourcebook (1985) 211 *ff.* An indication of the controversy and misunderstanding on this point is *State of New Jersey, Dept. of Ed. v. Hufstedler*, 662 F.2d 208 (3rd Cir., October 13, 1981, *reh. den.* December 17, 1981), *reversed and remanded, Bell v. New Jersey*, 461 U.S. 773, May 31, 1982, discussed in *Current Developments, Vol. 17, No. 3, Spring 1982, pp. 3, 10; Vol. 19, No. 2, Winter 1984, p. 16.

[101]The Economic Opportunity Act, as amended by the Economic Opportunity Amendments of 1967, Sec. 243 (then 42 U.S.C. 2835) authorized as one alternative in disallowance cases "a commensurate increase in the required non-Federal share of the costs of any grant or contract with the same agency or organization which is then in effect or which is entered into within twelve months after the date of disallowance." *See* Sencland Community Action, Inc., HEW DGAB Decision No. 21, June 25, 1976, pp. 2-3; Head Start of New Hanover County, Inc., Decision No. 65, September 26, 1979. In a number of mandatory grant statutes, the grantee receives an advance quarterly payment based on an estimate. This amount may then be adjusted in a later quarter when the new estimate will be "reduced or increased to the extent of any overpayment or underpayment ...for any quarter." Overpayments may result from inaccurate forecasting, of course, but apparently may also result from violations of grant terms. *See* Minnesota Department of Human Services, HHS DGAB Decision No. 653, June 7, 1985.

statute.[102] The inclusion of such authorization in a statute should not lightly be adopted however. It is not recommended because it would impair, in most cases excessively, the autonomy of the grantee, tending to make it illusory.

-- additional conditions may, when appropriate, be added to the next award to the grantee instead of to the current grant.

-- where necessary, in the case of serious violations, and particularly if there is reason to anticipate further serious violations, there may be a termination of the current award for cause.[103]

-- suspending the grant is possible in urgent cases pending a determination; this should normally be understood not as an alternative sanction but as a procedural step similar to a temporary injunction[104]

-- in sufficiently serious cases, a grantee, or specified personnel of the grantee, may be debarred for a period of time from receiving (or working on) future grants.[105]

-- specific performance or mandatory injunction is rarely if ever appropriate. This recommendation is, however, controversial.[106]

-- a criminal sanction may appropriately be included for certain classes of violation that merit it.[107]

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[102]*Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 25, 101 S.Ct. 1531, 1544 (1981): "Through Congress' power to legislate under the Spending Power is broad, it does not include surprising states with post-acceptance or 'retroactive' conditions." *See* *Current Developments, Vol. 18, No. 1, Fall 1982, 17-18 (Openness in Government: HHS Won't Explain); No. 2, Winter 1983, 6 (Openness in Government: HHS Still Won't Explain); No. 3, Spring 1986, 6.13 (Openness in Government: HHS Is Not Going to Explain).

[103]For cause: Grants should not be terminated for the convenience of the government. The assertion of a power to do that would make the grant essentially illusory. *See* *Current Trends, 35 FED. BAR J., at 167 n.25.

[104]A suspension should normally be prospective. *See* discussion of this point in National Urban Indian Council, HHS DGAB Decision No. 710, December 5, 1985.

[105]E.O. No. 12549, February 18, 1986, 51 FR 6730. In the case of violations of non-discrimination provisions, 42 U.S.C. 2000 d-1 contains a limited debarment provision.

[106]*See* Ch. II, n.8. *See* *Current Trends, at 167 n. 24 ("I. The Black Letter Law"), 177-279 ("Increased Federal Controls"), 179 ("VIII. Irradiation of the Supremacy Clause). ACUS Rec. 71-9, Enforcement of Standards in Federal grant-in-Aid Programs, D, Range of Sanctions, lists injunctive action to require fulfillment of "assurances". The authority for this and its appropriateness is questionable and in any case limited. *But see* Tomlinson and Mashaw, *supra* n.99..

[107]General statutes in this area include 18 U.S.C. 201-224 (bribery, conflicts of interest), 231 (false claims), 245 (intimidation), 286

-- civil penalties or reductions of assistance may be imposed.[108]

-- graded partial sanctions, such as diminution of the rate of federal financial participation, may be used as sanctions for unsatisfactory performance.[109]

-- a counterpart to graded sanctions is the holding out of incentives for sound performance and good results.[110]

(conspiracy to defraud the United States), 287 (false claims, again), 1001 (false statements). Examples of criminal provisions for specific grant statutes are 18 U.S.C. 874 (kickbacks in construction grant programs), 42 U.S.C. 1396 h (b) (kickbacks, bribes or rebates in Medicaid programs). The history of Congressional action providing explicit criminal provisions for specific grant statutes argues against construing general statutes broadly to reach grant programs not clearly covered by them, contrary to the result reached in *Dixson v. United States*, 465 U.S. 482, 104 S.Ct. 1172 (1984) which applied, on an interpretation of supposed Congressional intent, a general statute against bribery of "public officials" to the bribery of employees of a non-profit corporation sub-grantee of a city receiving a housing grant, calling them "public officials." The bribery, of course, could and should have been punishable under state law and perhaps under 18 U.S.C. 286 and 1001. *Current Developments Vol. 21, No. 3, Spring 1986, 14-15. This is an area where it may be appropriate for Congress to express its intent more strongly, perhaps by a general statute.

[108]*See* ACUS Rec. 72-6, Civil Money Penalties as a Sanction, and supporting study by Professor Goldschmid, 2 ACUS 896. This recommendation does not intend to cover grants (*ibid.* 67 n.4) but *cf.* Rec. 71-9, *supra*, on Grant-in-Aid programs. *See also* Rec. 79-3, Agency Assessment and Mitigation of Civil Money Penalties and supporting study by Diver, 1979 ACUS 203. Provisions for reduction of the level of assistance as a sanction for violations of conditions come close to the civil penalty notion. Thus highway assistance may be reduced in amount if a state highway official takes an active role in partisan on politics, or if the state's laws permit minors to buy liquor. *See* discussion of *South Dakota v. Dole*, ___U.S.___, 107 S.Ct 2793 (1987) and *Oklahoma v. United States Civil Service Commiss.*, 380 U.S. 172 (1947) in *Current Developments, Vol. 23, No. 1, Fall 1987, p. 8 (*A Right to Drive Alcoholized*). *See also* next footnote on graded sanctions.

[109]The Medicaid program requires grantees to maintain an effective program of medical review. In the absence of a satisfactory showing of such a program, federal financial participation in the costs of the program ("FFP") is reduced according to a formula set out in 1903(g)(5) of the Social Security Act, 42 U.S.C. 1396b(g)(5). A sample calculation of this reduced FFP is set out in Arkansas Department of Human Services, HHS DGAB Decision No. 735, March 28, 1986. *See* *Current Trends, at 178 n.94.

[110]*See* ACUS Rec. 71-9, Part E ("Other Performance Incentives") and supporting study by Professors Tomlinson and Mashaw, 2 ACUS 531, esp. at 622. *See* 29 U.S.C. 1602 (Job Training Partnership Act, 6% of State allotment to be used by the Governor to provide incentive grants for programs exceeding performance standards). *Cf. also* 1582 (Presidential awards for outstanding achievement by the private sector). Under the Medicaid program, states are required to enforce third-party liabilities, thereby diminishing the government costs of the program. An incentive of

-- transfer of grants from an offending grantee to another.[111]

Some considerations in the drafting of sanctions and incentives provisions:

(1) Sanctions in grant programs usually punish the wrong people. If a state violates Medicaid rules, for example, will you cut off the State? It is the indigent sick who will be hurt.[112]

(2) The agency may need flexibility to compromise and use indirection. Suppose that the world's greatest bio-medical researcher, who has developed early tests for major diseases and developed vaccines for some of them, simply will not, cannot, keep neat books; there is no thought that funds are improperly diverted, but time, money, property, just are not regularly and properly recorded, -- do you want the agency to refuse to fund him and lose for the world the research he is outstandingly capable of performing? A statute could direct that, but it may not be the wisest course. It may be desirable to leave the agency free to cajole, to offer help, to require passing the funds through a mutually satisfactory responsible university, or develop other methods of dealing with this problem case. If, instead of requiring the agency to cut him off, you allow the agency to fund him, but require it to obtain satisfactory records nevertheless, you may find that, to achieve that,

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15% of such collections is provided for collection efforts made by a political subdivision of the state or by one state for another. 1903(p), 42 U.S.C. 1396b(p). *See* New York State Department of Social Services, HHS DGAB Decision No. 628, March 19, 1985. The purpose and theory of the reduction provision and of amendments to it are discussed in detail in Effect of DEFRA Amendments on Utilization Control Disallowances, HHS DGAB Decision No. 655, June 7, 1985. A similar but perhaps broader incentive is contained in the Aid to Families with Dependent Children, 42 U.S.C. 658(a).

[111] ACUS Rec. 71-9, Part D5.

[112] *See* *Current Trends at 178 n.93. In the context of a Revenue Sharing program (currently not available), Tomlinson and Mashaw make the significant suggestion that sanctions incurred for violation of a categorical program, instead of being applied to that program, be applied to the revenue sharing amount thus assuring continuance of the categorical program but inducing compliance with federal standards, nevertheless, by tightening the purse strings. *Op. cit.*, n.110, at 622. On the general problem of sanctions, Tomlinson and Mashaw note but reject the possible sanctions of authorizing civil or criminal punishment of the individual state or local officials who willfully violate federal standards; federal rating of state or local officials on the basis of compliance, affecting their career opportunities; removal of offending state and local officials; federal take-over and operation of offending programs (this last has been experimented with by OEO and perhaps others.)

excessive machinery of control has to be piled on. Room for breathing, a softer approach, may be justified by the interests at stake, and should not be unnecessarily precluded.

(3) In drafting sanctions provisions, remember that you cannot command compliance. You can cut off aid. You can encourage compliance. But ordering compliance may be ordering the tide to halt.

(4) When sanctions are imposed it is important to provide a mechanism for review. This is required by fairness. It is also expedient because, where no review mechanism is provided, affected persons will nevertheless seek to obtain review and courts will be strongly inclined to provide review, making up a mechanism if possible.[113] The costs to the government and the affected public in this unsystemized hunt for a remedy are unnecessarily high.[114]

(5) You can and should recognize the value of incremental change. A pattern that the drafter should have in mind and that the agency should have in mind is this: when unsatisfactory performance is observed on the part of a wide class of grantees, the soundest response is not necessarily to match performance against standards and impose sanctions for shortcomings. Often, dealing with sovereign states or other autonomous grantees, you must recognize the possibility that your standards were not properly set if many grantees do not seem able to comply, and you must be willing, sometimes, to seek not perfect performance but increasingly better performance.[115] Agencies should put in place (none seem yet to have done it)[116] and drafters should encourage, a dynamic process that moves incrementally towards better performance, taking stock of results periodically, recognizing deficiencies, and taking steps that will

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[113] *See* *Current Trends, *The Blunt Instrument*, 35 FED. BAR J. 163 at 183-4.

[114] ACUS Rec. 82-2 "Resolving Disputes Under Federal Grant Programs"; supporting study, Steinberg, *Federal Grant Dispute Resolution*, MEZINES, STEIN, GRUFF, ADMINISTRATIVE LAW, Ch. 53 & 54. *See infra*, Section 15, Administrative and Judicial Review Provisions.

[115] *Monitoring Grantee Performance p. 82 *ff.* ("Dynamic Process of Grant Management") and 96 *ff.* ("Feedback").

[116] *Current Developments, Vol. 19, No. 3, Spring 1984, p. 8 notes such a process undertaken by Wisconsin to improve incrementally its management of social service grant programs. Federal agencies do not appear to have done so in a systematic way.

improve, if not necessarily perfect, grantee's (and agency) performance.

Sec. 14. Rulemaking power

Grant statutes should be simple, when that is possible. But even when they go to the opposite extreme (as, for example, the Social Security statutes often do), there is no possibility that even the most elaborately spelled out statutory rules can fully and satisfactorily deal with all the problems that will be confronted in the administration of the statute. The Congressional work load is too great to permit the full elaboration of rules by Congress. It is not likely that many members of Congress will have the necessary expertise in the substantive problems of a particular, often very technical, field (nor is there any reason why they should have -- they have a quite different task). There are often cross-currents of thought about what relatively are details which, if they were to be definitively articulated in the bill itself, could prevent enactment of a statute that both sides regard as desirable. The operation of a statute after its enactment almost always discloses problems that were not and could not be anticipated. The Congress is too unwieldy a body to respond quickly and flexibly to unforeseen problems of application. That is what the administrative agency is there for.

It is thus desirable that after defining goals as clearly as possible and suggesting approaches as strongly as possible, the writing of specific substantive rules be left to the agency. It is so obvious that an agency charged with administering a grant program should have such rulemaking power that the power ought to be presumed even if not expressed. Since the making of substantive rules is seen as a delegation of legislative power, however, it is not safe to rely on that obvious need. A grant statute should contain an express authority to make rules.

The authority to the agency to make substantive rules can, and ordinarily should, be granted in very simple terms. A complicated structure of rulemaking authorization invites litigation.[117] Sometimes much more elaborate provisions or

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[117]Professor Mullins, commenting on a draft of this book, letter to Charles Pou, Jr., ACUS, February 12, 1988, calls attention to *In re Permanent Surface Min. Regulation Litigation*, 653 F.2d 514 (D.C. Cir. 1981). The authority to "publish and promulate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act" was sufficient, but parties challenging the rulemaking were able to point to twenty-one specific rulemaking provisions. These provisions, authorizing particular topics or kinds of rules, supported a colorable, although in the

more stringent provisions are imposed.[118] While these may be needed, their possible disadvantages are worth a second thought before they are used. Among these additional provisions are the following:

-- "Pucinski-type" provisions that require publication of proposed rules.[119] Publication is already required by the Administrative Procedure Act with careful qualifications. Duplicating the APA with all the qualifications should be unnecessary, while duplicating it without all the qualifications may be unwise.[120]

-- "Wait-and-see" provisions that require submission of proposed rules to Congressional committees may serve as substitutes for the legislative veto, which has

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end rejected, argument that the agency's substantive rulemaking power was limited to the more specific provisions. *See, supra*, section 4, "Definitions--Anticipate Litigation."

[118]P.L. 96-294, the Energy Security Act, June 30, 1980, 94 Stat 611 illustrates both the simple and the (perhaps unnecessarily) complex.

Professionally simple: 260, adds a new title XX to the Food and Agriculture Act of 1977. Section 2001 [7 U.S.C. 1435] (a) 12) "The Secretary [of Agriculture] may issue any regulations necessary to carry out the provisions of this subsection."

Inflated: 408 (d), referring to small-scale hydropower initiatives, "The Secretary [of Energy] shall take such action as may be necessary to assure the establishment *** of such rules and regulations as may be necessary to fully implement his responsibilities under title IV of the Public Utility Regulatory Policies Act of 1978 and the amendments thereto made by this section.

Less simple: 520, relating to financial assistance for solar energy systems, "***the Board [of Directors of the Solar Energy and Energy Conservation Bank in the Department of Housing and Urban Development] shall issue such final rules and regulations as the Board determines are necessary to carry out this subtitle, including rules and regulations to assure that there will be no fraud in the provision of financial assistance through grants under this subtitle***."

Complex: 565 adds to the National Energy Conservation Policy Act a new section 712 consisting of some 30 lines of print authorizing rules on the content and implementation of state energy conservation plans for commercial buildings and multifamily dwellings. Publication and opportunity for comments and a delay of publication of final rules of 45 days from publication of proposed rules are required. The last two lines are again quite simple: "The Secretary [of Energy] may prescribe any other rules necessary to carry out the provisions of this title." Little if anything more seems necessary.

[119]Amendments sponsored by Rep. Roman Pucinski to many grant statutes required advance publication of rules and guidelines. There are several versions of the basic provision. *See* *Grant Rule Making, at 48 n.16 and 49 n.18. Sky, *Rulemaking in the Office of Education*, 26 AD. L. REV. 129, 131 (1974); Sky, *Rulemaking and the Federal Grant Process in the United States Office of Education*, 62 VA. L. REV. 1017, 1019 n.7.

[120]*Grant Rule Making at 48-49.

now been generally recognized as invalid in view of the Supreme Court's opinion in *Chadha* and its decisions in a string of related cases.[121]

-- Provisions that require identifying the agency's source of authority. Such identification is often called for by good practice. When, however, it is made a blanket requirement, it is often honored in a perfunctory way that serves no useful purpose and defeats the intention of the statute.[122]

-- Provisions that require rules to be published within a specific period of time. These provisions are sometimes a response to an agency's failure to issue rules with reasonable promptness.[123] The agency may need and perhaps deserve the pressure, but often such requirements are an over-reaction. It may be impossible for the agency to comply, it distracts limited resources to this task from possibly more valuable tasks, and it encourages the drafting of rules that are not as well thought out as they should be.

Major general statutes that govern the issuance of rules and that ordinarily do not require reduplication include the APA,[124] the Regulatory Flexibility Act,[125] and the Paper Work Reduction Act.[126]

Sec. 15. Administrative and judicial review provisions

-- Administrative

If a person dealing with the government feels ill-treated, the government should provide a readily accessible recourse to resolve the disagreement if possible. This is especially the case in the field of grant law since a characteristic of the grant process is its reliance on the enthusiasm of the grantee, an enthusiasm that will be dampened if a feeling is permitted to grow that grantees may be ill-treated without

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[121] ACUS, Legislative Veto of Agency Rules After INS v. Chadha, (1984).

[122] *Grant Rulemaking, at 49.

[123] *Ibid.* ACUS, A Guide to Federal Agency Rulemaking (1983) 85. ACUS Rec. 78-3, Time Limits on Agency Actions, and supporting study by Tomlinson, Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking, 1978 ACUS 119, esp. at 233 *ff.*

[124] 5 U.S.C. 551-554. ACUS Federal Administrative Procedure Sourcebook (1985) 3 *ff.*

[125] 5 U.S.C. 601-612. Sourcebook 901 *ff.*

[126] 44 U.S.C. 3501-3520. Sourcebook 771 *ff.*

recourse. Grantor agencies should furnish a recourse, informal by preference, readily accessible and seen to be fair, independent and knowledgeable.[127]

It is not essential that the recourse be provided by explicit statute. Agency rule-making authority is sufficient basis for establishing a resolution process. The best model was created without statute.[128]

Congress has, however, in many cases, preferred to provide explicitly for the establishment of such mechanisms. These range from fairly general provisions for "reconsideration" or "hearing"[129] to establishment of a specific institution with detailed provisions for its make-up, powers, and procedures.[130]

Agencies are generally aware, or should be, that the absence of an acceptable mechanism not only impairs the grantor-grantee cooperation that is desirable, but encourages resort to the courts with resulting costs of litigation in time and manpower and decision by a tribunal necessarily less sensitive and aware of the goals and difficulties of the program. The existence of a mechanism that is seen to be fair and informed encourages courts to feel less compelled to accept jurisdiction or, if they do, then to review on a standard that gives greater weight to the administrative result. An agency that is not prepared to stand the test of informed independent review within its own house impairs the quality of its own work and invites more strenuous judicial supervision.

In planning a disputes resolution provision, it is important to distinguish types of dispute. These are most readily recognized by considering the time line on which they occur: pre-award disputes, post-award disputes, renewal disputes.

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[127]Rec. 82-2, "Resolving Disputes under Federal Grant Programs," and supporting study Steinberg, *Federal Grant Dispute Resolution* in MEZINES, STEIN, GRUFF, ADMINISTRATIVE LAW, ch. 53 & 54. *See supra*, Section 13, Sanctions and Incentives, text at n.113.

[128]HEW DGAB, created by Secretary Weinberger and placed, for independence, in the Office of the Under Secretary. The author, having been the first full time Chairman of the Board, acknowledges a bias but believes this represents a consensus of informed opinion. Wallick and Chamblee, *Bridling the Trojan Horse*, 4 JOUR. OF COLL. AND UNIV. LAW 241 (1978) at 277.

[129]42 U.S.C. 1316 (Social Security Act), (a)(2) "reconsideration" with "hearing" for conformity issues, (d) "reconsideration" for disallowance issues; in fact HHS provides a hearing for both.

[130]P.L. 95-561, Nov. 1, 1978, Sec. 1232 established the Education Appeal Board. P.L. 100-297, sec. 3501, April 28, 1988, substituted an Office of Administrative Law Judges.

Pre-Award	Award	Post-Award	Renewal

(1) Pre-award disputes are primarily of the type: "we should have gotten a grant and didn't." Occasionally they are of the type: "they should not have gotten a grant and did." If all such disputes were to be afforded statutory review, the burden would be enormous since the number of applicants for grants far exceed the number of grants that can be made. In limited areas, however, Congress has provided review mechanisms.[131] Short of full review, there are the possibilities of lesser recourse such as provisions for announcement of standards and priorities and disclosure of reasons, where assignable, for making or not making an award[132] (complicated by problems of protecting the confidentiality of comments by peer reviewers).[133]

(2) Post-award disputes may concern such matters as refusal to grant a waiver that grantee has applied for, disallowances of costs alleged to be incurred in violation of grant terms, voiding or terminating a grant for serious deficiency in the application or performance. These are the primary concerns of most grant dispute resolution processes.

(3) Renewal disputes depend on the increasingly strong recognition of an expectation that grants of a renewable kind will be renewed, absent strong grounds to the contrary: the Head Start program is an example.[134]

Each of these three types of disputes brings special considerations into play that should not be ignored.

Some considerations in planning a statutory grants disputes resolution process:

(1) Should there be a statutory provision at all, or anything more than a broad authorization? Cannot the matter be safely left to the agency?

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[131] Steinberg, *op. cit., supra*, n.127, 53.02 [3][a] n.25 notes that the Department of Justice and the Legal Services Corporation have such pre-award review. There are others, *e.g.*, the Job Training Partnership Act, 29 U.S.C. 1576, 1578.

[132] ACUS Rec. 71-4, Minimum Procedures for Agencies Administering Discretionary Grant Programs, and supporting study by Kurzman 2 ACUS 181; Rec. 74-2, Procedures for Discretionary Distribution of Federal Assistance, and supporting study, by Gilhooley, 3 ACUS 422.

[133] *See Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972).

[134] 42 U.S.C. 9836(c), 9841(3).

(2) If there is to be a provision, how much detail is necessary or wise?

(3) While establishment of a process is healthy and desirable, imposition of statutory rules may force procedures too costly and often too formal for the benefits. Weigh this in considering the requirements that are to be imposed.

(4) A requirement for more than very informal discussion of the denial of discretionary grants may quickly overwhelm the agency's resources.

(5) Expectations of renewal are, appropriately, getting stronger over a long time-span, but disputes concerning disappointed expectations should be recognized as different in kind from terminations and other sanctions for grantee misconduct.

(6) Independence of the Board or other disputes-resolution institution is important. Legislation can perhaps encourage it, but there is little that legislation can do to assure it. Unless the value of independence is perceived by agency heads and effectively protected by them, it will not happen. The ALJ model, however useful in other contexts, while it protects independence, invites the very things that grant dispute resolution should seek to avoid: judicialization, overformalism, hearing officials' lack of commitment to and understanding of the goals of the program.[135]

(7) A disputes resolution process can be a precious resource for spotting the areas of administration that give rise to the "hospital cases." This opportunity for recognizing deficiencies and preventing them in the future should not be wasted by agency policy makers nor by Congressional oversight committees. Avoid writing appeals provisions that so emphasize a quasi-judicial character of agency grant appeals boards as to preclude their contribution to good policy making.[136]

-- *Judicial*

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[135]*See* Mason, *Administrative Law -- Reality or Red Tape?*, 40 RIVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 91 (1971).

[136]*See* *Monitoring grantee performance 79, 98. *Cf.* ACUS Rec. 87-7, A New Role for the Social Security Appeal Council, and supporting study by Koch and Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 1987 ACUS Vol. I, 625, esp. at 748, "What is important to the traditional structure of the typical government agency, however, is a self-conscious appellate authority, which deliberately attempts to look past the run of case-by-case determinations and extrapolate into more generally-applicable policy.".

Judicial review of grant disputes will take place whether specifically authorized by the grant statute or not, but there are a number of questions of importance that can be specified by legislation that are often left unclear. Attention to them in drafting a grant statute is worthwhile.

Among these are: Who has standing? If a grant is made (or refused), to X (or made and then terminated), shall X's employees be permitted to obtain review (apart from X itself)?[137] Members of the class of contemplated ultimate beneficiaries of the grant to X (for example, patients in a hospital)?[138] Organizations purporting to represent the class of ultimate beneficiaries? Rival applicants for the same grants? Concerned members of the public? The Supreme Court has commented on a frequent failure of Congress to give guidance on this type of question.[139]

In what court shall review be provided, district court or court of appeals? State court or federal court? It should be remembered that the grantee is ordinarily a creature of state law and in a dispute between grantee and subgrantee or grantee and employee, or grantee and ultimate beneficiary, the primary issues may be state law questions rather than federal grant law questions. State court jurisdiction may sometimes be appropriate.

What level of deference to the administrative action? The Administrative Procedure Act standard (5 U.S.C. 706) is often adequate and drafters' efforts to create special standards of judicial review may create confusion.

What distinctions between review of different types of grant disputes?

There are some general statutes partly covering the field of judicial review: the Administrative Procedure Act, the Debt Collection Act. To what extent do these need supplementation in particular cases?

-- Disallowance and non-conformity

When a grantee violates the rules of a grant, expenditures improperly made by the grantee may be disallowed, either by the grantor's refusal, after appropriate notice and opportunity for any appeal provided, to pay the federal

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[137] *Cf. Apter v. Richardson*, 510 F.2d 351 (CA7, 1975).

[138] *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S.Ct. 2467 (1980).

[139] *See, e.g., Guardians Ass'n v. Civ. Serv. Com'n of City of N.Y.*, 463 U.S. 582, 579 and esp. concuring opinion at 608, 103 S.Ct. 3221, 3230, 3236 (1983), quoted *supra*, Ch. I, n.16.

share, or by action to recover federal share already advanced. When the grantee violates the rules in fundamental ways, or systematically, or on a large scale, that may constitute a non-conformity of its plan to the statute or a substantial non-conformity of its actions to its plans, and the grantee may be disqualified from participation. In some grant statutes, particularly those that are part of the Social Security Act, this larger disqualification, because its consequences are expected to be more important, are attended with more elaborate procedural protection for the grantee. A disallowance may have "reconsideration" by the Secretary and informal procedures voluntarily offered by the grantor, and a possible recourse to the Federal District Court.[140] A non-conformity may have a statutory provision for "reconsideration" by the Secretary (that is, in practice, by the Secretary's delegate), an express right to a "hearing" and an express right of appeal by petition directly to the Federal Court of Appeal and possible recourse to the United States Supreme Court.[141]

Because of this different level of protection, grantees, challenged for improper expenditure, sometimes take the somewhat paradoxical position: this is not just a little matter of a disallowance, this is the big violation, a non-conformity, therefore the grantor cannot proceed against us just for the improper expenditure.

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[140] 42 U.S.C. 1316; 45 CFR Part 16, App.A. *See State of Conn., Dept. of Income Main. v. Heckler*, 471 F.2d 1052, 1055 (1984), *aff'd.* 471 U.S. 524, 528, 105 S.Ct. 2210, 2212.

[141] 42 U.S.C. 1316(a)(2), and (3),(4) and (5). *See Gardner v. State of Alabama, Dept of Pensions & Security*, 385 F.2d 804 (CA5 1967) *cert. den.* 389 US to 46 (1968).

It should be noted that the contrast between 42 U.S.C. 1316(a), providing expressly for court review (in the Court of Appeals) and possible recourse to the Supreme Court, and 1316(d), which does not expressly contemplate any court review, gives rise to a possible argument that Congress intended there to be no court review in the case of disallowance under 1316(d). The argument is formally a good one, since it may be said that Congress having the court-review question in its mind pointedly omitted provision for it in subsection (d). The argument is unrealistic, however in view of the large amounts often at stake ($100 million in *Gardner*, which is not unusually large) and the importance of the question to the States and the affected public. This suggests that the omission of reference to court review in subsection (d) may have been a drafting negligence. In any case, the Administrative Procedure Act supplies a remedy. *See* Connecticut case, *supra*, n.140; *Bowen v. Massachusetts*, ___ U.S. ___, 108 S. Ct. 2722 (1988); "Bowen and the Nichomachean Ethic," 24 Pub. Cont. Newsl., No. 2, winter 1989.

Wrangling about whether a violation is specific enough to base a disallowance or general enough to base a non-conformity proceeding is non-productive. It is desirable that either a clear test be provided for distinguishing between disallowance and non-conformity, or that the distinction be eliminated, or that grantor (or, if preferred, grantee) be given explicitly the power to determine which set of procedures are to be followed.

Sec. 16. Provisions for relationship to allied programs

Good grant programs usually do not stand alone nor should they. If the grant program is for research, there may be and usually are, related research programs carried on by the government in its own laboratories with its own personnel and programs carried on for the government under contract, and possibly also related research carried on without grant support by institutions and businesses outside the government. If the grant program is for a public service, there may be related grant programs supporting research or experimental efforts to improve the service. There may be regulatory controls intended to supplement the encouragement provided by the grant program. There may be efforts at public education to make the results of the service programs or research programs more fruitfully utilized. There may be loans, loan guarantees, tax benefits. It is useful in writing a grant statute to consider the coordination and relationships of these multiple approaches to common goals. Sometimes a coordinating body or authority is provided. Often this is unnecessary, but it is appropriate to consider whether it is desirable and if so, to include statutory provisions.

Sec. 17. Report to Congress

It is customary to aid Congressional oversight and public information by requiring the filing of an annual report to Congress.

Sec. 18. Repealers, saving harmless, severability, sunset and miscellaneous provisions

A number of miscellaneous provisions are often part of a grant statute: It may be necessary to repeal existing provisions in the same field. If changes are made in the amount of support, there is often a provision saving harmless present recipients now getting more support than

they would under the new statute.[142] If there is a possibility that a provision of the statute may be held unconstitutional or otherwise invalid, it is often provided that the remaining provisions of the statute are severable and shall remain in effect.[143] This should not be done, of course, unthinkingly: If the controversial provision is the essence of the statute, it is not necessarily desirable (in the event that it be cut out) to keep the remaining provisions intended merely to support it.

Provisions are often included giving a determined life-span to the program so that it does not automatically perseverate without fresh consideration by the Congress of the value of the authorized program.[144] The danger, here, is that Congress has not always acted within the time limits it has itself set.[145] This leads to severe undesirable strains in the administration of a program which, it may be determined in the end, should continue, but which, because Congress has not acted, could not, in its planning, count on continuation.

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[142] *See, e.g.*, the Medicaid provisions of the Omnibus Budget Reconciliation Act of 1986, sec. 9421, 100 Stat. 2065, amending sec. 9528 of the Consolidated Omnibus Budget Reconciliation Act of 1985, but providing that during FY 1987 the amendment "shall not apply to a State if the effect of applying the amendments would be to reduce the amount of payment made to the State under that section." *See also* save harmless provisions noted under Section 8, *supra*, allotment formula, n.73.

[143] *E.g.*, 20 U.S.C. 4073 [The Equal Access Act for students who wish to conduct a forum in a school receiving federal financial assistance]: If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby. *Cf.* 42 U.S.C. 4591 (Alcohol Abuse): If any section, provision, or term of this Act is adjudged invalid for any reason, such judgment shall not affect, impair, or invalidate any other section, provision, or term of this Act, and the remaining sections, provisions, and terms shall be and remain in full force and effect.

[144] *E.g.*, P.L. 100-87, Subtitle C - Job Training for the Homeless, 741 "The provisions of this subtitle other than section 740 [Amendments to the Job Training Partnership Act] shall terminate on October 1, 1990."

[145] As of December 21, 1987, the current one-day stop-gap measure funding the government once more came to an end. The newspapers barely mentioned this fact. When they did, they often said that government "technically" comes to a halt. That we can call this a technicality is eloquent of how routine this practice has become. It is no way to run a railroad. OEO, HEW and other agencies over many years have suffered repeated stop-and-go crises that destroy efforts at rational planning because of absence or threatened absence of program authorization renewals and appropriations. *Cf.* *Current Trends, 35 FED. BAR J. at 162, III. Improvements in the Appropriations Process.

-- Check-up periodically on existing statutes

Because grant programs have grown helter-skelter, it is desirable that existing programs be reviewed from time to time (and that future programs be subject to sunset provisions or to similar review) in order to determine whether the program meets its purposes, whether it is still necessary, and whether changes should be made. Such review is provided for in P.L. 90-577, 601, 602, 603, 31 U.S.C. 6507, 6508, which directs review every 4 years by the appropriate Committees and, on request of an appropriate Committee, by the Comptroller General and the ACIR. Although the statute does not explicitly say so, this review could also be an occasion for improving the draftsmanship of statutes that are retained on the books.[146]

Sec. 19. Effective date

It is not necessary but often thought desirable to specify an effective date for the statute.[147] This is most often felt to

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[146]Emogene Trexel points out in a letter, March 19, 1986, that

> language in grant statutes can become obsolete over time and through improved practices. For instance, commingling of federal funds used to be prohibited. Now, local governments are required to `pool' federal funds to avoid unnecessary draw-downs of cash.

This is an example of the kind of thing periodic check-ups should watch out for.

[147]Day certain. P.L. 100-77 (Homeless Assistance, Title VIII, Subtitle A, Sec. 803(b): The Amendment made by this section shall become effective on July 1, 1988.

Discretionary date. *ibid.*, sec 809(b): The amendments made by this section shall become effective and be implemented as soon as the Secretary of Agriculture determines is practicable after the date of enactment of this Act...

Date measured from date of enactment. idem; ...but not later than 160 days after enactment of this Act.

P.L. 100-17, Title IV, the Uniform Relocation Act Amendments of 1987, sec. 418: The amendment made by section 412 of this title (to the extent such amendment prescribes authority to develop, publish, and issue regulations) shall take effect on the date of the enactment of this title. This title and the amendments made by this title (other than the amendment made by section 412 to such extent) shall take effect on the effective date provided in such regulations but not later than 2 years after such date of enactment.

Retroactive. P.L. 100-50, the Higher Education Technical Amendments Act of 1987, approved June 3, 1987, sec. 27: The amendments made by this Act shall take effect as if enacted as part of the Higher Education Amendments of 1986 [which was effective generally on enactment, October 17, 1986].

be needed in an amendatory statute. The major trap is that the statute may require various time consuming steps that cannot be accomplished within the time available. This problem may be especially acute for programs that have their own well-established calendar. For example, educational programs often begin in September and commitments are often made the previous spring. It is not helpful to authorize a new program in November or even in August, intended to start that Fall. If grants must be made within a current fiscal year but the statute does not become effective until late in the year, appropriations not fixed until still later, then apportionment, allotment, allocation, notice of availability, publication of proposed rulemaking, final rulemaking, receipt of applications, evaluation of applications, award of grants may require the impossible to be done with indeliberate speed.[148] Drafters should be aware of the problem and avoid it, or perhaps temper the first year's wind to the tender lamb by not requiring impossible action to be completed within the initial year.

B. SPECIAL CONSIDERATIONS IN DRAFTING AMENDATORY GRANT STATUTES

-- Leave a track

The fact that a statute is an amendment to an existing statute creates problems of tracking. Consider, for example, the lawyer who has long familiarity with the Federal Grant and Cooperative Agreement Act of 1977, P.L. 95-224, Feb. 3, 1978, 92 Stat. 3, 41 U.S.C. 501. Looking up the text in 41 U.S.C. to focus on a particular problem, he finds a line that says: "Repealed." This is a terrible experience. "What? Repealed? I didn't know that." Of course, he takes a deep breath and studies further and finds that the text, essentially unchanged, is now in 31 U.S.C. Or try the Intergovernmental Cooperation Act of 1968, P.L. No. 90-577, 82 Stat. 1098, 42 U.S.C. 4201 (1976)(?). Look it up in 42 U.S.C.. "Repealed." After a deep breath, you find a piece of it in 31 U.S.C.

Statutes that make small amendments to existing statutes and recompile them, often do not leave as clear a track as they could and should. The reason seems to be a drafter's superstition that it is inelegant to be clear and

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[148]The first year of Head Start was an example of a crash program that worked, but often it will not work. When forced by statute (as was not I believe the case with Head Start) it more often than not will not work. Last minute summer job programs present similar problems.

direct. How would it hurt, for example, to replace the statute that has been moved with a bracketed note that says: "[Moved with minor amendments to Title 31]"? An official note, not leaving it to an annotator. It wouldn't hurt and it would help, but drafters seem to believe that there are intrinsic proprieties in drafting that override clarity and helpfulness.

Leave a track.

-- Is redesignation necessary?

A more complex problem: if you must repeal a subsection (d), do you redesignate (e) as (d)? If you must insert a new section after subsection (c), do you call the new section (d) and redesignate (d) as (e)? If you do either, you will create confusion for the lawyer who thinks he is familiar with old subsection (d). Peacock, Notes on Legislative Drafting (REC Foundation 1961) would totally scrap the practice of redesignation, and he clearly has a strong point. *Hirsch, 27 points to the "havoc it would create, for example, if section 501(c)(3) of the Internal Revenue Code of 1954, dealing with organizations eligible for exemption from income tax, were periodically redesignated."

Hirsch[149] takes a less extreme view than Peacock. Peacock says, don't redesignate. Hirsch says: "the larger the subdivision and the older the statute the more you should try to avoid redesignation." (p. 28).

-- An amending statute may need a different approach than an original statute

Many rules or counsels of good practice in the drafting of free-standing statutes do not apply or do not work the same way when the statute to be drafted is an amendatory statute.

The drafter of an amendment must work with an existing structure. He is not as free as the original drafter in writing what he believes is a logical and understandable structure. If he is not making a comprehensive revision, he must work with the structure he finds.

Curiously, however, as *Hirsch points out (p. 23), organizing an amendment to follow step by step the structure of the original Act may deprive the amending bill

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[149]In this section, I draw very freely from *Hirsch's Chapter IV, Amending a Statute, which calls attention clearly and helpfully to many of the problems of the amendatory statute.

of internal coherence. If for example one purpose of the amendment is to add one target to a group of targets, it may not be good amending practice to follow the structure of the original Act by (1) amending the Act's "Findings and Purposes", then (2) amending the definitions, then (3) amending the State Plan Requirements, then (4) amending the Research and Demonstration Projects section.

"Ordering those amendments in the bill as they are ordered in the Act," *Hirsch points out, "and separating them from each other by unrelated amendments, will make it difficult to discover the draftsman's purposes and how he carried them out . . . . [S]uch a structure, moreover, may place minor technical amendments in a bill's introductory sections while burying major program changes in the rear.

"Good drafting practice calls for grouping amendments by subject."

*Hirsch recommends a "modular construction," grouping amendments by subject, and shows that it has advantages not only in the clarity of the bill but in the outcome of a bill that may be further amended or may be adopted only in part. (p. 23).

In the case of amendments to a complex statute, it is unlikely that the drafter will be aware of all the places in that statute and in other statutes that involve cross-reference to the section being amended. Hirsch gives the example of section 218 of the Social Security Act, 42 U.S.C. 418 as it stood in 1980, which deals with voluntary agreements for the social security coverage of state and local employees. This section is referred to at least six times in two free-standing public laws, at least eight times in various parts of the Internal Revenue Code, and in at least six other sections or sectional subdivisions buried in a title that runs to several hundred pages. Peacock says, similarly, "But no draftsman can, and, as far as we know, none has even tried to accomplish the impossible task of assuring that he has run down all possible existing citations or references anywhere in the whole wide legal and administrative world." (Peacock, p. 42; *Hirsch, p. 27). Citations, it is true, are now becoming accessible by computer but redesignated sections complicate that approach and less direct reference may elude computer search.

Unless you happen to be an expert in the particular problem both in detail and broad perspective, how do you know whether proposed amendments achieve the results you intend. *Hirsch's advice: "Second Rule of Statutory Construction: CONSULT AN EXPERIENCED PROGRAM ATTORNEY." (p. 22). My amendment to Hirsch's advice:

but not after midnight on the eve of mark-up, an unfortunately common practice.

Particularly troublesome are amendments that amend invisibly. *Hirsch gives as a striking example a proposed enlargement of the Poultry Products Inspection Act (71 Stat. 441; 21 U.S.C. 451) which, had it become law, would have made that Act apply to domesticated rabbits without however actually amending the Act. What reader of the Poultry Products Inspection Act thereafter would have understood that feathers means pelt? (*Hirsch, p. 28). Another telling example in *Hirsch is the National Housing Act which appears to fix the maximum rate of interest on home mortgages insurable by HUD at six percent (section 203(b)(5)). But Public Law 90-301, without amending 203(b)(5), allows the Secretary to fix maximum rates to meet the market. (*Hirsch p. 28).

In general, "Notwithstanding any other law..." or "Notwithstanding the provisions of section...", unless used with special care, are invitations to trouble.[150]

C. SOME SUGGESTIONS FOR GENERAL GRANT STATUTES

There now exist a small number of statutes that apply to grants generally, unless expressly excluded by particular grant statutes. Among these, the principal one is the Federal Grants and Cooperative Agreements Act of 1978 (now recodified in 31 U.S.C. sec. 6501 ff). Also relevant are the Paperwork Reduction Act,[151] Federal Claims Collection Act[152] and the Debt Collection Act,[153] the Administrative Procedure Act which in part exempts grants from its rulemaking procedures but nevertheless applies to many grants because the administering agencies have agreed to waive the exemption.[154] Anyone drafting grant statutes should be familiar with these statutes.[155]

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[150]*Hirsch, p. 28.

[151]P.L. 96-511, December 11, 1980, 44 U.S. Code 3501 *et seq.*

[152]P.L. 89-508, July 19, 1966, 31 U.S.C. 3711(a)-(e).

[153]P.L. 97-365, October 25, 1982; P.L. 98-167. November 29, 1983, 5 U.S. Code 552 a (b) and (m), 5514; 18 U.S.C. 1114; 26 U.S.C. 6103, 7213; 28 U.S.C. 2415(i); 31 U.S.C. 3701, 3711(f) 3716-3719.

[154]5 U.S.C. 551-59, 701-06, 1305, 3105, 3344, 5372, 7521. On the waiver of the rulemaking exemption, *see* ACUS, A GUIDE TO FEDERAL AGENCY RULEMAKING (1983) 26-27.

[155]They are conveniently collected with commentary and related materials in ACUS, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (1985).

Some further topics are worth considering for general legislation. The purpose would be to set forth a general approach to grant problems of a kind that repeat themselves, to save repetition of frequently occurring matters in each grant statute, to avoid unintentional variations in phrasing (which can lead to inferences that substantive differences were meant when they were not), and to resolve doubts that have troubled the Courts, administrators, grantees, and beneficiaries.

Here is an outline of some considerations that might go into such a general statute. They are offered to stimulate thinking on a subject which seems to have received little thought so far.

Definitions: A list of standard definitions that would apply to all grant statutes unless the contrary is clearly indicated.

Some basic notions of grant law that would apply to all grant statutes unless the contrary is clearly indicated:

A grantee is not (by reason of being a grantee) an arm, instrumentality, or agent or agency of the United States.

Its employees are not (by reason of its being a grantee) employees or officials of the United States.

Property held by the grantee is not (by reason of its being a grantee) property of the United States.

Money held by the grantee is not (by reason of the grant) money of the United States. Even money received pursuant to the grant, once it is validly transferred to the grantee is not money of the United States. Grant funds include funds held by the grantee required to be committed to the purpose of the grant, both those received from the United States and those required to be supplied by grantee. The United States does, however, have a residual interest or resulting trust in its favor of its proportionate share of grant funds and property bought with grant funds.

Grantees are generally expected to meet with their own funds or property or with funds or property derived from sources other than the United States, a share of the grant costs. If that share is specified by a statute, and grantee fails to supply this required non-federal share, the proportionate amount of federally supplied funds may not be validly expended by grantee. If they are expended nevertheless, grantee is obligated to return to the United States that amount of federally supplied funds spent, that is necessary to bring actual local share into the required

ratio.[156] the proportionate amount of federally supplied funds. This, and other requirements, may, however, generally be waived by the grantor agency for good cause shown. Similarly, the grantor agency may, if a grant is renewed, authorize an adjustment of the non-federal share that will permit the required non-federal share to be supplied over a two year period instead of a one year period. (Perhaps a three year period?)

The grantor agency shall generally be authorized to waive any fringe requirement on a finding that the interests of justice and the purpose of the rule will be served by a waiver. Such waivers shall be reported to the Congress forthwith if they involve a matter greater than a specified amount.

Provisions in statutes requiring that activities paid for with local funds shall be supplemented not supplanted by the grant funds require good faith performance and shall be reflected in budget and plans submitted by the grantee in advance of operation. They do not contemplate enforcement by financial audit.

Provisions in statutes requiring maintenance of a previous level of effort require good faith performance and do contemplate enforcement by financial audit. They are, however, like most requirements, subject to waiver for good cause shown. In particular, a grantor agency shall generally have discretion to waive maintenance of effort provisions where the recent level of effort of the grantee is distorted by special nonrenewable grants from non-federal sources or special effort by the grantee intended to fund an experimental program or to launch early a program expected or reasonably hoped to be later funded in part by a federal grant program.

Agencies administering grants are authorized to establish grant appeals boards (or to arrange for the services of grant appeals boards established by other grant making agencies). Procedures should where possible emphasize the informal and the possibility of employing alternative methods of dispute resolution. The independence and competence of such boards shall be assured. The experience of such

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[156]Sample calculations and alternatives are discussed in "Recovery of Education Grant Funds Misspent or Accounted for Improperly," 25 Pub. Cont. Newsl., no. 1, fall 1989, at 10. A sample case: statute calls for an 80:20 ratio. Grantee draws down and spends the federal 80, but puts up only 10 of local share. Grantee is to pay back to the United States 8, so that the net federal contribution will be 72, local contribution 18. The ration 72:18 = 80:20.

boards shall be looked to as a source of information leading to improved grant administration procedures and methods.

Every grant making agency shall periodically review its results and make plans for improved administration.

IV. REFERENCE MATERIALS

A. OVERVIEW AND BRIEF PRELIMINARY SUGGESTIONS

This chapter contains, following this overview and the quick starting suggestions:

Part B. Two comprehensive bibliographies:

1. Related to grants
2. Related to drafting, and

Part C. A list of acronyms and other abbreviations used in the body of the book or often encountered.

Before plunging into the Bibliographies, which, although not exhaustive, are fairly extensive, it may be helpful to have a quick sketch of selected materials that will be found particularly useful for the drafter dealing with grants.

Items marked in the Bibliography with an initial * are those cited in the body of this book by an author's name or other short title, where they are also marked with an *. As you run through the list, watch out for the asterisks. They identify a set of materials that will be of major help to the drafter of grant statutes. Lack of an asterisk does not imply that the work is not very useful. It means only that the work did not happen to be cited often enough to call for a short title or that it seemed clearer to cite the work by full title.

Treatise: There is one treatise on grant law, *Cappalli, 3 volumes with annual updates.

One-volume book: A leading one-volume book on grant law is the ABA Public Contract Law Section *Federal Grant Law.

Leading articles include *Current Trends, a comprehensive review, and *Current Developments, a quarterly comment; articles on special topics by George Brown and by the several contributors to *Federal Grant Law, of whom the most prolific include Madden, Wallick, Dembling, Gavin, who are Chairman and Past Chairmen of the ABA Public Contract Law Section.

A useful guide to grant law news is Federal Grants Management Handbook supplemented by monthly reports.

ACUS Recommendations and studies are very useful on procedural aspects of grants. The recommendations are published in the Federal Register, in 1 C.F.R. 305, and in

the Conference's Annual Report. Both the recommendations and the supporting studies are published in annual bound volumes. The studies often appear also as law review articles. ACUS publishes a comprehensive Bibliography.

ACIR studies, emphasizing the structural aspects of grants to State and local governments, are published in monograph form. ACIR also publishes a quarterly journal, Intergovernmental Perspective.

Comptroller General Decisions and GAO Reports often contain valuable information about particular programs and problems. Also very useful to the drafter are GAO general studies such as Principles of Federal Appropriations Law; Grant Formulas, A Catalog of Federal Aid to States and Localities (GAO/HRD - 87-28); Federal Funding, Information on Selected Benefit/Mandatory Spending Programs (GAO/AFMD - 88-31FS).

The *Catalog of Federal Domestic Assistance is a very important resource.

Most of the major law reviews carry materials dealing with grants from time to time. Specialized law reviews and non-legal journals may be helpful, especially on particular technical problems. It is possible to give only some sketchy materials of this sort as suggestions:

Administrative Law Review
American Journal of Law and Medicine
Assistance Management and other publications of NAMA
Public Contract Law Journal

Recourse to unorthodox sources is strongly recommended, especially for understanding of technical fields in which grants operate and for perspective on how grants will fit into other activities in the field. Some random examples that have been found useful are:

"Blue Sheets" (this is the commonly used nickname for Drug Research Reports)
Government Computer News
Journal of Gerontology
Science
Scientific American
National Institutes of the American Bar Association
Seminars of the Federal Bar Association and National Assistance Management Association
Seminars of National Association of Counties, National Institute of Municipal Law Offices and similar organizations

Material on Appropriations Law and Budget Concepts, especially:

GAO, Principles of Federal Appropriations Law (June 1982) (GAO, A glossary of terms used in the Federal Budget Process (March 1981).

Texts on Statutory Drafting generally:

Peacock, Notes on Legislative Drafting (REC Foundation Inc. 1961) *Hirsch, Drafting Federal Law (DHHS, Washington, D.C. 1980) *Bell, Prose of Law: Congress As A Stylist of Statutory English (The Paper Tiger, Elliott City, Maryland, 1981) *Mullins, A Handbook for Legislative Drafters (Arkansas Edition) (Arkansas Legislation Digest, 1986).

B. BIBLIOGRAPHY

The following bibliography includes, in addition to works cited in the Guide, a number of works not cited in the text. It is supplied as a help to reference in this field. The drafting section is drawn very largely from the Minnesota Revisor's Manual (Office of the Revisor of Statutes, St. Paul, Minnesota, 1984), which also includes an extensive listing of State Bill Drafting Manuals, not included here. It also draws on a bibliography prepared by Professor Morell E. Mullins for his book on legislative drafting, prior to its publication. Professor Mullins very generously supplied the listing from his manuscript. Works cited in the Guide by a short title are identified by preceding asterisks. Works on grants and related federal assistance are listed first, then works on statutory drafting and related matters.

1. ACIR and ACUS Studies

ACIR STUDIES. The Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. P.L. 86-380, 73 Stat. 703, 42 U.S.C. 4271. Its Reports have valuable information and often an illuminating perspective, particularly on the structural respects of grants and their impact on State and local government. ACIR also publishes Intergovernmental Perspective, a quarterly journal. A list of its available publications from 1961 to 1989 can be found in 15 Intergovernmental Perspectives, no. 4 at 34 (fall 1989).

ACUS RECOMMENDATIONS AND SUPPORTING STUDIES AFFECTING GRANTS. The Administrative Conference of the United States (ACUS) was established by statute as an independent

agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

ACUS RECOMMENDATIONS

Rec. 68-5	Representation of the Poor in Agency Rulemaking of Direct Consequence to Them
Rec. 69-3	Publication of a *Guide to Federal Reporting Requirements*
Rec. 69-8	Elimination of Certain Exemptions from the APA Rule-making Requirements
Rec. 71-3	Articulation of Agency Policies
Rec. 71-4	Uniform Minimum Procedures for Agencies Administering Discretionary Grant Programs
Rec. 71-9	The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement
Rec. 72-5	Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking
Rec. 72-6	Civil Money Penalties as a Sanction
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include major public libraries and some college and law school libraries. *See* 44 U.S.C. 1901, *et seq.*

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C. ACRONYMS AND OTHER ABBREVIATIONS

The following common abbreviations are used in the text.

ACIR - Advisory Commission on Intergovernmental Relations. See discussion in Bibliography.

ACUS - Administrative Conference of the United States. See discussion in Bibliography.

APA - Administrative Procedure Act.

CAA - Community Action Agency.

CAP - Community Action Program.

CBO - Congressional Budget Office.

CETA - Comprehensive Employment and Training Act.

Catalog - Catalog of Federal Domestic Assistance.

CSA - Community Services Administration.

DGAB - Departmental Grant Appeals Board (of HEW and its successor HHS). *See* 45 CFR 16.

DOL - Department of Labor.

DOT - Department of Transportation.

ED - Department of Education.

EPA - Environmental Protection Agency.

ESEA - Elementary and Secondary Education Act.

FMC - Federal Management Circular, an alternative designation of those OMB Circulars which were at one time transferred to GSA for administration.

FOIA - Freedom of Information Act.

GAO - General Accounting Office.

GRS - General Revenue Sharing.

GSA - General Services Administration.

HEW - Department of Health, Education, and Welfare.

HEW DGAB - Departmental Grant Appeals Board of HEW.

HHS - Department of Health and Human Services.

HHS DGAB - Departmental Grant Appeals Board of HHS. (Name has been changed to Departmental Appeals Board.)

HUD - Department of Housing and Urban Development.

LEAA - Law Enforcement Assistance Administration.

NEH - National Endowment for the Humanities.

NEPA - National Environmental Policy Act.

NSF - National Science Foundation.

OEO - Office of Economic Opportunity.

OMB - Office of Management and Budget.

OSHA - Occupational Safety and Health Act.

PHS - Public Health Service (HHS).

UMTA - Urban Mass Transportation Administration.

ABRIDGED VERSION OF BACKGROUND REPORT FOR RECOMMENDATION 82–2

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FEDERAL GRANT DISPUTE RESOLUTION

*Ann Steinberg**

CONTENTS

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Introduction

Although grants have been awarded by the Federal Government for more than a century, it has been only in the last decade that there has been a traceable

pattern of grant disputes. These disputes have arisen throughout the Government, in a variety of contexts and a variety of programs.

The number of disputes is impressive. Between 1970 and 1980, more than seventeen hundred grant-related appeals were filed in writing with the Federal Government. Countless others were handled informally or resolved at lower levels of government. The total amount of money at issue in these appeals is estimated at over $350 million.[1]

Many of these appeals—and particularly those involving large sums of money—were brought by State and local governments. Others were brought by non-profit organizations, educational institutions, individuals and other recipients of Federal funds.

This report looks at these appeals, and the administrative procedures developed by Congress and the agencies to deal with them. Part 1 presents an overview of the grants system, and an introductory primer on the types of grant programs and potential grant disputes. Part 2 provides a summary of our study of thirty-four grantmaking agencies[2]—the types of dispute resolution procedures used by the agencies and the nature of disputes brought before them. Part 3 begins our analysis of the adequacy of existing grant dispute resolution procedures; it discusses the legal nature of a grant, and traces efforts by Congress and the Administration to distinguish grants from Federal procurement contracts. Chapter 4 considers existing procedures in light of constitutional due process concerns. Finally, Chapter 5 draws some conclusions and recommendations. Also included in the complete report (but not in this abridged version) are individual agency chapters which discuss, in detail, the appeals and appeals mechanisms of each of the thirty-four Federal and quasi-Federal agencies reviewed in this study.

1. The Grants System: An Historical Overview and Typology of Grants and Grant Disputes

A. An Historical Overview

The earliest Federal grants were land grants awarded to the States in the late 1800's for the development of agricultural colleges, railroad construction,

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1. For further discussion of these figures, *see*, pp. 172–3, *infra*.

2. These agencies include: ACTION, United States Department of Agriculture (USDA), Department of Commerce, Community Services Administration (CSA), Department of Education (ED), Department of Energy (DOE), Environmental Protection Agency (EPA), Department of Health and Human Services (HHS), Department of Housing and Urban Development HUD), Department of Justice (DOJ), Department of Labor (DOL), Department of Transportation (DOT), Department of Defense (DOD), Department of the Treasury, Federal Emergency Management Agency (FEMA), General Services Administration (GSA), National Science Foundation (NSF), National Endowment on the Arts and the Humanities, Nuclear Regulatory Commission (NRC), Office of Personnel Management (OPM), nine regional commissions, Small Business Administration (SBA), Veterans Administration (VA), and the Water Resources Council (WRC). Although technically not Federal agencies, the Legal Services Corporation (LSC) and Smithsonian Institution also were studied because they engage in grantmaking with Federal funds.

and other public purposes. During the same period, Congress authorized the first Federal grants of cash, targeting assistance for such diverse purposes as aid to the blind and the support of agricultural experimental stations.[3]

In the early 1900's, the number and size of Federal grant programs grew steadily. By 1922, grant expenditures totalled $118 million, nearly 80 percent of which was for a highway construction program initiated that year.[4]

The 1930's saw the advent of the New Deal, and the push for social reform. The Social Security Act of 1935[5] and other grant-enabling statutes of that period were key elements in the country's effort to stimulate the economy and to create new jobs.[6]

Through the next two decades, Federal grant programs continued to grow dramatically. In 1937, grant expenditures totalled approximately $296 million; by 1947, the amount reached $1.1 billion.[7] That figure doubled by 1950.[8] By 1960, more than $7 billion (or 7.6% of the Federal budget) was spent on grant programs.[9]

But the real explosion was yet to come.

In the 1960's, the Kennedy and Johnson Administrations used grant programs as key weapons in their War Against Poverty. Through grants, the Federal Government sought to target resources to particular segments of the population and to implement Federal civil rights policy.

With these goals, the Government changed not only the volume of grant activity, but also its direction. Prior to 1960, virtually all grants were awarded to States, and identified as "grants-in-aid." The term "cooperative federalism" frequently was used during this period to describe the grant-in-aid system, and to emphasize the voluntary nature of State participation.[10] Implicit in the notion of "cooperative federalism" was a recognition of States' autonomy in developing and administering grant programs. As one commentator noted:

> Before the 1960s, the typical grant-in-aid programs were not used to resolve problems of national concern but were established to help state or local governments accomplish their respective objectives—'to help them get farmers out of the mud'. . . . In general, federal agencies saw their role as one of technical assistance rather than of control: they offered advice and worked with the states to improve programs initiated

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3. Madden, "The Right to Receive Federal Grants and Assistance," 37 Fed. B.J. 17, 18 n. 7 (Fall 1978).

4. Advisory Commission on Intergovernmental Relations (ACIR) report, "Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law" (December 1980), p. 4.

5. 49 Stat. 620. Amendments to the Act currently are codified throughout Volume 42 of the United States Code.

6. Madden, *supra* n. 3, at 19.

7. Office of Management and Budget, "Special Analysis H, Federal Aid to State and Local Governments," in Special Analyses, Budget of the United States Government 1979 at 175 (Jan. 1978) (hereinafter referred to as "OMB Special Analysis H").

8. ACIR, "Significant Features of Fiscal Federalism 1976–77" (1977), p. 55, Table 38.

9. OMB Special Analysis H, pp. 175, 184, Table H-5.

10. Corwin, "National-State Cooperation—Its Present Possibilities," 8 Am. Law School Rev. 687, 704 (1937).

> by the states, and they did not substitute their policy judgment for those of state and local agencies . . . . Federal review and control of grant distribution in earlier decades was designed to accomplish the objectives of efficiency and economy in order to safeguard the federal treasury, and was not generally intended to affect the substance of grant programs.[11]

The grant programs of the "New Frontier" and "Great Society" were different. In many cases, they were designed especially for the purpose of implementing social change. Federal oversight of the programs focused not only on specific program requirements, but also on broader national goals.

During this period, there was a genuine *quid pro quo*: In exchange for the billions of dollars in grant funds awarded each year, States and local governments were required to give up some of the autonomy which had characterized the pre-1960 notion of cooperative federalism. Between 1960 and 1979, Congress enacted more than twenty separate laws imposing national standards on grantees, notably in the areas of civil rights and environmental protection.[12] These statutes attached "strings" to virtually all grants and were to be implemented by virtually all grantmaking agencies. In addition, in the 1970's, the Office of Management and Budget added another layer of "strings," by establishing Government-wide cost and administrative standards for grants.

State and local governments accepted these strings—and the billions of grant dollars that went along with them. Thus, in the 20-year period from 1960 to 1980, the amount of Federal funds spent on grants to State and local governments increased more than 13-fold: In 1960, the amount of such expenditures was roughly $7 billion; by 1981, it was estimated that expenditures would reach $96.3 billion.[13] Percentage-wise, the increase also was dramatic: In 1960, the amount of grant expenditures to State and local governments represented 7.6 percent of the total Federal budget for the year; in 1979, such expenditures represented approximately 17.4 percent of the Federal budget.[14]

Moreover, during the 1960's and 1970's, significant numbers of Federal grants were made to nongovernmental entities, such as colleges and universities, hospitals, community-based and other non-profit organizations. Indeed, under the Economic Opportunity Act of 1964 and other legislation identified as part of the War Against Poverty, a whole cadre of organizations was created spe-

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11. Harbert, "Federal Grants-in-Aid: Maximizing Benefits to the States" (1976), p. 4, as cited in Cappalli, *Rights and Remedies Under Federal Grants* (BNA: 1979), p. 12.

12. *See* Madden, "Future Directions for Federal Assistance Programs: Lessons from Block Grants and Revenue Sharing," 36 Fed. B.J. 107, 115 n. 48 (1977). Examples of these laws include the Civil Rights Act of 1964 and the National Environmental Policy Act of 1969.

13. A further breakdown shows some of the growth spurts:

1962: $7.4 billion
1968: $17.3 billion
1970: $25 billion
1977: $68.4 billion
1979: $82.9 billion

OMB Special Analysis H at 175.

14. *Id.* at 184, Table H-5.

cifically for the purpose of receiving and administering Federal grant programs. These organizations—which included community action agencies, migrant and seasonal farmworker programs, and community health centers—often were one hundred percent federally funded.

Taking these non-intergovernmental grants into consideration, the growth in Federal grant activity from 1960 to 1980 was even more astounding. Although no firm figure is available, grant outlays for these private sector activities are believed to amount to 30% of grant payments made to State and local governments—for an estimated total grant outlay in 1981 of more than $125 billion.[15]

In the 1980's, the Reagan Administration has sought to reverse many of these recent grant trends. Legislative initiatives have been designed to reduce and to consolidate the vast number of grant programs spawned in prior decades. Many of the programs originally targeted for community-based and other non-profit organizations have been eliminated or redesigned as part of larger, block grants awarded to States and local governments.[16] The myriad of Federal strings previously created has been abandoned or ignored. The notion of "cooperative federalism" so popular in the 1950's has been resurrected as "new federalism," and States have been assured "maximum flexibility" in administering grant funds.[17]

It still is too early to assess the full impact of these Reagan initiatives, and their long-range effect. In the meantime, however, it is important to review the current situation, and the ways by which Congress and the agencies themselves have viewed Federal grants and grant-related disputes.

B. Types of Grant Programs

As the foregoing section suggests, there are various types of grant programs and various types of grantees. Before considering the more specific issues of this report, it may be helpful to review quickly the nature of these variations.

There are at least five ways to categorize grants. *First*, grants may be classified as being either mandatory or discretionary. *Second*, grants may be classified as being either block or categorical. *Third*, grants may be categorized according to their program purpose. *Fourth*, grants may be categorized according to the type(s) of eligible recipients. *Fifth*, grants may be categorized according to their anticipated duration. Each of these categorizations is discussed below.

1. Mandatory versus Discretionary Grants

The distinction between mandatory and discretionary grants relates primarily to the amount of discretion allotted to an agency in the award of grant funds. The discretion may lie with respect to both the selection of a recipient and the determination of levels of funding.

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15. Catz, "Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirement," 59 Wash. U.L.Q. 1067, 1069 (Winter 1982).

16. *See, e.g.*, the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 357. For a brief discussion of the meaning of the term "block grant," *see* pages 148–9, *infra*.

17. *See, e.g.*, Department of Health and Human Services, Interim Final Rules on Block Grant Programs, 45 C.F.R. Part 96, 46 *Fed. Reg.* 48582 (Oct. 1, 1982).

"Mandatory" grants are authorized by statutes which require Federal agencies to award funds to eligible applicants which meet minimal requirements.[18] Once these requirements are met, applicants generally are viewed as having an "entitlement" to funds appropriated under the programs.

Most mandatory grants are awarded to States, and are designed to provide supplemental funding to support traditional public services, such as public school education, law enforcement, public welfare, health services, housing and community development, public employment, sewage treatment, highway and airport construction. Appropriations for mandatory grant programs often are divided among eligible applicants according to statutory formulae which take into account relevant demographic, social and economic data. The application of these formulae results in an allotment of funds to each applicant based on its size and relative needs. Block grants, as discussed below, are one type of mandatory grant.

The authorizing statutes for *"discretionary" grants* generally do not require agencies to award grants to any particular applicant or to support any particular type of activity. Rather, the statutes provide that the agencies "may" award grants to support certain types of projects. Eligibility for discretionary grants generally is not limited to States or units of local government, but instead is defined broadly to include any public or non-profit private entity.[19]

The underlying intent of most discretionary grant programs is not to solve long-range, broad social problems. Rather, the programs typically are designed to target support for specific problems or to meet specific research needs over a finite period of time. Federal agencies are given broad discretion both in terms of selecting among applicants and determining levels of funding; there is no preordained formula.

2. *Categorical versus Block Grants*

The distinction between categorical and block grants relates generally to the permissible range of eligible activities and the degree of discretion afforded the recipient. Categorical grants generally mandate that recipients use grant funds for specific purposes to aid specific segments of the population. Grant agreements for categorical grants typically include a full range of program and administrative requirements, virtually all of which are subject to Federal oversight.

In contrast, *block grants* authorize a broader range of activities, allowing the recipient to make priority funding determinations. As fashioned by the Reagan Administration, block grants have a minimal number of Federal restrictions, and rely heavily upon State law and practices. The recipients of block grants are virtually always States and local governments.

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18. Applicants for mandatory grants usually are required to submit to the administering agency a "plan" which contains assurances that the applicant will comply with all grant conditions, and describes in general terms the activities which the applicant will undertake.

19. There has been a recent movement to expand eligibility for these kinds of activities to profitmaking organizations. The National Science Foundation has been one of the first agencies to undertake such awards.

Some grant programs have characteristics of both categorical and block grants. Thus, for example, the Comprehensive Employment and Training Act of 1973, as amended,[20] authorizes the recipients' discretion in the selection of program services, but mandates compliance with many Federal standards and requirements.

3. Grant Purposes

There is a full range of possible grant program activity. To name a few: The delivery of educational, health, welfare, cultural and other social services, housing and community development, public employment, job training, sewage treatment, energy development and assistance, transportation and wastewater treatment facility construction, as well as scientific research, and research and development activities. As indicated above, most of the federally-funded services historically provided by State and local governments (such as public school education, welfare, sewage treatment, highway construction, etc.) generally are being funded through block grants to the States.

4. Grant Recipients

Some grants (such as the new block grants authorized under the Omnibus Budget Reconciliation Act of 1981)[21] may be awarded only to State governments; others (such as grants for the construction of wastewater treatment facilities under the Clean Water Act)[22] are awarded primarily to local governments; still others (such as Headstart) may be awarded to private, non-profit organizations as well as to State and local governments. Finally, under certain circumstances, grants may be awarded to individuals or private profit-making organizations.[23]

5. Duration of Grants

Most grants are for a one-time project or a designated one or two year period. However, some grants provide for a multi-year program, with annual funding review.[24] This distinction is important in our later discussion of pre-award appeals.

C. Types of Potential Grant Disputes

Just as the types of grant programs administered by the Federal Government vary tremendously, so do the types of disputes arising out of grant administration. At the outset, a fundamental distinction must be drawn between "pre-award" and "post-award" disputes.

1. Pre-Award Disputes

The term "pre-award" dispute refers to problems arising before a grant has been awarded. Pre-award disputes typically involve applicants who are disappointed with their non-selection or with the levels of approved funding.

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20. 29 U.S.C. § 801 *et seq.*
21. *See*, footnote 16, *supra*.
22. 33 U.S.C. § 1251 *et seq.*
23. *See*, footnote 19, *supra*.
24. For further discussion of grants with multi-year authorizations, *see*, p. 150, *infra*.

There may be several grounds for a pre-award dispute. For example, disappointed applicants may claim that the denial of their grant applications are caused by conflict of interest on the part of Federal or non-Federal "peer" reviewers, the denial of legal rights afforded to applicants, the improper application of review criteria, or the failure of an agency to follow its own procedures. In addition, applicants may challenge the non-renewal of continuation grants.[25]

Where mandatory or entitlement grants are involved, Federal agencies generally are required by statute to provide notice and the opportunity for a hearing before denying all or substantial funding to an eligible applicant. Similarly, agencies frequently are required by statute to provide notice and the opportunity for a hearing before denying refunding to continuation grant applicants.[26] Where no such statutory requirement exists, the agencies rarely view the denial of refunding as an appealable decision.[27] Absent statutory requirements to the contrary, denials or reductions in discretionary funding generally are considered non-appealable.

2. Post-award Disputes

The term "post-award" dispute refers to problems arising after a grant has been awarded. The following types of post-award disputes tend to recur: (1) voiding of a grant; (2) suspension; (3) termination; (4) cost disallowances; (5) denial of requests for approval to incur expenditures; (6) disapproval of indirect cost or other special rates; and (7) cease and desist orders or compliance determinations. Although uniform Federal definitions of these terms do not exist, there is some common understanding as to their meaning.

A grant may be *"voided"* (and funds recouped) when an agency determines that the award was obtained fraudulently or was otherwise illegal or invalid from inception. For example, at HHS, grants have been voided upon a finding that a grantee was not eligible to receive an award.

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25. Federal agencies, especially the Department of Health and Human Services (HHS), often support projects which are on-going in nature, *i.e.*, they cannot be completed in one year. For example, the need to support health clinics to serve the poor may continue indefinitely. Accordingly, for the convenience of both the agency and the grantee (in terms of long-range planning and budgeting) grants are made to support a project over a multi-year "project period." After the initial year of support, the grantee must apply for successive "continuation" awards (or "renewal" funding), but is not required to compete with other projects for funding. If the annual application is approvable, funds are available, and the grantee has performed satisfactorily, the Federal agency will continue to fund the project.

26. The Department of Justice, Legal Services Corporation (LSC), and Community Services Administration (CSA) have administered grant programs which are subject to such requirements. *NOTE:* For purposes of this report, it should be noted that although CSA ceased to exist as of September 30, 1981, many of its programs and grants continue through the end of the current fiscal year. The procedures discussed in this report continue to apply to these grants, and currently are being administered by the Office of Community Services within HHS.

27. However, HHS' new rules provide for administrative review of such actions when the non-renewal is based on the applicant's failure to comply with the terms of a previous award. 45 C.F.R. Part 16, Appendix A, Section C(3).

"*Suspension*" of a grant means a temporary withdrawal of a grantee's authority to obligate grant funds, pending corrective action by the grantee or an agency decision to terminate the grant. The underlying reason for suspension is a failure of the grantee to comply with grant terms. A suspension order typically may be in effect no longer than thirty (30) days.[28] Because it is viewed as an emergency action, suspension generally is preemptive, and not subject to full appeals. However, once the 30 days elapses, the grantee generally is afforded notice and the opportunity for a hearing.[29]

"*Termination*" of a grant means the permanent withdrawal of a grantee's authority to obligate previously awarded funds before the expiration date of the grant.[30] Typically, a grant is terminated when the agency determines that a grantee has failed to comply substantially with grant terms and conditions. In such cases, the proceeding is called a "termination for cause." A grant also may be terminated by consent of both the grantee and grantor agency.[31]

"*Cost disallowances*" are determinations that particular costs incurred by a grantee and charged to a grant are not allowable under the terms and conditions of the grant award. For example, costs of construction may not be charged to most grants unless specifically authorized by statute. Absent specific authority, if a grantee nevertheless incurs construction costs and charges those costs to the grant, the agency may disallow those costs, *i.e.*, require the grantee to reimburse those funds to the Federal Government. Disallowances commonly arise when grantees: (1) exceed their budgets (overall or in certain categories); (2) fail to obtain agency approval of certain costs; and (3) lack documentation supporting costs charged to the grant. Disputes arising from cost disallowances are by far the most common type of dispute arising in grant administration.

Under certain circumstances, a grantee is required to obtain *prior approval* from an agency in order to charge certain costs to its grant. For example, grant funds under a domestic program typically may not be used to support foreign

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28. *See, e.g.*, 42 U.S.C. 2996j(2) (LSC); 42 U.S.C. 5052 (ACTION).

29. *Id.*

30. A grant may be "partially" terminated as well as fully terminated. A decision by the agency to narrow the scope of the supported activity which prevents the grantee from using a part of the funds initially awarded is a partial termination.

31. Historically, one of the major distinctions between a Federal grant and a Federal procurement contract was that the Government could not terminate a grant for the convenience of the Government. *See*, Mason "Current Trends in Federal Grant Law—Fiscal Year 1976," 35 Fed. B.J. 167 (1976). However, there have been recent indications that this distinction no longer is as vital as it once was. For one thing, the Office of Management and Budget (OMB) circulars which establish the Governmentwide principle that grants may not be terminated for convenience (OMB Circular A-102, Attachment L, OMB Circular A-110, Attachment L) do not apply to the new block grants enacted at the initiative of the Reagan Administration. Moreover, there recently have been some Federal court decisions holding that the Government may terminate grants for reasons related to the Administration's budgetary concerns and process. *See, e.g. West Central Missouri Rural Development Corp. v. Donovan*, C.A. No. 81-1581 (D.C. Cir., filed July 2, 1981); *Region X Peer Review Systems, Inc. v. Schweiker*, No. C-2-81-1067 (S.D.C. Ohio, filed Oct. 11, 1981). These cases seem to make clear that there are valid reasons for grant terminations other thaan a grantee's failure to comply with grant terms and conditions. The full implications of the cases are not yet known.

travel, purchase major pieces of equipment, or to cover pre-award costs, unless the grantor agency approves the expenditure in advance. If the grantee does not obtain prior agency approval and incurs such costs, they may be disallowed. Disputes may arise in this context both before and after such costs are disallowed. Before the matter reaches that point, a few agencies (such as the Departments of Education and Labor) permit grantees to challenge the agency's failure to give cost approval; afterwards, a grantee may challenge the disallowance itself.

Another type of grant dispute involves *the negotiation and approval of indirect and other cost allocation rates.* Many grantees are recipients of numerous Federal grants. These grantees typically incur administrative and other general overhead costs which benefit more than one grant, and cannot be identified directly with any one grant. At least some of these costs may be regarded as "indirect."[32] To facilitate the equitable distribution of indirect expenses to each grant, the grantee may negotiate with the Government to arrive at a certain percentage "indirect cost" rate, rather than having to determine the actual indirect costs attributable to each grant. Special allocation plans or rates also may be required in situations where grantees incur joint direct costs. Disputes often arise out of these indirect cost rate and cost allocation plan negotiations. For example, grantees may challenge rates established by the Government, because the rate is too low or because in computing the rate, the agency refused to consider certain costs which the grantee believed should be included.

A few granting agencies (such as the Departments of Education, Justice and Labor) have authority to order grantees to "*cease and desist*" from violating any terms and conditions of their grants; *noncompliance determinations* also may be issued. Generally, this type of determination is made only after a complaint of noncompliance has been filed by a third party or the agency and, thereafter, investigated by the agency. The issuance of a cease and desist order or compliance determination may set the stage for graver sanctions, such as suspension, termination or debarment.

3. Debarment

Technically not a pre-award or post-award dispute, "debarment" refers to a situation in which a grantee or grant applicant is determined to be guilty of malfeasance or is determined to be so untrustworthy that a Federal agency refuses to do business with the grantee for a specified period of time, *e.g.* two years. A debarred entity is disqualified from future participation in *any* grant program administered by the agency, not just the grant program(s) which gave rise to the finding of misconduct. Moreover, the ban against program participation is absolute: Not only may a debarred entity not receive any direct grant funding from the agency; it also may not receive any indirect funding through a subgrant or other subsidiary relationship with a grantee. While this form of remedy is relatively new in the grants field, the agencies which are authorized to debar grantees (such as the Department of Housing and Urban Development, Department of

32. Common examples of indirect cost items include: costs of operating and maintaining a facility, accountant services, central office administrative staff salaries and housekeeping services.

Labor, and Environmental Protection Agency) afford the affected entity full notice and hearing rights, apparently recognizing the severity of the sanction.

4. Other Disputes

All of the foregoing types of disputes would arise between a grantee and its grantor agency. Disputes also may arise between a grantee or grantor agency and subrecipients of the grantee. For example, a non-profit organization may challenge a grantee's decision to deny its application for a subgrant. A construction company may protest a grantee's decision to award a contract under a grant to another company. Potential beneficiaries, employees, or participants in a program may challenge the validity of a grantee's actions. As shown below, some Federal grantor agencies provide appeal procedures for these types of disputes; most do not.

II. Grant Disputes: Existing Dispute Resolution Procedures and Disputes Brought Under Them

A. Background

The burst of grant activity in the 1960's was accompanied by the emergence of grant disputes. With a vastly increased Federal grant budget, an expanded range of types and numbers of eligible grant recipients, and a significantly increased role for Federal audit and oversight, Congress recognized the possibility of growing numbers of grant disputes and the need to establish dispute resolution procedures.

Accordingly, many of the grant-enabling statutes of the 1960's and 1970's specifically provided for notice and hearing procedures and appeal rights. For example, the Economic Opportunity Act of 1964, as amended,[33] provided for notice and hearing rights upon the suspension, termination, or denial of refunding of a grant. The Omnibus Crime Control and Safe Street Act of 1968, as amended,[34] authorized "compliance" and "adjudicatory" hearings for certain types of grantees and grant applicants. The Comprehensive Employment and Training Act of 1973, as amended,[35] established a multi-tiered grievance procedure, culminating in a hearing before an administrative law judge. The General Education Provisions Act of 1978 mandated the establishment of an Education Appeal Board.[36]

In the 1970's, grantmaking agencies began to use these procedures—and to develop their own. Thus, in 1972, the Department of Health, Education and Welfare—the agency responsible for administering the largest number of grant programs—established a Departmental Grant Appeals Board to hear and to decide various categories of post-award grant disputes. Similarly, in 1974, the Environmental Protection Agency established grant appeal procedures, and des-

33. 42 U.S.C. § 2701 *et seq* (1981).
34. 42 U.S.C. § 5301 *et seq*.
35. 29 U.S.C. § 801 *et seq*.
36. 20 U.S.C. § 1234 *et seq*.

ignated a board of hearing examiners to consider appeals. Some years later. the Department of Energy did likewise.

Other agencies have been far less aggressive in developing grant appeals procedures. At least one agency, the National Foundation on the Arts and Humanities (NFAH), is required statutorily to provide notice and opportunity for a hearing prior to suspension, termination and denial of refunding, but has not established general procedures to handle these actions.

In the absence of any statutory mandate, many agencies (including the Departments of Commerce and Defense, Federal Emergency Assistance Agency, General Services Administration, and Water Resources Council) have not developed any formal dispute resolution procedures; or have a review procedure which applies only to certain programs.[37] Some agencies, such as the Small Business Administration and the Regional Commissions, include a "Disputes Clause" in their standard grant award document which permits appeals of post-award decisions to review committees or designated agency officials.

This section focuses on these and related dispute resolution procedures.

A Note About Methodology

Before beginning the discussion of grant dispute resolution procedures, a few comments should be made regarding the nature of our study, and the character of statistics contained in this report.

In the course of this study, we reviewed the procedures and case law of each of thirty-four Federal and quasi-Federal grantmaking agencies.[38] We interviewed dozens of agency officials, and reviewed documentation regarding the more than 1,700 appeals reported by the agencies. Our findings are reported in detail in the individual agency chapters of this report. A summary of our findings is presented below.

In both the summary and agency chapters, references are made to statistics regarding the numbers, amounts, and types of grant disputes considered by the agencies. Unless otherwise noted, these statistics are based on our original research and compilations of available case data. While every feasible effort was made to ensure accuracy, certain inherent limitations existed. For example, many grantmaking agencies do not maintain centralized—or, in some cases, any—files of grant appeals.[39] Thus, data collected was the result of piecing together information from various sources in various locales. Furthermore, even where centralized files were maintained, there was no guarantee of complete and consistent information. For example, many case files failed to report the dollar amounts at issue in the appeal, or the full range of contested issues. Wherever

37. Examples include: The Department of the Interior, with respect to its Office of Surface Mining and Bureau of Indian Affairs; and the Department of Agriculture, with respect to its Food and Nutrition Service and Farmers Home Administration; USDA (FMHA, FNS, Child Care, Summer Feeding programs).

38. For a complete list of the agencies studied, *see* footnote 2, *supra*. Unless otherwise indicated, the agency abbreviations referenced in that footnote shall be used throughout the rest of this report.

39. *See*, p. 171, *infra*.

possible, we tried to supplement written records with agency or grantee follow-up reports.

While these facts suggest a less than exact analysis, we feel comfortable in stating that: (1) The major trends and developments suggested by the statistics are accurate; and (2) Even with its inherent flaws, the study represents the most extensive effort to date to review and catalogue grant disputes and grant dispute resolution procedures.

Finally, we must make clear what this study is *not* intended to do. It is *not* intended to focus on appeals to the General Accounting Office, Office of Management and Budget, Equal Employment Opportunity Commission or other agencies responsible for implementing or enforcing cross-cutting requirements. It is intended only to provide a cursory look at issues related to third-party rights under grants. As shown below, some agencies extend appeal rights to those parties; most do not. Furthermore, the study is designed to consider informal dispute resolution procedures only to the extent that they bear upon more formal appeal structures. Nor did we seek to document disputes ending (for whatever reason) prior to the invocation of the agency's final tier of review. Thus, for example, where the last stage of a review process was conducted before a grant appeals board or administrative law judge in Washington, we did not consider cases resolved or settled in prior review by regional or program officials.

With these *caveats* in mind, we move on to our findings.

B. Existing Procedures

As indicated above, a detailed review of existing appeal procedures in each of thirty-four Federal and quasi-Federal grantmaking agencies is presented in the appendix to this report. Set forth below is a summary of the agencies' responses to the many questions of grant dispute resolution.

1. What Form Must an Appeal Take?

Grant-related administrative appeal procedures take various forms. Most formal are those which require a full-scale evidentiary hearing at which witnesses may be examined and cross-examined, and documentary evidence may be introduced. Less formal are those procedures which call for submission of a written record (consisting of relevant documentation and briefs) and a nonadversarial conference or "show cause" meeting.[40] Still less formal are those procedures which call for an appeals decision based only on a written record or informal reconsideration.

The degree of formality of grant appeals procedures varies: (1) from agency to agency; (2) from program to program within an agency; and (3) from one type of decision to another. Many agencies have developed a combination of formal and informal procedures. Thus, agencies with relatively formal appeals mechanisms, such as HHS, DOL, EPA and DOJ, consistently build into their procedures a method for encouraging informal negotiation and settlement. A few

40. Some agencies, such as HHS, occasionally conduct these conferences by telephone.

agencies have fairly sophisticated methods for encouraging informal resolution. HHS, for example, provides trained mediators to accomplish this task.

The highest degree of formality is present in those agencies which permit oral hearings with the full range of procedural protections contained in the Administrative Procedure Act (APA), 5 U.S.C. § 554 *et seq.* DOL's appeal process for the CETA program is the prime example. DOL calls for the use of an independent administrative law judge (ALJ) as the arbiter of disputes; permits discovery; gives the opportunity to examine and cross-examine witnesses and to introduce written evidence; establishes burdens of proof; and provides generally that, absent an agency rule to the contrary, Federal Rules of Civil Procedure govern the appeal process. DOE also uses ALJs and, in factually complex cases, may provide the full range of protections employed by DOL.[41]

HHS, EPA and DOE have developed agency-wide grant appeals boards. These boards are composed of designated agency officials, and are governed by relatively elaborate rules of procedure. ED maintains a similar appeals board structure, but generally uses non-agency officials as hearing examiners. These agencies provide, at a minimum, for the development of a full written record. Most of the boards encourage the parties to resolve disputes informally by holding prehearing conferences, waiving deadlines to encourage settlement negotiations, and, at HHS, using trained mediators. In addition, HHS and EPA have developed expedited appeal mechanisms to resolve appeals which involve relatively small amounts of money.

A few agencies have established grant appeals boards to handle disputes arising in particular grant programs or agency components. For example, the Department of Agriculture has created such a procedure specifically for handling disputes arising from the Food Stamp, Child Care and Summer Youth programs.

Some agencies, such as DOJ, LSC, CSA and ACTION, have developed rather elaborate dispute resolution procedures, but have not created formal grant appeals boards. At least two of these agencies, ACTION and CSA, differentiate between termination decisions and all other appealable adverse decisions. They provide for relatively formal appeals in the termination context ("full and fair hearings" before the responsible official or an independent hearing examiner); and less formal appeals (through informal "show cause" meetings with the responsible official) in all other cases. DOJ, on the other hand, makes no distinction between types of disputes for purposes of deciding the nature of the appeals proceeding. In every case, DOJ seeks to resolve disputes informally (with marked success). If efforts at informal resolution fail, formal hearings are held, either by a DOJ official or, at the request of the appellant, an ALJ from outside the agency. LSC also builds informality into an otherwise formal pro-

41. HUD provides for APA-type hearings before ALJs in instances of termination or reductions in funding to recipients of mandatory grants under the Community Development Block Grant program. Moreover, in all instances of debarment, termination and suspension, hearing officers from HUD's Board of Contracts Appeal are assigned to hear the appeals and a full range of procedural protections (oral hearing, witnesses under oath, etc.) are provided. HUD never has had occasion to use these procedures.

cedure by requiring the agency decisionmaker to hold an informal conference "promptly" after the filing of an appeal. If settlement is not reached, LSC appoints an independent person, not an employee of LSC, as "presiding officer," to conduct a "timely, full, and fair hearing." The rest of the agencies (*e.g.*, DOI, HUD, DOD, GSA, VA, WRC) generally resolve disputes informally, whether or not formal appeals procedures exist.

2. Who Decides What Form an Appeal Should Take?

At most agencies, an appellant generally has no choice concerning the form an appeal will take. There, however, are some agencies which have developed alternative appeals methods and have given an election option to the appellant. EPA, HHS, and DOE are the chief examples of this latter category.

EPA decides all cases involving less than $50,000 on the basis of a written record without a conference or full evidentiary hearing. If the case involves more than $50,000, the appellant is entitled to elect a conference or a hearing in addition to the submission of a written record. The Board and agency cannot override the appellant's election of procedure.

At HHS, an expedited procedure (written record plus telephone conference call) is used in cases involving $25,000 or less, unless the Board determines otherwise. If expedited review is not given, a written record with briefs is required. In such cases, the Board may decide to hold a conference, and, where complex issues or material facts are disputed, a full evidentiary hearing. The appellant may request a conference or hearing, but is not entitled to either.[42]

DOE has the same three appeals methods, but the threshhold amount for expedited appeals is $10,000. The Board makes final decisions as to which method will be used in any particular case.

3. Who May Bring A Grant Appeal?

Most agencies which permit grant appeals have not specifically addressed the issue of who may initiate an appeal, presumably because it is assumed that only the affected applicant or grantee and the agency are interested parties.[43] A few agencies (such as HHS and EPA) have stated expressly that only an affected

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42. Appellant in one recent case sought to test this issue. When the Board denied appellant's request for an oral hearing, the appellant filed a complaint in Federal District Court charging that there was a dispute as to certain material facts in the case, and that, therefore, a hearing was warranted. *Community Relations—Social Development Commission of Milwaukee County v. Schweiker*, C.A. No. 81-0124 (D.D.C., filed Jan. 19, 1981). Before the court ruled on a motion for injunctive relief, the Board, through counsel, agreed to have the court remand the case to the Board and granted a hearing to appellant.

43. If, for example, a subgrantee tries to appeal a grantee's decision, agencies typically respond that they will not interfere in the grantee/subgrantee relationship. One agency spokesman has offered a variety of reasons for restricting access to the appeal process. *First*, access to the process simply is not needed to give fair treatment to parties other than the grantee and affected grant applicant. *Second*, the agency's involvement in disputes between grantees and third-parties may be inconsistent with the grantee's management duties. *Third*, the agency may not have sufficient resources to provide a right of independent review to all potentially aggrieved parties, which, depending upon the nature

applicant or grantee may bring an appeal. However, these agencies generally may permit third parties to intervene if they are "the real party in interest," or if their intervention will not cause undue delay and will aid in disposition of the appeal.[44] ED, LSC and DOE also permit third parties to intervene.

DOL, ACTION, CSA, and DOE are exceptional in this regard. Under the CETA program, DOL allows affected third parties to initiate, as well as to intervene, in appeal proceedings. By statute, CSA was required to review a "delegate agency" applicant's protest of unfair treatment of its application by a grantee.[45] Thus, the delegate agency applicant, not the grantee, was permitted to appeal directly to the agency. In addition, both ACTION and CSA regulations provide that delegate agencies whose conduct forms a substantial basis for a decision or are financially affected thereby may intervene in termination or suspension proceedings brought against grantees.

DOE's Board Chairman has indicated that if a grantee and subrecipient agree, the Board will review a subrecipient's appeal of grantee decisions. However, if the grantee does not agree, the Board will dismiss the case unless the subrecipient can point to a regulation or clause in its agreement giving it the right to appeal.[46]

4. Who May Represent the Parties?

a. Appellant

A few agencies which have implemented grant appeals procedures do not address the issue of who may (or should) represent an aggrieved applicant or grantee. However, most agencies (HHS, EPA, ED, DOE, LSC) have specified that the appellant *may* be represented by counsel. No agency requires the appellant to be represented by counsel. It should be noted that, under OMB's Governmentwide cost principles, attorney and other consultant fees incurred in con-

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of a program, may include other assistance applicants, bidders for assisted work, beneficiaries, contractors, subcontractors and suppliers performing assisted work, employees of assistees, and of contractors, subcontractors and suppliers, public interest groups, public bodies and individual citizens. Allan Brown, Outline of Presentation at Federal Bar Association Seminar on Grant Law, "Establishing an Assistance Appeals Board and Defining its Scope of Authority", Seminar Materials, pages 65–66 (February 20, 1981).

44. This general rule is inapposite to the seven block grant programs authorized by the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35). HHS interim regulations implementing the Act prohibit participation by third parties in informal compliance hearings which must be conducted after HHS finds States out of compliance with program requirements. Even in cases where a third party's conduct formed the basis for findings of noncompliance, intervention is not permitted. 45 C.F.R. § 96.64, 46 Fed. Reg. 48591 (October 1, 1981). If HHS's findings are upheld at the informal hearing, the State may appeal the findings to the Departmental Grant Appeals Board. However, the Board may review only the written hearing record. Thus, third parties again have no opportunity to participate. 45 C.F.R. § 96.52(d).

45. A "delegate agency" in CSA parlance is a subrecipient designated by a prime grantee to conduct a portion of the grant activities.

46. Interview with John Farmakides, October 1981, Washington, D.C. In one case, *Akron-Summit Community Action Agency, Inc.*, F.A. No. 2-12-80 (Feb. 20, 1981), the Board dismissed a subrecipient's appeal for these very reasons, i.e. the subrecipient could not establish a right to appeal and the grantee did not consent to Board review.

nection with an administrative appeal appear allowable if reasonable, necessary, and allocable to a grant. There has been considerable discussion regarding this issue.[47]

b. Appellee

Representation of the agency official who made the disputed decision is handled by agency attorneys in virtually all agencies which have formal appeals mechanisms.[48] Most agencies which authorize appeals only to some higher agency official or to the same official (in effect, a request for reconsideration), or which otherwise handle appeals "informally", typically do not see the need for representation by attorneys because these appeals are viewed as non-adversarial.[49] A few agencies, such as DOJ, call upon agency lawyers even at "informal" stages of review.

5. How is an Appeal Initiated?

In order to appeal an adverse agency decision, most agencies require applicants or grantees to demonstrate that a "final" adverse decision has been rendered. A few agencies (such as ED and HHS) describe in their regulations

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47. Under OMB cost standards, legal expenses are allowable grant costs if they are "required in the administration of grant programs." Federal Management Circular ("FMC") 74-4, "Cost Principles Applicable to Grants and Contracts with State and Local Governments," App. B, ¶ B.16; FMC 73-8, "Cost Principles for Educational Institutions", App. A, ¶ J.26; OMB Circular A-122, "Cost Principles for Nonprofit Organizations," Att. B, ¶ 34. A major exception, however, applies for "the prosecution of claims against the Federal Government." *Id.* Both HHS and OMB have taken the position that this exception does *not* apply to appeals brought before the HHS Departmental Grant Appeals Board "or to similar administrative appeals to other appropriate grant appeals authorities." Letter from Henry G. Kirschenmann, Jr., (then) Director of the Office of Grant and Contract Financial Management, HHS, to Ann Steinberg, September 26, 1980. In subsequent rulemaking before the Department of Labor, the Section of Public Contract Law of the American Bar Association went on record in support of this position.

The Equal Access to Justice Act, 5 U.S.C. §§ 501 *et seq.* also may be relevant to this discussion. That Act authorizes certain parties, including tax-exempt, § 501(c)(3) organizations with less than 500 employees, to recover attorneys' fees arising out of certain court and administrative litigation. A recovery of fees is warranted where the party prevails in the action, unless the position of the United States was substantially justified by special circumstances which make an award unjust. The burden is on the Federal government to prove the reasonableness of its position.

Of special relevance to grantees and grant applicants, the Act authorizes the award of attorneys' fees in connection with administrative proceedings only where those proceedings are agency adjudications under 5 U.S.C. § 554 (the APA). This limitation makes prospects for recovery of fees in the context of administrative grant appeals quite bleak, because the vast majority of grant appeals procedures are not provided under the authority of 5 U.S.C. § 554. (DOL appears to be the sole exception.) In fact, HHS's rules specifically deprive the Departmental Grant Appeals Board of jurisdiction in cases where a statute requires a § 554 hearing. (45 C.F.R. Part 16, Appendix A, Section F) In its Equal Access to Justice Act implementing regulations, HHS predictably does not authorize attorneys' fee awards in connection with Grant Appeals Board proceedings. (*See* 45 C.F.R. § 13.3, 47 Fed. Reg. 10837 (March 12, 1982).)

48. An exception is HHS' Public Health Service. Grants management officials represent PHS in appeals to the HHS Board. Past officials of the Board have indicated that this practice hindered Board operations.

49. Prime examples of this type of agency are NSF, NFAH, and FEMA.

what constitutes a final decision, going so far as to require the decisionmaker to include various types of information in the decision letter, such as what action is being taken, the specific reasons (with citations) for the action, and advice to the applicant or grantee concerning its appeal rights and deadlines. However, most agencies do not systematically advise applicants and grantees of their appeal rights either in advance or in the adverse decision letter; moreover, some agencies' appeals procedures are not published in regulations (e.g. NSF).

Most agencies require that an appeal be filed within a certain time period, generally 30 days. Some agencies are far more restrictive. For example, DOL requires the filing of a notice of appeal within ten days of the receipt of notification of adverse agency action. Some agencies (such as HHS and DOL) waive this deadline for good cause shown (HHS, DOL); others (such as ED) may not.

Most agencies require further that the appellant notify the agency in writing of its intent to appeal. HHS, ED, and DOL require the appellant to attach a copy of the agency decision to the appeal notice; HHS and ED also demand a brief statement of why the agency decision is wrong.

Some agencies (such as DOL, DOE and HHS) provide the appellant with a formal acknowledgement of their receipt of the notice of appeal. HHS then sends the appellant a copy of the grant appeals procedures.

If either the agency decision or the appellant's notice of appeal is incomplete, the parties generally are notified. At ED, if the appellant's notice is inadequate, the appellant is given only one chance to revise it.

6. *Who Hears the Appeal?*

The agencies have differed greatly in their approach to this issue. Some agencies require an impartial or independent decisionmaker on appeal; others (such as ACTION, CSA, NFAH) provide only for reconsideration by the original decisionmaker or his/her immediate supervisor.

Where impartial or independent decisionmakers are called for, several models emerge. For example, at ED, most appeals are heard by non-federal individuals (attorneys and non-attorneys). DOJ gives the appellant an option: The appellant may request a hearing before a DOJ official or an ALJ designated by the General Services Administration.

DOL assigns appeals to an Office of Administrative Law Judges, which is physically and bureaucratically removed from the rest of the Department. HHS' Grant Appeals Board is lodged within the Office of the Assistant Secretary for Personnel Management, wholly separate from all program offices and the Office of General Counsel; DOE uses a Board composed of three ALJs; also removed from other parts of the agency. USDA assigns Food and Nutrition Service appeals to an independent Administrative Review Staff.

These agencies may compare favorably to agencies which have placed supposedly impartial hearing examiners in the Office of General Counsel, the office also responsible for representing the agency in appeals. EPA is the primary example of this type of agency. At EPA, the issue of impartiality is further compounded by the fact that the Board uses technical advisors who are employed by various EPA program divisions as standing members of the Board. Although

these members are not permitted to vote on decisions, and are viewed purely as technical advisors, their ability to influence the Board's deliberations may suggest at least the appearance of agency bias.

Virtually all of the agencies discussed above indicate that appellants may object to a particular hearing examiner on grounds of conflict of interest or personal bias.[50] In addition, the agencies generally require that the hearing examiner have no prior involvement in the matters at issue in the appeal. Such agencies also generally prohibit *ex parte* communications with the hearing examiner. (*See* Section 11.f, *infra*.)

7. Is the Outcome of the Appeal Reviewable by the Agency Head?

Several agencies do not regard the hearing examiner's decision as the final agency decision. Instead, agency procedures at ED, DOJ and DOL require that the hearing examiner's "recommendations" be transmitted to the Secretary, and permit the Secretary to affirm, reverse or modify those decisions.[51]

At HHS and EPA, Board decisions currently represent final agency action, not reviewable by the agency head. However, there recently has been considerable debate on this issue in both agencies. At HHS, until August 1981, only one category of Board decisions was considered final: Appeals brought under mandatory Social Security Act programs. These decisions represented the largest category of appeals brought before the Board, both in terms of volume and dollar amounts at stake. Yet there remained other categories of cases, including those involving the many discretionary grants administered by HHS.

In August, 1981, the Secretary of HHS promulgated new rules for the Board. In the rules, the Secretary specifically reserved this issue for further review, but provided that, in the interim, all Board decisions should be considered final agency action.[52]

While the issue is thus temporarily resolved at HHS, it may be helpful to consider the various pros and cons raised by the Board chairman with respect to the issue of finality of Board decisions. In a memorandum to the Secretary of HHS,[53] the Chairman recommended against Secretarial review because such review could: (1) subject the Secretary to frequent pressures to change decisions from conflicting interests inside and outside the Department; (2) introduce further

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50. Our study showed at least one case where this concern was an issue on appeal. In *Kansas Turnpike Authority*, docket No. 75-3 (March 2, 1979), the EPA Board of Assistance Appeals considered the issue of whether a designated hearing examiner (Regional Counsel for Region I) was sufficiently removed from the Regional Administrator of Region VII, whose action was being appealed, and whether he was, in fact, impartial in light of his prior defense of appeals on similar issues. EPA refused to replace the examiner, stating that its requirement that a hearing examiner be organizationally and geographically removed from the decision being appealed must not be carried to extremes; otherwise, no official of the Agency could hear an appeal from a decision of any other official of the Agency.

51. At ED, the Secretary never has reversed or modified a hearing examiner's decision. DOJ's Administrator appeared to consistently adopt the hearing examiners' decisions when favorable to the agency, but to reverse at least some of the decisions which were unfavorable to the agency.

52. 52 *Fed. Reg.* 43817 (August 31, 1981).

delay in resolving disputes; (3) require the Secretary to devote considerable personal and staff time to responding to requests for review, reviewing decisions (and the underlying voluminous records), and writing new decisions; (4) cause unfavorable reaction in court and Congress; and (5) reduce the incentive of the parties to present their best case to the Board.

On the other hand, the Chairman acknowledged that Secretarial review could: (1) give the Secretary control over Board decisions with which the Secretary disagreed on policy grounds; (2) give the Secretary and parties a means to correct errors in Board decisions; and (3) make the Board's job easier if difficult questions could be passed to the Secretary. In response to these points, however, the Chairman further noted that the Board is bound by HHS regulations and defers to agency expertise and programmatic judgment, thereby reducing the risk of a Board decision conflicting with Departmental policy. Furthermore, the nature of disputes brought before the Board (primarily contested audit findings) rarely involved policy questions of sufficient importance to justify Secretarial review. Finally, the Board's reconsideration process allows the Department to alert the Board to any errors and permits the Board to change its decision.

In light of these considerations, the Chairman recommended that Board decisions be accorded finality. In the event that the Secretary rejected this recommendation, the Chairman suggested that Secretarial review be limited in terms of short timeframes and subject to a "clearly erroneous" standard of review.

While HHS was considering this issue, EPA was too. The issue, however, is viewed slightly differently at EPA, because there the appeals board has taken the position that it is not bound by agency regulations (*i.e.* the Board may determine that duly promulgated regulations are inconsistent with statutory mandates or otherwise improper).[54] This position created the concern that the EPA Administrator should have the opportunity to review at least those Board decisions which would render invalid an agency regulation. In unpublished, draft regulations, the agency recently proposed to deal with this issue by removing the Board's authority to review the validity of agency regulations. No change in the Board's current posture on finality is suggested.

8. What is the Hearing Examiner's Scope of Authority

Agencies with fairly elaborate appeals procedures have considered a number of issues regarding their hearing examiners' scope of authority. The *first* issue is whether hearing examiners may review the validity of agency regulations, and if necessary, declare regulations invalid. The *second* issue is whether hearing examiners may waive duly promulgated regulations. The *third* issue is whether hearing examiners may overrule prior agency interpretations of relevant statutes not promulgated through regulation. The *fourth* issue is whether hearing examiners may evaluate the substance of financial audit and program compliance

53. Memorandum to the Secretary from Norval D. Settle, Chairman, Departmental Grant Appeals Board, "Should the Secretary review all decisions of the Departmental Grant Appeals Board" (April 8, 1981).

54. *See*, discussion at pp. 163–4, *infra*

reports issued by qualified agency personnel. The *fifth* issue is whether hearing examiners may hold that an agency is "estopped" from rendering an adverse decision because of prior agency actions. Each of these issues is discussed below.

a. Authority to Review the Validity of Agency Regulations, and, if Necessary, to Declare them Invalid

As indicated above, the agencies' consideration of this issue seems closely tied to the question of the finality of hearing examiners' decisions.[55] If such decisions represent final agency action, agencies may be reluctant to delegate to the hearing examiners the authority to rule on the validity of agency regulations. Conversely, if hearing examiners' decisions are subject to review by the Secretary or other agency head, agencies appear less reluctant to delegate such authority.

The experiences of EPA and HHS are instructive on this point. At EPA, decisions of the Board of Assistance Appeals are final; they are not subject to the review of the Administrator. Current rules governing the Board are silent on the issue of the Board's authority to review the validity of agency regulations. However, in April 1981, the Board held that it had such authority.[56] In apparent response to this decision, EPA has proposed (but has not yet published in the *Federal Register*) rules which would make clear that even if the Board once had the authority to render regulations invalid, it does not have such authority now.

According to one agency spokesman, the current rulemaking is required because it would be bad law and policy for EPA to allow a board with final decisionmaking authority to rule on the validity of agency regulations.[57] From a legal standpoint, the spokesman notes that allowing the Board of Assistance Appeals to overturn agency regulations might contravene the principle that an agency is bound to follow its own rules. Moreover, according to the spokesman, such a policy might violate the principle that rules should not be made through *ad hoc* adjudication but rather, through the rulemaking process. (*See*, Section 552(a)(1) of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1).)[58] From a policy standpoint, the spokesman suggests that if Board review were allowed to continue, agency program managers could lose control of the agency's funding liability; the facts of one appeal could cause the Board to ignore more general policy and factual determinations underlying a rule; the agency may have to use additional resources to justify its policies and rules to the Board, thereby reducing its ability to defend against outside attacks; and the agency head may be placed in the anomalous position of having to request that Congress enact legislation to accommodate or reverse decisions of the agency's own board.[59]

Prior to August 1981, these considerations were not particularly significant at HHS where Board decisions regarding discretionary grant programs were subject to review by agency heads. To be sure, HHS regulations during that

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55. *See*, discussion, at pp. 161–2, *supra*.
56. Carlstadt Sewerage Authority, EPA Docket No. 79-49 (April 13, 1981).
57. Brown, *supra* n. 43, at 73–74.
58. *Id.* at 74–75.
59. *Id.*

period specifically provided that the Departmental Grant Appeals Board was bound by applicable laws and regulations.[60] However, in at least one appeal involving a discretionary grant, the Board held that it had authority to determine whether a regulation was properly issued, applicable to the dispute, and reasonably consistent with the authorizing statute. (*Hinds County Human Resources Agency*, HHS Docket No. 7911, Decision No. 109 (July 3, 1980).)

In August 1981, the HHS regulations were changed to make virtually all Board decisions final, without any opportunity for Secretarial review. In light of this change, the considerations discussed above with respect to EPA now may be equally relevant to HHS. In any event, the current Board Chairman has indicated some doubt as to whether the decisions in the *Hinds County* case would have the same vitality it once had.

b. The Authority to Waive Duly Promulgated Regulations

A related issue is whether, assuming the validity of duly promulgated regulations, hearing examiners may waive regulations on equitable or other grounds. The agencies' response to this issue appears to be a resounding "No."[61]

c. Authority to Overrule Prior Agency Interpretations (Not Codified Regulations) of Relevant Statutes and the United States Constitution

Where an agency's interpretation or application of a statute or constitutional provision is contested, the HHS and EPA boards have not been reluctant to differ with the agency's position.[62] However, ED's Board has refused to review the validity of the agency's interpretation of a statute.[63]

d. Authority to Evaluate the Substance of Financial Audit and Program Compliance Reports—A Question of Burden of Proof

All of the agencies appear willing to evaluate financial audit and grantee compliance reports, but to differing extents. The extent to which such evaluations will be made generally is expressed in terms of burdens of proof. In some agencies, such as LSC and CSA, the burden of proof to justify the proposed sanction, *e.g.* by a "preponderance of the evidence" or by showing a "substantial basis," rests with the agency. However, in most agencies, such as ED, EPA, and DOL, the grantee has the burden of proving that the agency decision was wrong, *e.g.* in violation of applicable requirements, based on erroneous interpretation of facts or law, or otherwise unreasonable. Where an applicant already has had the opportunity for informal but independent review (such as by an informal review committee of the Public Health Service at HHS) the agency-

60. 45 C.F.R. § 16.14. ED has a similar provision. 34 C.F.R. § 78.61(b).

61. *See, e.g.*, Village of Elburn, EPA Docket No. 77-13 (June 20, 1980). The HHS and ED boards, and DOL Administrative Law Judges have reached similar conclusions.

62. *See, e.g.*, Michigan Department of Social Services, HHS Decision No. 101 (May 23, 1980).

63. *See* California State Department of Education and Richmond Unified School District, 4-(59)-80 (August 30, 1980). This holding seems inconsistent with ED's appeal regulations which state that the Board may interpret statutes and regulations. However, the Board labeled the agency's interpretation an "interpretative rule," the validity of which it could not question.

wide board may review the informal decision only to the extent necessary to determine whether it is clearly erroneous.[64]

e. *Authority to Hold That an Agency is Estopped From Taking Adverse Action*

The HHS and EPA boards both consider it within their authority to hold the agency estopped from taking a particular action because of inconsistent prior action on the part of duly authorized agency officials.[65] For a finding of estoppel, a grantee or grant applicant must show that: (1) there is no written regulation, policy, or other guidance which should have alerted it to the impropriety of the prior action; (2) the prior action was taken by someone duly authorized to do so; and (3) its belief or acceptance of the prior action was reasonable.[66] The boards apparently have found no cases in which all three requirements were met.

9. Where is the Appeal Proceeding Held?

Some agencies, like ACTION, rely on regional appeal proceedings held in regional offices.

Those agencies which have established centralized, Washington-based appeal mechanisms have taken a variety of approaches to dealing with the sometimes long distances between the parties and decisionmaker. DOL gives the site option to the appellant: Hearings may be conducted either in Washington or at a location closer to appellant.[67] LSC similarly provides that any hearing should be held at a place convenient to the appellant and the community it serves. HHS generally conducts all hearings or conferences in Washington, but tries to offset the cost and time involved in long-distance travel by conducting as much business as possible through written submissions and conference calls. Other agencies, notably DOJ, which have combined formal and informal appeals methods, conduct informal proceedings at regional offices (or, in some cases, closer to the grantee's site), and only when an appeal reaches the formal stage, is the proceeding conducted in Washington.

10. What is the Hearing Examiner's Authority to Control a Proceeding?

Most agencies with relatively formal appeals mechanisms (such as HHS, EPA, ED, DOL) authorize hearing examiners to issue binding orders necessary for the conduct of an orderly and fair proceeding, such as orders to assist the parties to obtain testimony or information, orders to assure that deadlines are met, rulings on requests and motions. These orders may be issued pursuant to

64. The same standard was applied with respect to delegate agency appeals of prime sponsor decisions at CSA.

65. *See*, Carlstadt, *supra*; City of Miami Beach, EPA Docket No. 75-26 (July 13, 1980); Lane County Community Mental Health Center, HHS Decision No. 33, (March 3, 1977); United States International University, Decision No. 42 (October 19, 1977).

66. *Id.*

67. In either event, the DOL Office of the Solicitor generally assigns agency representation to attorneys located in regional offices.

Federal Rules of Civil Procedure (as in the case of DOL), or simply as written and/or oral instructions to the parties (as in the case of most other agencies).

11. What Information May be Presented?

The rules of procedure governing the conduct of grant appeals vary from agency to agency. There are several issues which may be considered in this context, such as: (i) the applicability of Federal Rules to Civil Procedure and Federal Rules of Evidence; (ii) whether oral testimony as well as written documentation may be offered; (iii) whether compulsory process (subpoena power) is available; (iv) whether testimony must be given under oath; (v) whether after-the-fact documentation may be offered; and (vi) whether *ex parte* communications are permitted.

a. *Formal rules of discovery and evidence*

No agencies treat grant-related appeals as "mini-trials," subject to the Federal Rules of Civil Procedure and Federal Rules of Evidence. DOL and DOE come the closest: They authorize administrative law judges to use such rules as "guides."

Most agencies which have addressed the issue (such as ACTION, CSA, DOJ, EPA, LSC, HHS, DOL) empower their hearing examiners to decide all issues concerning admissibility of evidence and discovery. Typically, the hearing examiners are authorized to include all relevant information in the appeal record. In addition, most hearing examiners are authorized to order, or at least request, the parties to submit relevant documentation and testimony.[68] At some agencies (EPA and DOE), the appellant is assigned the initial burden of producing documentation in support of its position. Other agencies, such as HHS and ED, do not specify such a burden, but since the appellant has the burden of proof (*e.g.* to prove the allowability of costs), in effect it also bears the burden of production.[69]

b. *Oral testimony*

An initial distinction must be drawn between procedures which afford the parties an opportunity to make informal oral presentations in response to the hearing examiner's questions, and a hearing in which the parties may conduct direct and cross-examination of witnesses. DOL permits hearings in all appeals. CSA and ACTION provide that a grantee is entitled to both informal oral presentations and more formal hearings, but only in instances of grant termination. Most agencies vest discretion in the hearing examiner to determine on an *ad hoc* basis whether informal oral presentations and/or oral testimony are necessary.

In a few agencies, such as HHS, EPA and DOE, different types of appeal methods may be available: (a) appeals based solely on written records; (b) appeals based on written records with conference (non-adversarial) hearings; and (c) full-scale evidentiary hearings. The availability of an oral presentation and/or witness testimony in these agencies depends on which appeal method is selected. If a

68. *E.g.*, ED, EPA, DOL, and HHS.

69. *See*, discussion of burden of proof issue, *supra* pp. 164–5.

conference-type appeal is selected, the parties may make oral presentations in response to questions from the hearing examiner but generally may not examine or cross-examine witnesses. Such conferences may be conducted telephonically. At EPA, if a case involves more than $50,000, the appellant is entitled to select the appeal method, and thus may elect a full-scale hearing with witness testimony. HHS and DOE do not automatically permit full-scale oral hearings in any case. At HHS, for example, an appellant may request a full oral hearing but the request will be approved only if: (1) the Board finds that there are complex issues or material facts in dispute, the resolution of which would be significantly aided by a hearing; (2) for other reasons, the Board concludes that oral argument would be helpful; or (3) a hearing is required by law or regulations. DOE generally will provide an "adversary evidentiary hearing" only if there are complex facts in dispute. ED simply decides whether an oral hearing is necessary to clarify the issues in dispute.

c. *Compulsory process*

Most agencies have not dealt with this issue, or have determined that compulsory process in grant appeals is not necessary. These agencies simply encourage the parties to cooperate in developing a complete appeal record.

Some exceptions are: (a) DOL, where an ALJ may order discovery under the Federal Rules of Civil Procedure as well as issue subpoenas to secure the attendance of witnesses; (b) DOE's Board of Assistance Appeals, which may order the production of documents and other evidence, issue subpoenas and order depositions; (c) DOJ, which has specific procedures permitting discovery, including the taking of depositions and serving of interrogatories; and (d) HHS, which may issue show cause orders and "request" the submission of written witness' statements and documents. ED specifically does not have authority to issue subpoenas.

d. *Administering an Oath*

Most agencies do not specifically require that oral testimony be given under oath.[70] However, HHS indicates that false statements by a witness may subject the witness to criminal prosecution.[71]

e. *After-the-fact documentation*

Whether an appellant may justify questioned conduct with after-the-fact documentation, is an issue typically arising in the context of audit disallowances.[72] HHS has addressed this issue on several occasions, and appears willing to consider such documentation, provided it is specific and precise.[73] No agency

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70. DOE is an exception. *See*, 45 C.F.R. § 1024.4, Rule 5(b)(3).

71. *See*, 45 C.F.R. § 16.11(d)(3).

72. "After-the-fact" documentation refers to documentation that was prepared or issued subsequent to the event in question. Thus, for example, a grantee's affidavit that certain cost comparisons had been undertaken prior to a purchase completed at the time of the signing of the affidavit would be considered "after-the-fact" documentation.

73. In fact, in none of the written decisions of the Board, has a disallowance been reversed in reliance on after-the-fact documentation. *See*, *e.g.*, Head Start of New Hanover County, Decision No. 65 (September 26, 1979); Neighborhood Services Department, Decision No. 110 (July 15,

prohibits the submission of after-the-fact documentation, but it is unclear whether many would be willing to rely on it.

f. *Ex parte communications*

Virtually every agency which has developed formal grant appeals procedures prohibits *ex parte* (off-the-record) communications about the merits of an appeal.[74] However, communications concerning administrative or procedural questions often are not prohibited.[75]

Recognizing, however, that parties nevertheless may attempt to influence the outcome of appeals by initiating such contacts, a few agencies have developed procedures to handle these attempts. HHS, for example, provides that if such a communication is made either to a Board or staff member, it must be disclosed to the other party and made a part of the record after the other party has had an opportunity to comment.[76] ED has similar requirements. EPA's Board records the substance of any *ex parte* communication and sends it to the other party.

None of the agencies expressly characterize congressional or other outside contacts as *ex parte* communications subject to disclosure and comment rules. In practice, however, it seems such contacts are treated as *ex parte* communications.[77]

In any event, most agencies require that the appeals decision be based only on documents and testimony which are part of the record.[78]

11. What Impact do Timeliness Considerations Have?

On June 26, 1978, the Administrative Conference of the United States issued Recommendation 78–3, "Time Limits on Agency Action," which encouraged agencies to adopt reasonable time limits or guidelines for the prompt disposition of adjudicatory and regulatory actions. This recommendation has been largely ignored in the grant appeals arena.

Rather, proceeding through an agency's appeals mechanism has proven to be a time-consuming affair, sometimes more time-consuming than litigating a dispute in court.[79] The agencies offer a variety of explanations for the delays, such as: (1) understaffed boards; (2) understaffed General Counsel's Offices (to represent the agency); (3) non-Federal individuals or part-time employees who serve as hearing examiners, but have other priorities and may need training to

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1980). Board officials suggest that where adequate after-the-fact documentation is produced, the agency typically withdraws the disallowance (before a formal decision is reached by the Board).

74. *See, e.g.*, 45 C.F.R. § 16.17 (HHS); 34 C.F.R. § 78.47 (ED).

75. *See, e.g.*, 45 C.F.R. § 16.17(a); 34 C.F.R. § 78.47.

76. *See*, 45 C.F.R. § 16.17(b).

77. In a recent appeal to the HHS Board, East Bronx Community Health Association, Inc., Docket No. 81-191 (January 29, 1982), a Congressman urged the Board to rule in the appellant's favor. The Board Chairman sent a copy of the letter to both parties as well as a copy of his response to the Congressman, in which he thanked him for his interest and promised to send a copy of the decision once rendered. This response seems typical.

78. *See, e.g.*, 45 C.F.R. § 16.21(a) (HHS); 20 C.F.R. § 676.20(c) (DOL).

79. At ED, the average case takes 2–4 years to resolve; at EPA, the average is 1–3 years; at DOJ and DOL, 1 to 1½ years.

handle the cases; (4) settlement efforts which require the relaxation of deadlines; and (5) built-in incentives for the delay of proceedings, particularly in cost disallowance appeals.[80]

Although delays in the context of cost disallowances may be advantageous to grantees, delays in other types of disputes may be devastating. Prime examples are disputes arising in the pre-award context. Such disputes could take several forms: (1) a rejected grant applicant, claiming that a Federal agency improperly denied its application; (2) a community-based organization, claiming that a State or local government serving as a Federal grantee improperly denied its application for subgrant funds; or (3) a construction company claiming that a Federal grantee improperly rejected its bid for contract construction work under a grant. In all of these cases, the awarding agency (Federal, State, or local) may have awarded available grant funds to other parties at the same time it denied appellants' bids or applications. Unless the appeals are handled promptly or on an expedited basis, the grant funds will be expended before the appeal is resolved. At that point, unless the awarding agency (Federal, State or local) has available additional funds, the appellants may have no viable remedy.

Furthermore, it should be noted that in all types of disputes—even the cost disallowance proceedings discussed above—delays may have a definite impact upon the conduct and outcome of an appeal. Records both inside and outside the Government have a tendency to be lost or destroyed as time goes by; staff turnovers often result in key personnel being absent by the time the appeals reach a critical stage. Moreover, from the appellant's standpoint, delays often mean money. Additional attorney or consultant time may be necessary to review or resurrect records. Duplicative efforts may have to be made to advise or negotiate with newly-arrived Federal officials.

A few agencies are trying to speed up the process. For example, HHS and EPA recently have developed expedited appeals methods for relatively uncomplicated cases, and encourage the use of conferences rather than full-scale hearings even in moderately complex appeals.[81] Both agencies have developed the staff capability to manage large caseloads, and the staffs carefully monitor the progress of each case, setting deadlines for filing and contacting the parties regularly to ensure that deadlines are met. The use of permanent Board members at both agencies has served to reduce delays. HHS will dismiss appeals if grantees repeatedly miss deadlines; however, it will not reverse the agency decision if the agency causes delay.[82]

Of course, in emergency situations, grantees may seek to circumvent administrative appeals by suing the agency in court. Typically, the first defense

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80. Interest may not be charged on outstanding disallowances until they become final, *i.e.*, after the grantee has fully exhausted its appeal rights.

81. See discussion at pages 155–7, *supra*.

82. In response to comments critical of the Board's unwillingness to reverse agency decisions because of timeliness concerns, the Board stated that: "There is a substantial legal and policy question whether the Board could or should take an action effectively precluding HHS from recouping funds which HHS determines the grantee possesses or claims illegally." 46 Fed. Reg. 43817 (Aug. 31, 1981).

raised by the agency will be that the grantee must exhaust administrative remedies.[83] While there are certain limitations to the exhaustion doctrine,[84] grantees may be hard pressed to obtain relief, especially where the agency has an expedited appeals process. Indeed, ED specifically states in its appeals regulations that bringing a lawsuit prior to administrative appeal is a failure to exhaust administrative remedies. 34 C.F.R. § 78.7.

With respect to one agency, ED, Congress has taken the initiative in trying to cope with the massive delays. In 1974, Congress enacted legislation which excused audit disallowances which had not been resolved within five years.[85] This "statute of limitations" resulted in the forgiving of millions of dollars in questioned costs to ED grantees.

12. Do Grant Appeals Decisions Have Precedential Value?

None of the agency appeal regulations provide that precedential weight must be accorded to appeals decision. However, as a practical matter, the appellate bodies generally seem guided by prior decisions.

A more difficult issue may be whether other components of an agency consider themselves bound by grant appeal decisions. At HHS, there has been at least one problem in this regard. In *Wayne State University*, Docket No. 21, Decision No. 12 (Dec. 12, 1975), the Departmental Grant Appeals Board held against the National Institutes of Health (NIH) in a case involving the issue of whether certain types of compensation should be charged as "research fellowships" or "stipend payments." NIH, however, refused to change its policies to reflect the Board's decisions. Indeed, quite the opposite occurred: When other educational institutions sought to use the *Wayne State* decision as precedent for research fellowship classification, they were told flatly that the decision did not govern. Thus, the Chief of Audit Resolution for NIH advised an educational institution that:

> The Wayne State case was not precedent setting for a later case involving the same principal issue.[86]

This type of agency response to Board decisions suggests a number of important implications. First, even if a grantee were to receive a favorable ruling from a

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83. The doctrine of exhaustion provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipping Corp., 303 U.S. 41, 50–51 (1938). The rationale for the doctrine is the need to let the administrative process develop the factual record for its decisions and exercise its expertise and discretion accordingly (without premature interruption by the courts). It also is an expression of executive and administrative autonomy.

84. *See, e.g.*, McKart v. United States, 395 U.S. 185 (1969) (no need to exhaust where issue is purely legal rather than factual, and does not involve agency discretion); Cannon v. University of Chicago, 99 S. Ct. 1946, n. 41 (1979) (private judicial remedy available where statute explicitly confers a benefit on a class of persons but does not assure those persons the ability to activate and participate in the administrative proceedings).

85. 20 U.S.C. § 884 (1975).

86. Confidential letter from Jacob Seidenberg, Chief, Audit Resolution Section, NIH, to counsel for educational institution, Dec. 4, 1978.

grant appeals mechanism, it may not be assured of continued proper treatment without further appeals. Second, there may be an inequity between those grantees which are willing and financially able to bring appeals and those which are not. Third, the agency's caseload may be burdened with repetitive appeals of virtually the same issue. Although these appeals presumably could be handled in some form of expedited manner, they nonetheless would impose an added workload.

13. Are Grant Appeals Decisions Disseminated or made Available to the Public?

With few exceptions, appeals decisions are not published, and few agencies have any "system" for notifying grantees of their decisions. Indeed, several agencies have no system for maintaining a central file of appeals decisions.

HHS, ED and EPA keep decisions in a centralized location, and disseminate them periodically to designated agency officials and persons outside the agency who request copies of decisions. These agencies maintain a central index file at the boards' offices in Washington. From time to time, summaries of HHS and ED decisions are published in the *Federal Register*. DOL decisions are maintained by the clerk of the Office of Administrative Law Judges.

Notwithstanding these efforts, it is difficult to track large numbers of grant-related disputes, and to ascertain case precedent. This is so for several reasons. *First*, several agencies, such as HUD, DOT, NSF (and a host of agencies with relatively small grant programs), do not have formal appeals procedures. Even agencies which have such procedures invariably attempt to resolve disputes informally, *e.g.* through negotiation or reconsideration. The agencies rarely maintain a system of records to track disputes which are resolved informally.[87]

Second, a few of the larger grantor agencies do not have an agency-wide office of grants administration and do not deal with disputes in a centralized manner. Accordingly, examination of dispute resolution at the Departments of Commerce and Agriculture reveals varying levels of attention to grant disputes among sub-agency components. Some components have no appeals mechanism (and no records of appeals) while other components have formal grant appeals boards. These agencies do not track disputes in any centralized fashion.

Third, even some of the agencies with formal appeals procedures do not keep track of grant appeals. Thus, LSC, CSA and ACTION, for examples, were able to identify a few instances in which terminations and denials of refunding were appealed, but identifying those appeals appeared to be a hit-or-miss proposition. The problem is compounded in agencies, such as ACTION, which handle appeals at the regional office level. In those agencies, no centrally-located appeals file is kept.

87. There are a few exceptions. DOJ, HHS, DOL and EPA have tracked formal appeals which have been resolved informally, *e.g.* settled or withdrawn. NSF has kept track of requests for reconsideration of rejected applications. These agencies, however, only keep track of appeals which have been filed formally.

C. *Appeals Actually Brought*

1. *Numbers*

During the ten-year period from 1970 to 1980, more than 1,700 grant-related appeals had been brought before the appeal mechanisms discussed above. A closer look at the period shows a clear upswing in cases towards the end of the period.

Not surprisingly, most of the appeals have been brought before agencies which administer large grant programs. Thus, for example, during this period, more than 420 appeals were filed with the Departmental Grant Appeals Board of the Department of Health and Human Services (and its predecessor, the Department of Health, Education and Welfare); and more than 821 grant-related appeals were filed with the Department of Labor's Office of Administrative Law Judges.[88] Other agencies, such as the National Science Foundation and Department of the Interior, reported no or only a few disputes.[89]

These figures may represent only the tip of the grant dispute iceberg. Many disputes are resolved informally without any paper trail or recordation and, therefore, are unrepresented in our survey. Moreover, even where paper trails exist, many agencies lack any tracking system or centralized method for ascertaining the number and types of disputes brought. *See*, pp. 00–00, *supra*

2. *Dollar Amounts*

The dollar amounts involved in these appeals is significant: At HHS alone, appeals involving more than $200 million have been considered by the Departmental Grant Appeals Board. At DOL, amounts subject to appeal are estimated at more than $150 million; at EPA, more than $50 million; at DOJ, more than $18 million. The amount subject to appeal in individual cases has ranged from less than $100 (in an HHS appeal) to an estimated $50 million (also in an HHS appeal).

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88. It should be noted that 548 of the DOL appeals involved disputes concerning individual CETA participants. The remaining 273 appeals involved disputes between DOL and grantees, as well as grantee-subgrantee disputes.

89. The caseload in other agencies surveyed was as follows:

EPA: 208; USDA: 130; DOJ: 109; ED: 65; LSC: 20; NFAH: 11; Commerce: 9; CSA: 5; ACTION: 4; DOE: 1.

The agencies' perceptions with respect to these figures *vis-a-vis* the need for elaborate grievance procedures vary. For example, NSF officials state that the few number of disputes raised before their agency evidence the fact that formal appeal procedures are not necessary. On the other hand, however, these same officials express concern that, if more elaborate procedures existed, more appeals would be brought. Interviews with William Cole, Director of the Division of Grants and Contracts, NSF, (Washington, D.C., June 1980 and March 5, 1982). Officials at DOL generally refute this latter concern. According to them, the main variable in an agency's number of appeals is the policy underlying enforcement and settlement decisions. If an agency is willing (and legally able) to compromise, for example, audit disallowances, the number of disputes will decline; conversely, if grantees are required to repay full amounts disallowed, the number of appeals may increase. Interview with Chief Judge Nahum Litt, Office of Administrative Law Judges (Washington, D.C., May 5, 1982).

3. Issues

The types of appeals brought vary from agency to agency, and, in some cases, from program to program. However, in the aggregate, the vast majority of grant-related appeals pertain to cost allowability issues, *i.e.* whether a grantee properly expended grant funds. Most of these appeals have arisen as a result of Federal audits of grant funds. Recurring issues in these appeals include: (1) inadequate documentation; (2) improper cost allocation; (3) costs in excess of budgeted amounts; (4) allowability of certain costs (such as the purchase of equipment) without prior approval; and (5) allowability of preaward costs.

The second most common type of appeal (and most prevalent at EPA and DOJ) involves certain types of pre-award disputes. At EPA, local governments frequently challenge agency determinations that a locality or the locality's proposed project is ineligible for grant funding. At DOJ, appeals of both entitlement and discretionary grants are common. At DOL, disappointed applicants for CETA funds (at both the prime grant and subgrant levels) frequently challenge agency determinations of ineligibility and/or agency straying from pre-established review criteria and procedures. At HHS, there have been very few pre-award appeals, primarily because the jurisdiction of the Departmental Grant Appeals Board was extended to pre-award disputes only in limited circumstances and only as of August, 1981.[90]

Appeals involving indirect and other cost rate determinations occur most frequently at HHS. (This fact is not surprising since the Office of Management and Budget has assigned responsibility to HHS for the negotiation and approval of cost rates for many grantees—including State and local governments, hospitals, colleges and universities—which receive Federal grant funds from several agencies.) Recurring issues in such appeals are whether certain costs may be treated as indirect costs, whether certain elements of cost should be included in the rate determination, and whether the rate may be reduced retroactively.

No agency has had more than a handful of appeals involving grant terminations and suspensions. There apparently has been only one appeal (at DOL) involving the debarment of a grantee.

4. Parties

The type of grantee (such as States, units of local government, educational institutions, and non-profit organizations) bringing any particular type of appeal depends upon the nature of the grant program involved. Thus, to give an obvious example: Because States are the only eligible recipients of mandatory Social Security Act grants, States are the only appellants in Social Security Act appeals brought before the HHS Board. Similarly, local governments are the primary recipients of EPA's Clean Water Act grants, and, therefore, account for most

90. HHS grant appeal regulations now provide that the Board has jurisdiction to hear appeals from denials of continuation grants where the denial is based on the grantee's failure to comply with the terms of a previous award. *See* 45 C.F.R. Part 16, Appendix A, Section C(3). Denials of continuation grants based on budget constraints are not appealable. *East Bronx Community Health Association*, Docket No. 81-191 (appeal dismissed, January 29, 1982).

of the grant appeals brought before EPA. Where program eligibility is more diverse (such as under the CETA program at DOL), the types of appellants are similarly diverse.

Looking at the entire grants picture, more appeals are filed by State governments than any other single category of grantees or grant applicants. The bulk of these appeals has been filed at HHS and DOJ. Appeals brought by local governments (primarily at DOL, EPA, and DOJ) run a close second. Appeals brought by educational institutions and non-profit organizations run third.

Moreover, it should be noted that the appeals brought by State and local governments involved, on a case-by-case and aggregate basis, significantly greater amounts of dollars than those involved in appeals brought by educational institutions and non-profit organizations.

5. Outcomes

In grant appeals, sometimes the grantee or disappointed applicant wins, sometimes the agency wins; but, more often than not, neither party wins outright: Appeals are settled informally and/or some issues in an appeal are decided in favor of the grantee or applicant, and some are decided in favor of the agency. Especially in audit appeals, the great majority of cases are resolved in this manner.

HHS provides an interesting example. As of December, 1980, 149 of the 420 appeals brought before the Departmental Grant Appeals Board were settled or withdrawn prior to the issuance of a written decision by the Board. Of the approximately 140 appeals in which written decisions were issued, 58 percent of the cases were decided wholly in favor of the agency; 19 percent of the cases were decided wholly in favor of the grantee; and 23 percent of the cases were decided in part in favor of the agency and in part in favor of the grantee.[91]

In dollar terms, the rough outcomes of HHS written decisions were as follows:[92]

	Favorable to Agency	*Favorable to Grantee*	*Split*
Dollar Value (where known)	$104 million	$3.2 million	$3.6 million

There are two important *caveats* to these figures. First, in many appeals, the amounts subject to dispute were not ascertainable from available records. Second, one of the appeals which culminated in a decision adverse to the grantee involved a significant portion of the amount recorded—approximately $50 million. Large

91. These figures are based on our independent review of HHS appeal files as of December, 1980. During the next four-month period—from January 1981 through April 1981—approximately 35 additional decisions were issued by the Board. In April, 1981, the Board chairman advised the Secretary of HHS that 59 percent of the decisions of the Board upheld agency action, 17 percent were in favor of the grantee, and 24 percent were resolved partly in favor of the agency and partly in favor of the grantee.

92. *See* HHS chapter for a further breakdown of these figures.

amounts in other (notably Social Security Act) appeals also may skew the analysis.

Other agencies also have had interesting experiences. For example, the outcome of DOJ's appeals overwhelmingly favor the agency. DOJ officials explain that this is due to attorney involvement in every stage of the dispute, and that the attorneys "weed out" or settle "bad" cases, i.e. cases which the agency probably would lose. The outcomes also are attributed to the agency's successful informal resolution efforts. LSC's track record—and proffered justification—are the same. EPA's outcomes are split in the pre-award dispute context, but post-award disputes tend to be resolved in favor of the agency. In "win-loss" terms, ED decisions have been distinctly anti-grantee, but in monetary terms the outcomes have been split.

III. The Legal Nature of a Grant

While Federal grantmaking agencies have been engaged in developing and utilizing grant dispute resolution procedures, it has been left to Congress and the courts to consider the fundamental issue of what is a grant. In the Federal Grant and Cooperative Agreement Act of 1977,[93] Congress sought to distinguish a grant from a Federal procurement contract, and to identify certain major grant characteristics. In case law dating back to the 1800's, Federal courts have sought to define the legal nature of a grant, and to compare it to more traditional legal instruments, such as gifts, trusts, and contracts.

This part of the report reviews these efforts. It begins with a discussion of the congressionally-created Commission on Government Procurement, which, in 1972, called for legislation to clarify the interrelationship between Federal grants and procurement contracts. It next considers the Federal Grant and Cooperative Agreement Act, and a Governmentwide study conducted pursuant to that Act. Finally, the section reviews the century of case law which analogizes grants to contracts, gifts, and trusts.

Consideration of these issues is important to this study for at least two reasons. *First*, Congress and administrative agencies have established elaborate procedures for disputes arising under Federal procurement contracts.[94] As designed and implemented, these procedures allow contractors and disappointed bidders a full panoply of notice, discovery, hearing, and appeal rights. In assessing and making recommendations regarding grant dispute resolution procedures, the Conference (and Congress) may wish to consider the rationale upon which the distinction between grants and procurement contracts is based.[95]

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93. 41 U.S.C. §§ 501–509.

94. *See, e.g.*, the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.*

95. A certain note of irony must be interjected at this point. From the agencies' perspective, one of the fundamental distinctions between grants and procurement contracts is that whereas the Federal Government is engaged in a business, arms-length relationship with contractors, it is in a closer "partnership" relationship with grantees. Moreover, it is understood that whereas contractors generally engage in dealings with the Government for their own benefit (i.e. profit), grantees'

Second, the legal nature of a grant may have serious implications in light of constitutional due process concerns. In the following discussion we show that, notwithstanding other legal theories advanced through the years, grants are essentially contractual in nature. Because courts consistently have found that contracts give rise to constitutionally-protected property interests, the conclusion of this part of the study suggests that, at least under certain circumstances, even if agencies refuse to give notice and hearing rights to grantees, such rights may be mandated by the Constitution.

With these factors in mind, we proceed.

A. The Commission on Government Procurement: A Call for Distinction Between Grants and Procurement Contracts

1. The Commission's Mandate and Findings

In 1969, Congress established a Commission on Government Procurement to study, among other things, the interrelationship between Federal grants and procurement contracts.[96]

The Commission's focus on grant activities was narrow. As stated in the Commission's final report, the purpose of the grants study was:

> "to gain an understanding of the significance, if any, of the interchangeable use of grants and contracts and of the extent to which procurement rules and regulations are or should be applied to grant-type assistance programs."[97]

The Commission found that, as of the early 1970's:

> Federal grant-type activities are a vast and complex collection of assistance programs, functioning with little central guidance in a variety of ways that are often inconsistent even for similar programs or projects. This situation generates confusion, frustration, uncertainty, ineffectiveness, and waste.

Report, p. 153.

Three aspects—or causes—of the "disarray" were identified. The first dealt with terminology and practice, and the fact that there was no single or

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dealings are on behalf of the public, and any monetary sanctions imposed must come from the public weal. Yet, as indicated above, the Government typically chooses to give less notice and hearing rights and other procedural protections to grantees—even when the Government is asking a grantee to repay millions of dollars of grant funds. In such cases, grantees may well wish to be considered as arms-length intruders rather than as close partners.

96. The Commission was established pursuant to Pub. L. 91-129. It was comprised of two members of the House of Representatives, a public member appointed by the Speaker of the House, two members of the Senate, a public member appointed by the President of the Senate, two members of the Executive Branch, three public members appointed by the President of the United States, and the Comptroller General of the United States.

97. Report of the Commission on Government Procurement, Volume 3, Part F at 153 (Dec. 1972) (hereinafter "Report"). The Commission's mandate to study grants first was discussed in congressional hearings preceding the enactment of Pub. L. 91-129. *See*, U.S. Congress, House, Committee on Government Operations, Government Procurement and Contracting (Part 6), hearings on H.R. 474 before a Subcommittee of the Committee on Government Operations, 91st Cong. 1st Sess., May 15–21, 1969, pp. 1636–1637.

precise meaning of the term "grant." The second dealt with statutes which compounded the confusion by creating inconsistent standards and grant requirements. The third dealt with the lack of Federal control and guidance on grant-related matters.[98] Each of these issues is discussed more fully below.

a. Terminology and Practice

The Commission's chief finding was that the term "grant" had no single or precise meaning. (Report, p. 156). In fact, the Commission found that grants and procurement contracts were used interchangeably (within agencies and among agencies) for the same types of projects. The Report states:

> Some agencies admit that they use grants to avoid the requirements, such as advance payment justifications, which apply to contracts. Some agencies use more grants in June to obligate funds before the end of the fiscal year because grants are quicker to process than contracts. Some program officials who have responsibility for negotiating and administering grants, but not contracts, tend to shift to contracts when they are busy in order to place the workload elsewhere.

Id. at 157.[99]

b. Statutes

The Commission's Report states:

> Enabling and appropriation statutes for grant programs cause confusion. As a group they lack consistency in requirements, terminology, level of details, and emphasis.

Report, p. 159. Moreover, as noted by the Commission, the statutes are inconsistent in specifying the circumstances under which grants (as opposed to procurement contracts) should be used. Some statutes require the use of grants when a procurement contract would appear to be the more appropriate instrument; others authorize procurement contracts for grant-type activities. Such statutes, according to the Commission:

> are a major source of the government-wide inconsistency, confusion, and uneven management attending Federal grant-type assistance. *Id.*

c. Federal Control and Guidance

The Commission found uncertainty, at both the Federal and recipient levels, as to what the roles and responsibilities of grantor agencies and recipients should be. As the Commission stated:

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98. *Id.*

99. The Commission also found wide variance in the level of administrative involvement in grant programs. In this regard, the Commission noted a general recognition of the Executive Branch's tendency to over or underadminister grant-type programs. Citing authorities from the Office of Management and Budget, General Accounting Office, and Congress, the Commission concluded:

> Too much, too little, or the wrong kind of Federal involvement demonstrates uncertainty concerning the relationships of the Government and the recipient in many of these programs.

Id. At 158. Finally, the Commission found that grant-type instruments revealed wide variances in agency requirements. Of particular note here were agency requirements dealing with contracting under grants.

> Agencies often do not know to what extent Congress expects Federal control of, or participation in, a program or the extent to which the agency and its program officials will be responsible for the activities of recipients.

Report, p. 159. According to the Commission, the confusion may be exacerbated by the variety of media used to issue Governmentwide guidance to granting agencies and the fact that such guidance is not issued systematically.

2. *The Commission's Recommendations*

To deal with these problems, the Commission made two sets of recommendations. First, the Commission recommended that legislation be enacted to:

> (1) distinguish assistance from procurement by restricting the term "contract" to procurement relationships and by requiring the use of other instruments to implement assistance relationships; (2) distinguish among grant-type relationships by introducing a "new" instrument (cooperative agreement) to accommodate the assistance relationships requiring substantial Federal/non-Federal interaction during performance; (3) override statutes which prevent the agencies from using the most appropriate instrument in each grant-type and procurement situation; and (4) give the agencies new authority to use grant-type instruments in situations which call for them.

Report, p. 153.

Second, the Commission recommended that the Office of Federal Procurement Policy (within the Office of Management and Budget) be urged to:

> undertake or sponsor a study of the feasibility of developing a system of guidance for Federal assistance programs and periodically inform Congress of the progress of this study.

Id., p. 168.

In its report, the Commission expanded upon these recommendations, and their underlying need. For example, with respect to the first set of recommendations, the Commission pointed out that grant-type assistance differed from procurement contracts in their basic design and purpose. Assistance typically is designed to support, stimulate, or aid a recipient's activities in furtherance of public policy. Procurement is solely for the purchase of goods or services for the primary benefit of the Government. The Government's role in assistance relationships generally is more that of a patron or partner, rather than that of a purchaser in a formal, arms-length bargaining relationship.

With respect to the second recommendation (*i.e.*, further study of the feasibility of a Governmentwide system of guidance), the Commission reported:

> [T]he stimulus to achieve maximum efficiency, consistency, simplicity, and effectiveness is likely to come only from a Government-wide assistance system spelling out the rationale for and specific guidance on methods, techniques, and requirements for assistance transactions and relationships. Such a system would illuminate grant-type programs and the ways they are carried out so as to permit public scrutiny and encourage better understanding and needed improvements.

Report, p. 167.

The Commission suggested that the system of guidance might be regarded as an analogue to the system of Federal procurement regulations. Accordingly, the Commission suggested a process and framework for developing appropriate guidance.[100] As the Commission concluded:

> An important by-product of [this] effort . . . is likely to be the emergence of better ways of defining the nature of Federal assistance. . . . The continuing increase in the number, size, and complexity of Federal assistance programs and the increasing billions of dollars appropriated for assistance underline the urgency of this task.

Report, p. 171.

B. The Federal Grant and Cooperative Agreement Act of 1978: Answering the Call

1. From Recommendations to Law

a. Formal Adoption of Commission's Recommendations

After the Commission on Government Procurement submitted its report to Congress in December 1972, the Executive Branch convened separate interagency Task Groups to review the Commission's two recommendations on grant matters. The Task Groups issued favorable reports on the two recommendations on September 19, 1973, and on March 1, 1974, respectively.[101] The Executive Branch formally accepted the Commission's recommendations on June 23, 1975.[102]

b. Congressional Actions

Even before the Executive Branch had reviewed and accepted the Commission's grant recommendations, bills were introduced in the 93rd Congress to give the recommendations the force and effect of law. Thus, on June 28, 1973, a bill was introduced to implement the Commission's first recommendation. The bill—H.R. 9060—sought to distinguish Federal procurement and grant-type assistance transactions, to standardize the use of legal instruments for these types of transactions, and to authorize the use of procurement or grant-type instruments, as appropriate. On the same day, H.R. 9059 was introduced to create an Office of Federal Procurement Policy. Section 14 of that bill embodied the Commission's second recommendation for further study. On the Senate side, S. 3514, styled the Federal Grant and Cooperative Agreement Act of 1974, was introduced. This bill incorporated both of the Commission's recommendations on Federal grant-type activities. None of these bills was enacted.[103]

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100. The suggested framework included provisions for dispute resolution.

101. Hearings before the Subcommittee on Federal Spending Practices, Efficiency and Open Government and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations on S. 1437, 94th Cong., 2d Sess., March 23 and April 5, 1976, 221, 230, cited in S. Rep. No. 95-449, 95th Cong., 2d Sess. 4, notes 2 and 3 (Sept. 22, 1977).

102. *Id.* at 112.

103. Although hearings were held on both H.R. 9059 and H.R. 9060, neither bill was reported by the House Subcommittee. Joint hearings were held during the summer of 1974 on S. 3614 by

In the 94th Congress, Senate Bill S. 1437, styled the Federal Grant and Cooperative Agreement Act of 1975, was introduced. This bill, essentially a reintroduction of the 93rd Congress' S. 1437, was reported by the Senate Committee on Government Operations;[104] a companion bill was reported by the corresponding House committee.[105]

Both the Senate and House passed the legislation, and on October 1, 1976, forwarded it to President Ford for signing. President Ford withheld approval and pocket vetoed the legislation. In his Memorandum of Disapproval, the President indicated that while there was "confirmed support for the objectives of the legislation," a recently completed OMB study had "led to serious questions as to whether, at this point legislation is necessary or desirable."

Virtually identical legislation was introduced again during the 95th Congress. This time the bill was styled the Federal Grant and Cooperative Agreement Act of 1977, S. 431. Essentially a reintroduction of the legislation that passed the Senate in both the 93rd and 94th Congress, S. 431 was reported by the Committee on Governmental Affairs, as amended, on August 2, 1977.[106] It passed the Senate on October 1, 1977. Its companion bill, H.R. 7691, was reported by the House Committee on Government Operations on July 1, 1977[107] and passed by the House on September 27, 1977, and then again on January 19, 1978, to reflect minor differences in bill language embodied by the Senate version. President Carter signed the bill into law on February 3, 1978. (Pub. L. No. 5-224).

2. The Act's Provisions

Despite the fact that it took three sessions of Congress to be enacted, the Federal Grant and Cooperative Agreement Act of 1978 basically reflects what was its original impetus— the grant recommendations of the Commission on Government Procurement. It, therefore, is quite limited in scope.

The provisions in the Act, according to the Senate report, "give statutory expression to the initial steps needed to correct the problems in Federal grant-type activities described by the Commission."[108] Like the Commission, the Congress found legislation was needed to distinguish Federal assistance from Federal procurement relationships, as well as to standardize usage and to clarify the meaning of the legal instruments which reflect these relationships (§ 2(a)(1) of the Act). In addition, Congress agreed with the Commission that the meaning

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the Ad Hoc Subcommittee on Federal Procurement and the Subcommittee on Intergovernmental Relations of the Government Operations Committee. The Government Operations Committee reported S. 3514 as amended on October 7, 1974, S. Rept. 93-1239. It passed the Senate two days later.

104. S. Rep. 94-1180, 94th Cong., 2d Sess.

105. H. Rep. 94-1572, 94th Cong., 2d Sess. (Sept. 16, 1976).

106. S. Rep. 95-449.

107. H. Rep. 95-481, 95th Cong., 2d Sess. (July 1, 1977) (Government Operations Committee).

108. S. Rep. 95-449 at 7.

of the terms, "contract," "grant," and "cooperative agreement," as well as the relationships they reflect, are uncertain and that this uncertainty "causes operational inconsistencies, confusion, inefficiency, and waste" for recipients and executive agencies (§ 2(a)(2) of the Act).[109]

The stated purposes of the Act are as follows:

- To characterize Federal/non-Federal relationships in the acquisition of property and services and in the furnishing of assistance by the Federal Government so as to promote a better understanding of Federal spending and help eliminate unnecessary administrative requirements on recipients of Federal awards;
- To establish Government-wide criteria for the selection of appropriate legal instruments, to achieve uniformity in their use by the executive agencies which offer such instruments, a clear definition of the relationships they reflect, and a better understanding of the responsibilities of the parties;
- To promote increased discipline in the selection and use of contracts, grant agreements, and cooperative agreements;
- To encourage competition, as appropriate, in the award of contracts, grants and cooperative agreements; and
- To require a study of Federal/non-Federal relationships in Federal assistance programs that should lead to the development of a comprehensive system of guidance for Federal assistance programs.

To address these findings and purposes, the Act establishes Government-wide criteria for selecting the appropriate class of legal instruments to be used by Federal agencies. Following the Commission's recommendations, Sections 4–6 of the Act describe the appropriate use of a "procurement contract," a "grant agreement," and a "cooperative agreement." The Act does not define these instruments, or discuss the rights and responsibilities arising from them. Nor are the exact terms, conditions, and clauses that are contained in these types of instruments necessarily determined by the mandated criteria. Rather, tracking the Commission recommendation, the Act simply sets forth circumstances and conditions under which each instrument is to be used. They are as follows:

- *Contract*

  Whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government;

  or

  Whenever an executive agency determines in a specific instance that use of a type of procurement contract is appropriate.

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109. The Senate Report stated, as the Commission had found earlier, that this situation had given "rise to inappropriate practices by Federal agencies, including the use of grants to avoid competition and certain requirements that apply to procurement contracts." S. Rep. 95-449, p. 7.

- *Grant*
  Where the principal purpose of the relationship established is the transfer of money, property, or services, or anything of value to the recipient to accomplish a public purpose of support or stimulation;
  and
  No substantial involvement is anticipated between the Federal agency and the recipient during performance of the contemplated activity.
- *Cooperative Agreement*
  Where the principal purpose of the relationship established is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation;
  and
  Substantial involvement is anticipated between the Federal agency and the recipient during performance of the activity.

Recognizing that the above criteria are broadly worded, Section 9 of the Act authorizes the Director of OMB "to issue supplementary interpretative guidelines to promote consistent and efficient use of contracts, grants agreements, and cooperative agreements . . . ."[110] In addition to classifying legal instruments to be used in certain Federal transactions, the Act also provides Federal agencies with authorization to enter into the relationships it describes (§ 7(a) of the Act). This provision was designed to overcome the problems some agencies faced of having their choice of instrument statutorily restricted to a particular instrument. However, the Act is not designed to supersede a provision of law which specifically prohibits an agency from using a particular type of instrument.[111]

Section 8 of the Act implements the Commission's study recommendation by instructing the Director of OMB, in cooperation with other Executive agencies, to "undertake a study to develop a better understanding of alternative means of implementing Federal assistance programs, and to determine the feasibility of developing a comprehensive system of guidance for Federal assistance programs." The study was to be transmitted to Congress within 2 years and was to include a "thorough consideration" of the findings and recommendations of the Commission on Procurement. Three areas of study were required to be included in a report:

- Detailed descriptions of the alternative means of implementing Federal assistance programs and of the circumstances in which use of each appears to be the most desirable;
- Detailed descriptions of the basic circumstances and an outline of a comprehensive system of guidance for Federal assistance programs which may be feasibly developed; and

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110. According to Senate Report No. 95-449, *supra* at 10, these distinctions provide only a "structure which will enable the Federal agencies to make disciplined choices and decisions on their roles and responsibilities and the roles and responsibilities of recipients."

111. S. Rep. 95-499 at 10.

- Recommendations concerning (a) arrangements to proceed with full development of the comprehensive system of guidance and (b) administrative or statutory changes which may be deemed appropriate.

The Act also contained various savings provisions to insure that the legislation did not unintentionally interfere with existing programs. Thus, for example, Section 10 states that the Act does not prohibit the use of different legal instruments for different components of a federally-funded project.

3. Implementation of the Act

a. OMB Guidelines

Pursuant to Section 9 of the Act, OMB issued supplementary interpretative Guidelines on August 18, 1978 (43 Fed. Reg. 36860 *et seq.*). In general, the Guidelines sought to provide further—albeit limited—explanation of the statutory distinctions between procurement and assistance relationships; to delineate OMB's exceptions policies and procedures under Section 10 of the Act; to detail various recordkeeping and reporting requirements; and to clarify the meaning of various other sections of the Act.

The Guidelines reflected the narrow scope of the Act. They did little to clarify the situation. For example, like the Act, the Guidelines failed to provide any specific definition of a "grant," "contract," or "cooperative agreement." Instead, they relied simply upon the statutory distinctions based on the purpose of the transaction and level of Federal involvement. The Guidelines provided no explanation, illustration, or further description of the criteria to be applied.

OMB justified its position by indicating that agencies "will have no trouble" making the required distinction "in most cases"; and when they do "agency mission and intent must be the guide, and . . . more detailed criteria would not be useful." 43 Fed. Reg. 36380.

The Guidelines also are not expansive in another ambiguous statutory area. During deliberations on the Act, concern was expressed that Section 4(2), which allows use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate" would neutralize the distinction otherwise drawn between procurement and assistance. While the Senate report on the Act rejected this concern (43 Fed. Reg. 36832), it is apparent that this language, if abused, could nullify significant provisions of the statute. Despite this danger, the Guidelines offered no guidance on the issue. Rather, they required Federal agencies to report procurement transactions based upon this subsection, and to rely on policies and procedures in various procurement regulations whenever procurement contracts were awarded.

b. Section 8 Study

As indicated above, Section 8 of the Act required OMB to conduct a two-year study of Federal assistance and to issue a report on various ways to improve it. The report, "Managing Federal Assistance in the 1980's" was submitted to Congress on March 5, 1980. In addition to the three study issues mandated by the Act, OMB identified other related issues for inclusion in the study.

The study was conducted by eight task groups with members from Federal agencies, recipients and other interested parties. The task groups produced an eleven-volume set of working papers which were widely distributed as part of a public comment process. After the comment period, the working papers were revised. According to OMB, the final report basically reflected the content of the working papers as well as views expressed by and submitted to OMB. The 64-page report produced by OMB contained a wide-range discussion which identified numerous unresolved issues concerning Federal assistance and suggested ways to deal with them. However, one area of the report was notably lacking. Among the three major topics which section 8 of the Act required to be included in the report was:

> 'detailed descriptions of the alternative means of implementing Federal assistance programs and of the circumstances in which use of each appears to be most desirable . . .'

The OMB Report contains less than a two-page discussion of this issue and did not contain the required descriptions. Instead, the report noted the problems of resolving the issue, and suggested that more work and analysis needs to be done. As the report stated:

> This study attempted to identify the patterns of grant and cooperative agreement sub-types, but it has barely scratched the surface . . . . Guidance that explains the characteristics of each major sub-type would help both Congress and the agencies design more effective programs. More analysis is needed, however, before accurate guidance can be issued. OMB in conjunction with the agencies will continue this important work.[112]

OMB's failure to adopt these—or other—recommendations is unexplained.

One other aspect of the Section 8 Report dealing with the grant relationship merits comment. The Senate Report, as indicated above, emphasized that the study should take into account the concerns of voluntary human service organizations, including consideration of their rights in the event of disputes. While all the problems of these agencies are not addressed by OMB, the report does recognize that the "number of disputes between Federal assistance agencies and recipients is growing apace with the growing importance and complexity of Federal assistance." Therefore, the report recommends "speedy, economical

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112. Curiously, the OMB Report fails to mention any of the impressive work done on the issue of alternative means by Task Force C of the OMB Study. In its Working Papers, Task Force C proposed a first-cut definition of a Federal grant, and established a blueprint for the review and development of delivering Federal assistance. Specifically, the task force developed in matrix form a number of alternative instruments for implementing Federal programs or projects; described the alternatives in terms of purpose and the characteristics that distinguish one from the other; developed a sample decision tree which illustrated the process of selecting one alternative over another; provided a narrative description of how the process might proceed and a suggested typology of grants; included a flowchart to illustrate the factors or considerations one might use in choosing between grants and cooperative agreements; and suggested what specific steps needed to be taken to further develop, test and implement alternative means of Federal assistance. Managing Federal Assistance in the 1980's, Working Papers, *see* Alternative Means of Implementing Federal Asssistance (August, 1979).

and fair dispute resolution processes" within each Federal administering agency (p. 31).[113]

c. Cases before the General Accounting Office

The General Accounting Office (GAO), through the Comptroller General of the United States, has decided two cases involving the appropriate classifications of legal instruments under the Federal Grant and Cooperative Agreement Act. *Burgos & Associates*, Comptroller General Decision No. B-197140 (September 13, 1979) and *Bloomsburg West, Inc.*, Comptroller General Decision No. B-194229 (September 20, 1979).

In both cases, protestors challenged the decisions of Federal agencies to finance activities through assistance awards. Previously, both agencies had used competitive procurement contracts to finance similar activities. After the enactment of the Federal Grant and Cooperative Agreement Act, the agencies changed the award instruments to grants, and defended the changes on the basis of the Act's provisions. The protestors claimed that the agencies' shift from contracts to grants was made for the purpose of avoiding the competition requirements of Federal procurement.

In deciding both cases, the Comptroller General noted that GAO generally did not consider the propriety of grant awards. However, GAO's consideration of these cases was viewed as proper because funding previously had been provided through competitive contracts, and the protestors claimed that the shift to grants unreasonably deprived them of their rights to compete.

On the merits of the cases, the Comptroller General held in favor of the agencies. Reviewing the provisions of the Federal Grant and Cooperative Agreement Act, the Comptroller General held that the agencies' determinations that the awards met the "grant" criteria of the Act were "reasonable" and consistent with the purposes of the Act.

In *Bloomsbury West, Inc.*, there was an additional wrinkle. The protestor claimed that the awarding agency—the Office of Education of the then-existing Department of Health, Education and Welfare—lacked statutory authority to award a grant for the program in question. The Comptroller General disagreed, holding that although it was not clear that OE previously had had only contract authority, in any event, it now was clear that, under the Federal Grant and Cooperative Agreement Act, the agency had authority to award grants as well as contracts for the program.

Although not formally decided by the Comptroller General, the GAO also considered, in response to a congressional inquiry, the appropriateness of an Agency's grant/contract classification. Specifically at issue was the propriety of awarding a contract to the State of Connecticut for the operation of a Citizen/Government Transportation Planning Center. The Planning Center's contract was awarded by the Department of Transportation and the Environmental Pro-

113. As a follow-up to this report, a special OMB task force, headed by Norval D. (John) Settle, Chairman of the HHS Departmental Grant Appeals Board, prepared a draft OMB circular on grant dispute resolution. The circular was never issued in final form.

tection Agency. In considering the grant versus contract issue, the GAO applied the standards of the Federal Grant and Cooperative Agreement Act. Specifically, GAO considered whether the Center's project was for the Federal agencies' "direct benefit or use." GAO cited—with apparent approval—the comment of an agency official that the agency "may benefit in this case because the Center's interim and final reports will be submitted to [the agency] . . . and consideration will then be given to instituting similar projects nationwide." In light of this explanation, GAO found "no legal or procedural prohibitions" against the agency's use of a contract.[114]

The Connecticut case suggests that, despite the best intentions of Congress, there is a large unanswered question as to whether the Act has been successful in achieving even its limited purposes. GAO's willingness to accept an agency's selection of a contract instrument solely on the basis of general reporting requirements suggests that: (1) virtually any contract award could be viewed as acceptable; and (2) the agencies continue to enjoy virtually unrestricted freedom in their selection of award instruments.

C. A Century of Case Law: The Contractual Nature of a Grant

1. A Synopsis of the Law

As shown above, grants are viewed as different legal instruments than Federal procurement contracts. This distinction, however, should not blur the essentially contractual nature of the grant relationship.

As early as 1866, the United States Supreme Court held that:

> It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State . . . .

McGehee v. Mathis, 71 U.S. 143, 155 (1866).

More than a century later, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Supreme Court repeated its commitment to the contractual nature of a grant. Reviewing a grant-enabling statute authorized under the Spending Clause of the United States Constitution, the Court held:

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114. GAO, however, appeared to have certain policy reservations about the contract award. GAO indicated, for example, that the agencies' use of a contract may have precluded the opportunity of the State of Connecticut to establish funding priorities and to assign tasks for all public participation and information programs within the State—an opportunity it would have had under available grant programs. Moreover, the award of the contract, according to GAO, "could potentially work at cross purposes" with existing Federal assistance guidelines which stress the importance of providing adequate public participation and information activities. In view of these concerns, GAO recommended that the Secretary of DOT and the Administrator of EPA require "clear documentation" of "a deficiency or compelling need" before authorizing future contract funding for public participation and information activities which may be eligible for Federal assistance under established grant programs.

> [L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowlingly accepts the terms of the 'contract.' [Citations omitted.]

451 U.S. at 17.[115]

In the one hundred and fifteen years which came between *McGehee* and *Pennhurst*, the Supreme Court and lower Federal courts have considered various aspects of the contractual nature of grants. A brief synopsis of these cases follows.

a. Land Grant Cases

The analysis of grants in terms of contractual principles appeared first in the context of land grant disputes. As early as 1810, the Supreme Court specifically was asked the question: "Is a grant a contract?" and answered the question in the affirmative. *Fletcher v. Peck*, 6 Cranch 87, 136 (1810). *See also, Trustees of Dartmouth College v. Woodward*, 4 U.S. (4 Wheat.) 518, 682 (1819).

The *Fletcher* and *Dartmouth College* cases involved grants from sovereigns other than the United States. In *Fletcher*, the sovereign was the governor of a State; in *Dartmouth College*, the sovereign was the British Crown. In both cases, the Supreme Court held that at least implied contracts existed which assured the recipients' holding of title to land previously granted.

In *McGehee v. Mathis, supra*, the Supreme Court applied contract principles to land grants awarded by the United States. *See also, Burke v. Southern Pacific R. Co.*, 2334 U.S. 669 (1913); *Oregon and California R. Co. v. United States*, 238 U.S. 393 (1915); and *United States v. Northern Pacific R. Co.*, 256 U.S. 51 (1920); *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). Thus, in *Burke*, the Supreme Court rejected a third-party claim because the claimant lacked "privity" to the "contract" between the United States and the grantee. In the *Oregon* case, the Court rejected plaintiff's argument that railroads were intended, third-party beneficiaries of the grant relationship. In the *San Francisco* case, the Supreme Court rejected the grantee's argument that, because Government officials previously had not contractually enforced a condition, they were estopped from enforcing it.

b. School Board Cases

In the 1950's and 1960's, Congress recognized that the children of United States military personnel increased local school district membership without contributing their fair share of tax revenues, resulting in overcrowded and underfinanced schools. Under the School Facilities Construction Act, Congress authorized grants to school districts for the construction of school facilities upon the districts' assurance that the facilities would be made available to "Federal" children on the same terms as other children. A series of disputes arose as a result of school districts' alleged noncompliance with this assurance. These cases were analyzed by the courts in terms of contract principles.

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115. For further discussion of this case, *see* page 190, *infra*.

For example, *United States v. County School Board of Prince George's County, Va.*, 221 F. Supp. 93 (E.D. Va. 1963) involved a suit by the United States for an injunction requiring the grantee to admit black "Federal" children to schools previously attended only by white children. Relying upon earlier land grant cases, the court held that the United States could sue the grantee to enforce compliance. As the court stated:

> It has long been recognized that federal grants authorized by Congress create binding contracts [citing *Burke, supra*, and *United States v. Northern Pacific R. Co., supra*].
>
> * * *
>
> There is no essential difference between the grants to the railroads and the grants to the School Board . . . . The United States agreed to make certain payments to the School Board in exchange for certain assurances. The School Board, in order to receive the funds, gave the assurances required by the statute. The United States made the payments, and the contract is executed on its part.

221 F. Supp at 99–100.

In *Prince George's County*, the court further held that relief was not limited to the withholding of funds or repayment because that would frustrate the purpose of the Act. Rather, the court declared it to be a "well-established right" of the United States to sue for enforcement of the contract, citing *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 181 (1818); *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850). Accordingly, the Court enjoined the School Board from continued violations. *See also, United States v. Sumter County School Dist. No. 2*, 232 F. Supp. 945 (E.D.S.C. 1964).[116]

In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. den.* 388 U.S. 911 (1967), the Fifth Circuit had an opportunity to consider a related case in which a class of black "Federal" children who sought admission to the Parish's schools sued to enforce grant conditions. In *Bossier*, the Court held that the assurances provided by the Parish in exchange for the receipt of

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116. *See also*, United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S.D. Miss. 1963), aff'd 326 F.2d 237 (5th Cir.), *cert. den.* 379 U.S. 929 (1964); United States v. Madison County Bd. of Ed., 326 F.2d 237 (5th Cir.) *cert. den.* 379 U.S. 929 (1964), wherein the Government also sued to desegregate local schools through the specific performance of grant assurances. The Court of Appeals dismissed these cases, not because the court found the United States lacking in authority to enforce contractual assurances, but rather because the court found that no assurances of desegregation had been made. As the Biloxi court stated:

> No one would be so rash as to claim that a local school board in either of the 'hard core' states of Alabama or Mississippi would intentionally enter into a contract which it understood to provide for even partial desegregation of the races in the public schools under its jurisdiction. A more improbable official action of such a local school board can scarcely be imagined.

326 F.2d at 239. Presumably, these courts would have looked favorably on the recent Supreme Court ruling in Pennhurst State School and Hospital, *supra*, wherein the Court held:

> There can, of course, be no knowing acceptance [of a grant] if a State is unaware of the conditions or is unable to ascertain what is expected of it. 451 U.S. at 17.

Federal grant funds established the children's right to attend Parish schools. Quoting from a lower court opinion, the Court of Appeals held:

> Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools.

370 F.2d at 850.

c. Specific Performance Cases

Relying on earlier land grant and school board cases, a Federal district court in *United States v. Frazer*, 297 F. Supp. 319 (M.D. Ala. 1968) held that the United States could sue for specific performance of grant conditions (here, merit system requirements for state administrative personnel). As the court stated:

> This Court is clear to the conclusion that the United States does have standing to seek judicial enforcement of the terms and conditions of grants of Federal property and that the administrative remedy of termination was not intended to be and is not exclusive. . . .

297 F. Supp. at 322.

Although *Frazer* is the case most often cited for the proposition that grant conditions may be specifically enforced by the granting agency, several other courts (including four United States Courts of Appeals) have reached the same conclusion. *United States v. Harrison County, Miss.*, 399 F.2d 485 (5th Cir. 1968); *Poirrier v. St. James Parish Police Jury*, 372 F. Supp. 1021 (E.D. La. 1974), *aff'd per curiam*, 531 F.2d 316 (5th Cir. 1976); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977); *United States v. Mattson*, 600 F.2d 1295, at 1299, n. 6 (9th Cir. 1979).[117]

The most recent and comprehensive opinion upholding the right of the United States to seek an order compelling specific performance of grant assurances is *United States v. Marion County School District*, 625 F.2d 607 (5th Cir. 1980), *reh'g den.* (1980). In that case, the United States sought to compel a school district to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which prohibits discrimination in federally-funded schools. The school district had provided an assurance of compliance in exchange for Federal financial assistance. Relying on several of the cases cited herein, the court stated:

> It is settled law that the United States has authority to fix the terms and conditions upon which its money allotments to state and other

117. While these cases involved a variety of factual settings, all related in some way to alleged violations of fundamental constitutional rights as well as grant assurances. Thus, for example, the Harrison County and St. James Parish cases involved allegations of unconstitutional racial discrimination. The Solomon and Mattson cases involved allegations of violations of constitutional rights of mentally retarded persons. This fact has led at least one scholar to suggest that courts will order specific performance of grants only where fundamental constitutional rights are involved; they may be less inclined to do so where more mundane grant assurances are at issue, particularly where States are the recipients of the grant funds and Tenth Amendment questions are involved. Remarks of Sallyanne Payton, Associate Professor of Law, University of Michigan, "Judicial Review: Two Tenth Amendment Puzzles," at the Federal Bar Association's Third Annual Seminar on Grant Law, Washington, D.C., February 22, 1980.

> governmental entities should be disbursed. . . . As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient is obligated to perform the condition, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court. . . .

625 F.2d at 611.

The district court in *Marion County* had held that the United States had no right to sue on its "contract" because Congress had nullified that right by providing alternative remedies in the Civil Rights Act. In reversing the district court's decision, the Court of Appeals held:

> [I]t is well established that the government's right to sue to enforce its contracts exists as a matter of federal common law, without necessity of a statute . . . there is no persuasive, much less unmistakable, evidence that Congress intended to eradicate or even restrict the United States' right to sue to enforce contractual assurances of nondiscrimination in the operation of public schools.

625 F.2d at 611.

d. Third Party Beneficiary Cases

As shown above, for more than a century, the courts have used traditional contract principles to establish the authority of the United States to impose grant conditions and to enforce them. A more recent trend is the application of third party beneficiary principles to grant disputes.

The United States Supreme Court has alluded to these principles in two cases. In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court recognized the contractual nature of assurances made in connection with grants. Plaintiffs in *Lau* were non-English speaking students who claimed that a school district was violating its grant assurances by failing to provide bilingual education. Viewing the assurance as "contractual" in nature, the Supreme Court held that the school district was out of compliance and remanded the case for the fashioning of appropriate relief.

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Supreme Court again recognized the contractual nature of grant terms and conditions. Plaintiffs in *Pennhurst* were representatives of mentally retarded persons who claimed specific rights based on their State's receipt of grant funds authorized under the Developmentally Disabled Assistance and Bill of Rights Act of 1975.[118] The Supreme Court indicated that if the State's protection of the claimed rights were, in fact, a condition to its receipt of grant funds, plaintiffs may have a cause of action. However, the Court's examination of the Act showed no such condition.

Lower courts have considered third party beneficiary claims in two contexts: standing and private right of action.

(i) Standing Cases

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118. 42 U.S.C. § 6000 *et seq.*

Lower courts have relied on third party beneficiary principles in determining whether parties other than the United States have standing to sue a grantee (and, even grantor) to compel performance of grant conditions. *See, Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97 (9th Cir. 1976); *Local Div. No. 714 v. Greater Portland, Inc.*, 589 F.2d 1 (1st Cir. 1978); *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972); *Miree v. United States*, 526 F.2d 679, *reh'g en banc*, 538 F.2d 643 (5th Cir. 1976). Third party standing was rejected in only one of these cases. In *Miree*, the court found no intent in the "contract" to protect members of the general public. In all of the other cases, the courts found that plaintiffs were intended beneficiaries of the grant, and, therefore, had standing to seek enforcement of specific grant conditions.

(ii) Private Right of Action Cases

The courts also have applied third party beneficiary principles in determining whether individuals have private rights of action against grantees for alleged violations of grant conditions. The courts are particularly inclined to recognize private rights of action in cases where the government's right to withhold future funds for grantee noncompliance can no longer be asserted, *i.e.*, where the grant activity has ended. *See, Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972). *See also, Lloyd v. Regional Transp. Authority*, 548 F.2d 1277 (7th Cir. 1977).

e. Court of Claims Cases

Under the Tucker Act, the Court of Claims has jurisdiction over claims against the United States founded upon the Constitution, statutes, regulations, or upon any "express or implied contract with the United States," for damages not sounding in tort. 28 U.S.C. § 1491. It is hardly surprising that the handful of grant cases over which the Court of Claims has asserted jurisdiction has been analyzed in terms of contract principles.[119]

Three of the cases considered by the Court of Claims involved grants under the Federal-Aid Highways Act, which declares that the Secretary's approval of a State highway project shall be deemed a contractual obligation of the Federal Government for payment. 23 U.S.C. § 106(a). *Arizona v. United States*, 494 F.2d 1285 (Ct. Cl. 1974); *California v. United States*, 551 F.2d 843 (Ct. Cl.), *cert. den.* 434 U.S. 857 (1977); *Louisiana Dept. of Highways v. United States*, 604 F.2d 1339 (Ct. Cl. 1979).

In the *Arizona* case, the State sought reimbursement of costs incurred in connection with the removal and relocation of facilities for the construction of a highway. The Federal Highway Administration had approved this aspect of the project but thereafter reversed itself. The Court found that the plaintiff had complied with all grant conditions and held that: "The Government has a contractual obligation to pay Arizona . . . since the Government's authorized employees approved an agreement so providing." 494 F.2d at 1288.

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119. *See*, Wallick and Montalto, "Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs," 46 Geo. Wash. L. Rev. 159, 167–68 (1978).

With different facts, California and Louisiana did not fare as well. In those cases, the States claimed entitlement to payment of costs incurred *in addition to those authorized* in the State's grant. The Court held that the grantees could not unilaterally increase the Federal contractual obligation.

The Court of Claims has asserted jurisdiction even in cases where the statute authorizing the grant does not contain language explicitly making the agreement a contract. In *Texas v. United States*, 537 F.2d 466 (Ct. Cl. 1976), for example, the Court asserted jurisdiction over a claim for payments under the Federal Disaster Act although the United States argued that the agreement was not a contract in the traditional sense. While the majority of the court declined to face squarely the issue of whether the agreement was a contract, it did hold that the agreement imposed "enforceable obligations."

In *Missouri Health and Medical Organization, Inc. v. United States*, 641 F.2d 870 (1981), the Court of Claims again was asked to determine, for purposes of its jurisdiction, whether a grant is a contract. The Court concluded that even the discretionary grant involved in the case created enforceable obligations subject to its review.

f. Other Relevant Case Law

There is a considerable body of case law in which the courts presume the enforceability of grant conditions. The courts in these cases do not describe the grant as a contract in express terms; however, the underlying rationale for their holdings seems contractual in nature.

For example, the courts have ruled in several cases that when a State, county, city, district or private group voluntarily accepts and utilizes Federal grant monies, the recipient commits itself to comply with Federal "strings" attached to the award. Concomitantly, the Supreme Court has made clear that, as a constitutional matter, the Federal Government has the power to impose conditions on its offer of Federal funds because it does not require the offeree to accept any funds. *See, Massachusetts v. Mellon*, 262 U.S. 447, 480, 482 (1923) (dicta); *Steward Machine Co. v. Davis*, 301 u.S. 548, 590 (1937); *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127, 143–144 (1947); *Batterton v. Francis*, 432 U.S. 416, 420, 431–32 (1977); *Quern v. Mandley*, 436 U.S. 725, 734 (1978).[120]

The courts further hold that a State law or regulation which is inconsistent with Federal grant conditions must yield to Congress' will under the Supremacy Clause of the United States Constitution (Art. 6, Cl. 2). The rationale underlying this principle is that when Federal monies are spent to promote the general welfare (U.S. Constitution, Art. 1, § 8, Cl. 1), the concept of welfare is shaped by Congress, not the States. *See, Helvering v. Davis*, 301 U.S. 619, 640–41, 645 (1937). The landmark case in this regard is *King v. Smith*, 392 U.S. 309 (1968), wherein the State of Alabama, a Federal recipient of Aid to Families with Dependent Children (AFDC) funds, issued a regulation which was incon-

120. *See also*, North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D. N.C. 1977), aff'd 435 U.S. 962 (1978); State of Florida v. Matthews, 526 F.2d 319, 326 (5th Cir. 1976).

sistent with AFDC provisions of the Social Security Act. Individuals whose AFDC benefits were terminated as a result of the State's regulation sought to enjoin its enforcement. The Supreme Court held:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional provision, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.

392 U.S. at 333, n. 34.[121]

Although the grantee cannot be enjoined from operating under the conflicting State law, regulation or practice, the grantee can be enjoined from using Federal funds unless and until it complies with Federal requirements. *Rosado v. Wyman*, 397 U.S. 397, 420–22 (1970).[122]

2. Differing Views

Over the years, there has been considerable debate regarding the legal nature of a grant.[123] In the debate, scholars and a few courts have characterized grants as gifts and trusts, as well as contracts.[124] Significantly, however, none of these characterizations preclude the applicability of the contractual enforcement principles discussed above.

a. The "Gift" Theory

Several writers in the grants field have suggested that grants are commonly viewed as analogous to private gifts. These writers hasten to add, however, that they do not share this view of the grant relationship. As Professor Richard Cappalli noted:

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121. *See also*, Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Carleson v. Remillard, 406 U.S. 598 (1972); Williford v. Laupheimer, 311 F. Supp. 720, 722 (E.D. Pa. 1969); Barber v. White, 351 F. Supp. 1091, 1096 (D. Conn. 1972); Lower East Side Neighborhood Health Council-South, Inc. v. Richardson, 346 F. Supp. 386, 388 (S.D. N.Y. 1972); Dupler v. City of Portland, 421 F. Supp. 1314, 1320 (D. Maine 1976); Stiner v. Califano, 438 F. Supp. 796, 800 (W.D. Okl. 1977).

122. *But see*, Named Individual Members of San Antonia Conservation Society v. Texas Highway Dept., 446 F.2d 1013 (5th Cir.), reh'g den. 446 F.2d 1029 (1971), in which the State sought to avoid Federal requirements in connection with a highway construction project. The State claimed that it would finance the project solely out of State funds rather than comply. Although no Federal funds had been disbursed to the State, the court ruled that, because the State had agreed to accept Federal funds, the project was "Federal" in nature, and that, despite the fact that the Federal-State "marriage" might be an unhappy one, the State had to comply with the Federal requirements. 446 F.2d at 1028. *See also*, Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972); Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); River v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va. 1973).

123. *See, e.g.*, Willcox, "The Function and Nature of Grants," 22 Admin. L. Rev. 125 (1970), Mason, "Current Trends in Federal Grant Law—Fiscal Year 1976," 35 Fed. B. J. 163, (1976); Wallick and Montalto, "Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs," 46 Geo. Wash. L. Rev. 159 (1978); Cappalli, "Rights and Remedies Under Federal Grants," (BNA, 1979).

124. In addition, a partnership theory has been suggested. Catz, *supra* n. 15, at p. 1088, n. 117. However, this theory is generally summarily dismissed. *Id.*

> The concept of giving without receiving leads one readily to the idea of a gift. The spirit is, indeed, donative, but the gift analogy fails when one adds the ingredient of enforceability. Once a federal agency makes a grant award, or in some cases once Congress appropriates funds for a grant program, the recipient can successfully sue if the federal agency does not come up with the promised cash, or parts thereof. The gift analogy is also weakened by the host of restrictions and conditions placed on the federal grant. Each federal control and standard tends to support the idea that, indeed the United States is getting something out of the deal and, thus, moves the grant toward the world of quid pro quos.

Cappalli, *supra* at 174.

As shown above, the courts do not share this view either. Indeed, in two early cases involving land grants, the United States Supreme Court explicitly rejected the notion that grants are gifts. *Burke v. Southern Pacific R. Co.*, 234 U.S. 669 (1913); *Wyoming ex rel. Wyoming Agricultural College v. Irvine*, 206 U.S. 278 (1907).[125]

There appear to be only two cases in which a Federal grant has been characterized as a gift. *Alabama v. Schmidt*, 232 U.S. 168 (1914); and *School Board of Okaloosa County v. Richardson*, 332 F. Supp. 1263 (N.D. Fla. 1971). Neither case offers any explanation as to why it differs from the mainstream of grant law. However, neither case reaches a conclusion which would have been different had contract principles applied.

b. The "Trust" Theory

According to Professor Allanson Willcox, the trust theory, "in a nutshell," is that:

> A grant upon conditions is analogous to a trust, and that acceptance of the grant places the grantee under an equitable obligation, independent of any agreement on his part, to abide by the trust[.]

Significantly, Professor Willcox goes on to add:

> This theory does not deny that a contractual obligation on the part of the grantee may and usually does co-exist with his equitable obligation[.][126]

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125. *See also*, Stearns v. State of Minnesota ex rel. Marr, 179 U.S. 223, 241 (1900).

126. *Supra* n. 123, at 128. Willcox favors this theory, and explains its utility as follows:

> One reason for pressing the trust analogy is that it tends to avoid disputes about what was actually agreed to. A grantee may have demurred to some condition and may resist enforcement on the ground that he did not actually consent. In such a case, surely, if the grantee accepts and uses the funds he should be bound by all valid conditions attached to their use, as one cashing a check is bound by the terms on which it was given.
>
> But the chief advantage of the trust approach is flexibility of equitable remedies and the tools they provide for the fair resolution of questions that arise in day to day operation. The right to demand an accounting by the grantee should be a matter of course, as well as the right to pursue any funds that may have been diverted. There should be no need to make proof that the Government has been damaged or how much it has been damaged by a breach of the terms of the grant, or alternatively to show that damages are an inadequate

Only a handful of cases has alluded to the trust theory; and all of those cases were decided with respect to land grants awarded prior to 1919.[127]

The Comptroller General has applied the trust concept in cases regarding a grantee's use of interest earned on grant funds. In those cases, the Comptroller General ruled that the grantee had to return interest earned because the underlying grant funds were held "in trust" for the Federal Government and any profit inured to the benefit of the United States. 42 Comp. Gen. 289, 292 (1962), *citing* 40 Comp. Gen. 81, and 1 Comp. Gen. 652.

IV. A Legal Analysis of Current Grant Dispute Resolution Procedures—Are They Consistent with Constitutional Due Process?

A. Introduction

In the discussion which follows, we will look beyond the dispute procedures currently in existence, and will consider the issue of whether Federal agencies are required under constitutional due process to provide grant dispute resolution procedures, and, if so, what form those procedures must take. To be more precise: In the absence of any statutory command, does the Fifth Amendment to the United States Constitution require that, before an agency can take adverse action against a grantee or grant applicant, the grantee or applicant must be afforded procedural due process? And, if there is this entitlement to due process, exactly what process—what type of "notice" and what type of "hearing"—is due?

The discussion will be organized as follows: First, we will overview the doctrine of procedural due process in terms of the "interests" which are entitled to constitutional due process protection. Following this overview, we step back momentarily to analyze whether the constitutional requirement of procedural due process for "persons" applies to one large category of Federal grantees, namely State and local governments. Then, returning to the doctrine of procedural due process, we focus on pre-award and post-award grant decisions, and the likelihood of finding protected interests in disputes arising from such decisions. Finally, based upon the conclusion that, at least in certain situations, grantees and grant applicants have constitutionally protected interests, we consider what "process is due."

Before undertaking this review, it is important to note that the need to examine constitutional due process issues arises only where the other potential sources of procedural protections for grantees—grant-enabling statutes, agency regulations, and the Administrative Procedure Act (APA)—are lacking.

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remedy. If the purpose of a grant fails or is abandoned, imposition of a resulting trust is likely to be the proper recourse. Conversely, there may be equities on the grantee's side that would be difficult to take into reckoning in an action for breach of contract.

127. Tucker v. Ferguson, 89 U.S. (22 Wall) 527, 22 L. Ed. 805 (1875). *See also*, dissenting opinion in Cornell University v. Fiske, 136 U.S. 152 (1890); Stearns v. State of Minnesota ex rel. Marr, *supra*, at 240–241; Wyoming ex rel. Wyoming Agricultural College v. Irvine, 206 U.S. 278, 283 (1907); Ervien v. United States, 251 U.S. 41, 48 (1919).

Three considerations in this regard are especially significant. *First*, to the extent that grant-enabling statutes and agency regulations establish notice and hearing or other appeal procedures, agencies must follow such procedures.[128] *Second*, under the APA, grantees and grant applicants may have a right to "prompt notice" of adverse agency action, and, under certain circumstances, a "brief statement" of the grounds for such action. 5 U.S.C. § 555(e). *Third*, also under the APA, grantees and grant applicants have a right of judicial review of adverse agency action. This right extends even to the denial of discretionary grant applications where it is alleged that an agency "has transgressed a constitutional guarantee or violated an express statutory or procedural directive[.]" *Apter v. Richardson*, 510 F.2d 351 (D.C. Cir. 1975).[129]

These protections, however, may not be sufficient. As shown in this report, the full panoply of due process protections—such as detailed notice of the charges, an oral hearing before an impartial decisionmaker with a written decision on the record, the right to compulsory process and cross-examination—often are not provided for in agency regulations and vary greatly from agency to agency, and, in some cases, from program to program.[130]

The Administrative Procedure Act, specifically the adjudication provisions therein,[131] rarely apply to grantees absent a constitutionally protected due process interest.[132] The APA's formal adjudication provisions, 5 U.S.C. § 554 *et seq.*, are provided to grantees in an agency proceeding only if a statute *explicitly* requires that a "hearing" be held by that agency.[133] Thus, if a grant-enabling

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128. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959); Red School House Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974).

129. *See also*, Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969). In Apter, the court acknowledged the potential burden to an agency of broad judicial review of an agency's award of discretionary (in this case, the National Institutes of Health of the Public Health Service) grants. Thus, the court noted: "We are mindful as well that judicial review of training grant decisions might place a heavy burden of litigation and delay upon the agency and its grantees as well." 510 F.2d at 355, n. 5. In light of this and other considerations, the court expressly limited its finding of the right to judicial review to the situation described in the text accompanying this footnote. As the court held:

> [T]he medical merits of NIH decisions on training grants may be committed to the unreviewable discretion of the agency. However, that does not mean that NIH actions wholly escape judicial scrutiny. Where it is alleged that the agency has transgressed a constitutional guarantee or violated an express statutory or procedural directive, otherwise non-reviewable agency action should be examined to the extent necessary to determine the merits of the allegation. [Citations omitted.]

510 F.2d at 355.

130. *Compare*, for example, the grant dispute procedures at the Department of the Interior, to those in the Department of Health and Human Services, both discussed in Chapter II and the agency chapters in Part 2 of this report.

131. 5 U.S.C. §§ 554, 556, 557.

132. *See, Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). For a full discussion of this case, *see* pp. 216–19, *infra*.

133. *See*, U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 536 (D.C. Cir. 1978). To trigger the formal adjudication provisions of the APA, a statute does not have to invoke the precise language of 5 U.S.C. § 554, calling for a hearing "on the record." If the statute contains

statute is silent as to the hearing rights of grantees, the formal adjudication provisions of the APA will not be invoked.

B. An Overview of the Doctrine of Procedural Due Process

To decide whether grantees and grant applicants are constitutionally entitled to notice and hearing rights in agency proceedings, the doctrine of constitutional due process requires a two-step analysis. First, a finding must be made that the aggrieved party (the one seeking due process) has a protected "interest" in the object of the dispute—either a protected "property" interest or a protected "liberty" interest.[134] Second, a determination must be made as to what process is due the aggrieved party and interest.

In *Board of Regents v. Roth*,[135] the Supreme Court defined what would constitute a "property" interest meriting constitutional protection:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and support certain claims of entitlement to those benefits.[136]

On the same day as the Supreme Court decided *Roth*, it held as follows in the companion case of *Perry v. Sindermann*, 408 U.S. 593, 601 (1972):

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or *mutually explicit understandings* that support his claim of entitlement to the benefit that he may invoke at a hearing. [Emphasis added.]

In *Board of Regents v. Roth*, the Supreme Court also announced the parameters of a constitutionally-protected "liberty interest." According to the Supreme Court, such interest arises,

> where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him. . . .

408 U.S. at 573, *quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Under such circumstances, "notice and an opportunity to be heard are essential." *Id.*[137]

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words requiring some type of "hearing", the courts will inquire into whether Congress intended to create an APA adjudicatory hearing and the substantive character of the proceeding involved to decide if APA adjudication applies. *See also*, 2 Davis, *Administrative Law Treatise*, § 12:10 (2d ed., 1979).

134. Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Perry v. Sindermann, 408 U.S. 593, 599 (1972); Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

135. 400 U.S. 564 (1972).

136. *Id.* at 577.

137. *See also*, Bishop v. Wood, 426 U.S. 341, 348 (1976); Goss v. Lopez, 419 U.S. 565, 574 (1975).

After a constitutionally protected interest is found, a court's analysis will shift to an inquiry into what "process is due," *i.e.* whether a party is entitled to detailed notice and a trial-type hearing, or a lesser proceeding still involving some type of notice and some type of hearing.[138] To identify the particular process due in any particular case, three factors generally are balanced:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.[139]

C. *The Applicability of Procedural Due Process to States and Localities as Grantees*

Before commencing an extended discussion of the procedural due process rights of grantees and grant applicants, it is important to focus on a potentially significant limitation on this constitutional right: *Under current law, State and local governments are not considered to be within the reach of the procedural Due Process Clause of the Constitution.* The apparent exclusion of State and local governments stems from a 1966 Supreme Court decision, *South Carolina v. Katzenbach*, 383 U.S. 301, in which the Supreme Court upheld the constitutionality of a provision in the Voting Rights Act which allows the Justice Department to invalidate a State's voting district plan. As the Court held:

> The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any Court.

Id. at 323–324.

Commentators have interpreted the Court's holding in this case to apply equally to localities within a State serving as Federal grantees.[140]

Relying on *South Carolina v. Katzenbach*, at least five courts which have been faced with the question of whether States have procedural due process rights have concluded that they do not.[141] However, none of these courts squarely

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138. *See*, Mathews v. Eldridge, 424 U.S. 319, 333–335 (1976); Goss v. Lopez, 419 U.S. 565, 575–577 (1975); Wolff v. McDonnell, 418 U.S. 539, 555–557 (1974); Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 894–95 (1961).

139. For a different approach to the issue of what process is due, *see* discussion of the Supreme Court's decision in Wong Yang Sung, 339 U.S. 33 (1950), *infra* at p. 216–19.

140. *See*, Wallick and Montalto, "Symbiosis or Domination: Rights and Remedies Under Grants-in-Aid," 46 Geo. Wash. L. Rev. 185 (1978); Cappalli, *Rights and Remedies Under Federal Grant Law*, 225 (BNA: 1979).

141. Aquayo v. Richardson, 473 F.2d 1090, 1100–1101 (2nd Cir. 1973); Arizona State Dept. of Public Welfare v. Department of Health, Education and Welfare, 449 F.2d 456, 478 (9th Cir. 1971), *cert. denied*, 405 U.S. 919; Connecticut State Dept. of Public Welfare v. Department of

addressed the issue of whether the sweeping language of *South Carolina v. Katzenbach* was meant to apply to due process considerations in grant dispute resolution.[142] Nor did the courts consider the incongruities of having due process protections denied to State and local governments, but afforded to other types of grantees and grant applicants.

These arguments have been raised by Professor Richard Cappalli in his book, *Rights and Remedies Under Federal Grants*.[143] According to Professor Cappalli, the denial of due process rights to State and local grantees is wrong for three reasons: (1) Denying due process to State and local grantees creates undesirable contradictions in the law governing grant administration[144]; (2) Other Supreme Court cases, notably *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), have given States the implicit protection of procedural due process in their dealings with the Government[145]; and, finally, (3) If ever faced with a claim by a State or locality demanding due process rights in its role as grantee, the Supreme Court would allow due process protections. Professor Cappalli bases this last prediction on the Supreme Court decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), a case in which the Court was willing "to rediscover a domain of untouchable state power and authority. . ."[146]

Even if a court were to disagree with these arguments and deny constitutional due process to State and local grantees, the issue of constitutional due process

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Health, Education and Welfare, 448 F.2d 209, 212–13 (2nd Cir. 1971); Stiner v. Califano, 438 F. Supp. 796, 799 n. 3 (W.D. Okla. 1977); Carroll v. Finch, 326 F. Supp. 891, 894 (D. Alas. 1971).

142. In two of these cases, Arizona State Department of Public Welfare v. Department of Health, Education and Welfare, and Connecticut State Department of Public Welfare v. Department of Health, Education and Welfare, State grantees were claiming that grant appeals procedures afforded them by HEW did not comport with constitutional due process. However, in both cases, the States admitted that they had no Fifth Amendment right to due process under South Carolina v. Katzenbach, and instead were basing their claim on the Tenth Amendment—a claim which was rejected by one court (Arizona, 449 F.2d at 478), and found to be irrelevant by the other because the State, in fact, had been given due process. (Connecticut, 448 F.2d at 212.) Thus, neither court was forced to reach the question of whether South Carolina v. Katzenbach applied to States in their role as grantees.

143. Cappalli, Rights and Remedies Under Federal Grants, *supra*, n. 123, pp. 225–43.

144. Cappalli at 229–33. By way of example: A non-profit grantee may have the right to a hearing when the Federal Government demands a repayment of grant funds, while under the exact same grant program and for exactly the same type of dispute, a State or locality may have no hearing right.

145. Cappalli at 238. As Professor Cappalli states: "In the *Thorpe* case . . . one argument made by the government defendant was that the new HUD regulations violated the constitutional prohibition on the impairment of contracts which applied, by way of Fifth Amendment Due Process, to the Federal Government. Note that a government agency was, thus, sneaking under the protective shield afforded 'persons' by the constitutional text. The Court reached the argument on the merits and held that the grant agreement was not impaired. It did not deny Durham Housing Authority the right to claim such protection."

146. Cappalli at 241. It should be noted, however, that National League of Cities v. Usery was dealing with matters covered by the Fair Labor Standards Act, a "domain of untouchable state power" which may be quite distinct from a State's role in Federal grant programs. Thus, the case may be no more than suggestive of the considerations the Supreme Court may weigh in deciding whether procedural due process applies to States and local grantees.

protections in grant dispute resolution remains crucial. Nongovernmental grantees (such as private educational institutions and non-profit organizations) represent a significant segment of the grantee community; Federal grantmaking agencies still must consider whether they are obligated to provide due process protections to these types of recipients. Furthermore, if agencies are required to provide due process protections for grant disputes involving non-governmental grantees, they may decide that, for reasons of policy, administrative convenience, or fundamental fairness, they will extend the same protections to all grantees, including State and local governments. In the political milieu in which we live, it would be highly unlikely if an agency were to follow a different course.

D. Constitutionally Protected Interests in Grant Disputes

1. Constitutionally Protected Interests in Pre-Award Grant Disputes

Pre-award disputes usually center around the denial, in whole or in part, of a grant to an applicant, or disagreements in the way in which a grant application was processed. Also falling into the category of pre-award disputes are those conflicts which arise because a former grantee has been denied refunding. At the outset, it is important to recall that rejected grant applicants have the right to judicial review of denials where they allege that an agency has transgressed a constitutional guarantee or violated an express statutory or procedural directive. (*Apter v. Richardson, supra.*)[147]

a. The Applicant's Property Interest

Drawing on the Supreme Court's language in *Board of Regents v. Roth*, a series of lower court decisions has held that disappointed applicants have no constitutionally protected property interests in receiving a grant.[148] These courts reason that because applicants have no ongoing contractual relationship with the Government, there are no "mutually explicit understandings" which would give rise to a constitutionally protected property interest. Rather, disappointed grant applicants have only a "unilateral expectation" of receiving a grant. There do not appear to be any decisions to the contrary.[149]

It is important to note, however, that all of the foregoing cases involved applications for *discretionary* grants. At least one commentator (Professor Cap-

147. *See* discussion at p. 196, *supra*.

148. *See, e.g.*, Missouri Health and Medical Organization, Inc. v. United States, 641 F.2d 870 (Ct. Cl. 1981); National Consumer Information Center v. Gallegos, 549 F.2d 822 (D.C. Cir. 1977); Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976); Legal Services Corp. of Prince George's County, Maryland v. Ehrlich, 457 F. Supp. 1058 (D. Md. 1978); Mil-Ka-Ko Research and Development Corp. v. OEO, 352 F. Supp. 169 (D.D.C. 1972); *aff'd mem.*, 497 F.2d 684 (D.C. Cir. 1974).

149. Of course, one could postulate a situation in which an applicant had been explicitly promised funding or refunding by an agency, only to be later denied the grant. In such circumstances, a court could apply the quasi-contractual doctrine of promissory reliance, to hold that mutual obligations had been entered into, constituting a property interest. No cases have been decided on this issue. *But see*, Conset Corporation, et al. v. Community Services Administration, 655 F.2d 1291, 1295 (D.C. Cir. 1981), which suggests that promissory reliance analysis may be accepted in appropriate circumstances as creating a property interest.

palli) has suggested that eligible applicants for *mandatory, entitlement* grants (where funds are distributed according to a statutorily-mandated formula) have a constitutionally protected property interest if they are denied funding.[150] This conclusion is based on the fact that most mandatory grant programs allow no administrative discretion in terms of who will receive the grant, and instead require only that the administering agency approve the applicant's (usually a State's) submission if it conforms to Federal requirements. Under this scheme, a justifiable reliance by the grant applicant may be established which could constitute a constitutionally protected property interest. Any rejection of an application for a mandatory grant, therefore, would have to be consistent with constitutional due process.[151] There do not appear to be any cases which specifically address this issue.

b. The Applicant's Liberty Interest

A liberty interest revolves around questions of a person's reputation or integrity and what the Government is doing to that reputation.[152] Situations in which a grant applicant's liberty may be violated include those in which an applicant has been blacklisted by an agency ("debarred") or otherwise denied the opportunity to apply for grants. Also involved may be situations in which the denial of a grant application harms the applicant's reputation or standing in the community.

There do not appear to be any cases which address this liberty interest in the context of the denial of a grant application. However, three recent cases have held that Federal *contractors* who were blacklisted by the Government have a protected liberty interest in their reputations and, therefore, are entitled to due process protections before they are disqualified from bidding for Government contracts. *Conset Corporation, et al. v. Community Services Administration*, 655 F.2d 1291 (D.C. Cir. 1981); *Transco of Ohio v. Freeman*, 639 F.2d 318 (6th Cir. 1981); *Old Dominion Dairy v. Secretary of Defense*, 613 F.2d 953 (D.C. Cir. 1980). Under these cases, a constitutionally-protected liberty interest may be found where an agency makes a decision that a contractor lacks integrity, communicates that decision to other agencies; and, as a result of the decision, the contractor is denied Government contracts.

Although each of these cases is limited on the facts to *contractor* rights vis-a-vis the Government, the liberty interest at issue here may be at least equally compelling in grantees facing debarment. To begin with, unlike the contractors involved in these cases, some grantees have legal "entitlements" or statutory preferences in some grantmaking. Furthermore, grant applicants typically are public entities or non-profit organizations which are largely dependent upon the receipt of Federal grant funds for at least part of their essential operations. The potential harm to these parties conceivably would be greater or at least more

150. Cappalli, *Rights and Remedies Under Federal Grants*, *supra*, 193–98. For further discussion of the nature of mandatory grants, *see*, pages 147–8, *supra*.

151. *Id.*, at 197.

152. Board of Regents v. Roth, 408 U.S. at 573.

direct than the harm to Government contractors, many of whom have significant non-Federal, private business dealings.[153]

2. *Constitutionally Protected Interests in Post-Award Grant Disputes*

Although several judicial decisions during the last decade have touched on the question of the constitutional due process rights of a grant applicant,[154] no court has faced squarely the issue of whether a grantee involved in a post-award dispute has the right to due process notice and hearing prior to final agency action.[155]

a. The Grantee's Property Interest

Unlike the pre-award situation, in all post-award disputes the grantee has received grant funds or has a written agreement promising the award of grant funds. For a grantee to demonstrate that it has a constitutionally-protected property interest under *Roth* and *Sindermann*, the grantee must demonstrate that its grant award or agreement constitutes a "claim of entitlement" arising from a "mutually explicit understanding" with the Government. As shown below, because grant agreements generally are viewed as being contractual in nature, and because contracts with the Federal Government are held to be protected property interests, the conclusion that a grantee, in a post-award dispute, possesses a protected property interest in grant funds seems compelling. Moreover, as also shown below, several courts already have treated Federal grant agreements as constitutionally-protected property interests.

(1) Contracts with the Federal Government Create Property Interests

It appears undisputed that *contracts* with the Federal Government are viewed as constitutionally-protected property interests. Not only does this conclusion flow logically from the "mutually explicit understanding" language of cases like *Sindermann* and *Roth*, but on several occasions the Supreme Court has ruled on this precise issue. As the Supreme Court held in *Lynch v. United States*, 292 U.S. 571, 579 (1934):

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153. In Southern Mutual Help Association, Inc. v. Califano, 574 F.2d 518, 524 (D.C. Ric. 1977), a court recognized the importance of this interest to a grant applicant. In its discussion of an applicant's standing to contest the denial of a continuation grant, the court noted:

> For an organization such as SMHA, dependent as it is upon grants of its very existence, a good reputation is perhaps its most valuable asset. Reputation, especially that established by past performance is a key element in agency grant decisions, and an organization that acquires a bad reputation in the grant community based on poor performance will have a difficult burden to overcome in securing new grants.

154. *See* discussion *supra*.

155. Two recent appellate courts have skirted the issue. In State of New Jersey v. Hufstedler, 662 F.2d 208 (3rd Cir. 1981), and State of West Virginia v. Secretary of Education, No. 80-1704 (4th Cir., Oct. 15, 1981) (unpublished decision), *motion to file late pet. for cert. denied*, 50 U.S.L.W. 3858 (April 15, 1982), the courts considered the validity of remedies imposed against Department of Education grantees for the misexpenditure of grant funds. The central issue in both cases was whether proceedings held before the Department's Education Appeal Board upholding the agency's cost disallowances were authorized by statute. In their decisions, both courts touched on what may have been due process concerns. In State of New Jersey, the court, in *dicta*, expressed concern

> Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

In *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 278 fn. 31 (1968), the *Lynch* holding was reaffirmed in a case involving a federally-assisted housing program.[156]

(2) Federal Grants are Contractual in Nature

Given the fact that contracts with the Federal Government are considered to be protected property interests, the finding in this report—that grants are contractual in nature—becomes extremely significant in establishing a protected constitutional interest for grantees. As shown above, although grants are different from Federal procurement contracts, they nonetheless create enforceable obligations which may give rise to constitutional due process rights.

The preaward cases discussed previously in this chapter support this finding. Utilizing a contract analogy, the courts in those cases held that disappointed grant applicants had no "mutually explicit understanding" with the Government. An important observation about these cases, however, is that, in each, the applicant's due process claim was not dismissed automatically because the application was for a Federal grant, and not a contract. Rather, the court examined, *in a contractual context*, the particular facts of each case to determine whether a mutually explicit understanding had been created between the applicant and the Federal Government. This examination is identical to that undertaken to determine if a contractor (or bidder on a contract) has a protected property interest.[157] Also supportive of this finding is a series of cases holding that terminating a participant from a Federal grant program may violate the participant's property interest if due process protections are not given. *See e.g.*, *Gold-*

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about the Department of Education acting without statutory authority. In its discussion, the court referred to "due process," but only in the context of the unilateral abridgement of grant terms. As the court stated:

> More important [than other concerns cited] would be the absence of due process in a system where agencies charged with administering the multitude of federal grant programs were free to augment or abridge the rights and obligations forming the contractual basis of the grantees' participation. 662 F.2d at 212.

In State of West Virginia, the court considered the grantee's claim that it was impermissibly denied an evidentiary hearing before the Board. The court rejected this claim, but it is not clear on what grounds. For example, in its decision, the court found that there had been a pre-hearing conference and that, from the record, it was "not clear . . . that [the grantee] desired an evidentiary hearing." Slip opinion, p. 4. Furthermore, the court found that the basic facts in the case were undisputed, and that the written record before the Board was sufficient. Thus, neither court expressly acknowledged the application of constitutional due process protections to grantees. The full implications of the decisions are not yet known.

156. *See also*, Larionoff v. United States, 429 U.S. 997 (1976).

157. *See, e.g.*, Lynch v. United States, 292 U.S. 571, 579 (1934); Art-Metal-USA, Inc. v. Solomon, 473 F. Supp. 1, 4 (D.D.C. 1978); Pan World Airways, Inc. v. Marshall, 439 F. Supp. 487, 493 (S.D.N.Y. 1977).

berg v. Kelly, 397 U.S. 255 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. United States*, 512 F.2d 1212 (4th Cir. 1975).

Similar holdings apply with respect to the termination of "providers" of grant services (*e.g.*, physicians and hospitals in the Medicaid program, grocery stores in the Food Stamp program). *Greenspan v. Klein*, 442 F. Supp. 860 (D.N.J. 1977); *Case v. Weinberger*, 523 F.2d 602 (2nd Cir. 1975); *Hathaway v. Mathews*, 546 F.2d 227 (7th Cir. 1976); *Cross v. United States*, 512 F.2d 1212 (4th Cir. 1975). In all of these cases, the courts found "mutually explicit understandings" between the parties—understandings which were based, at least in part, upon the obligational, contractual nature of grant programs.

b. The Grantee's Liberty Interest

It appears that no court has reached the question of whether a grantee has a liberty interest in a post-award dispute involving a grantee's reputation or integrity. However, the cases discussed above with respect to preaward disputes (*Old Dominion Dairy v. Secretary of Defense*, *Transco of Ohio v. Freeman*, and *Conset Corporation, et al. v. Community Services Administration*) also should apply here.[158] Thus, for example, where a grant is suspended without notice and hearing because of the grantee's alleged fraudulent practices, *both* the grantee's property and liberty interests may be violated.[159]

E. What Process is Due: Constitutional Requirements for Grant Appeals Procedures

Finding that a grantee or grant applicant has a protected property or liberty interest does not necessarily mandate a trial-type hearing before adverse agency action may be taken. "It is by now axiomatic that a determination that a due process liberty or property right has been violated does not determine the amount or type of process that is constitutionally required."[160] In fact, the Supreme Court consistently has held that, "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[161]

Nevertheless, there appear to be certain due process minimums. For example, a grantee or grant applicant with a protected property or liberty interest appears to be entitled to "some type of notice" and "some type of hearing." The Supreme Court has defined the notice requirement as follows:

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158. *See* pp. 200–202, *supra*.

159. No part of the due process doctrine suggests that a violation of *both* a grantee's property and liberty interests would entitle the grantee to any greater due process procedures than violation of only the grantee's property interest. However, under the balancing of factors ordered by Mathews v. Eldridge, a court may believe that the loss of current grant funds (the property interest) plus the harm to reputation attached to losing a grant because of alleged wrongdoing (the liberty interest) is a sufficiently "grievous loss" so as to necessitate greater trial-type procedures before the taking of any adverse administrative action. *See* discussion of Mathews v. Eldridge, *infra* p. 205–16 *et seq.*

160. Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953, 967 (D.C. Cir. 1980).

161. Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Goss v. Lopez, 419 U.S. 565, 578 (1975), quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); *See also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 13 (1978), *quoting Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

The right to a hearing is equally "fundamental." As the Supreme Court has made clear:

> [Some] type of hearing is required at some time before a person is finally deprived of this property interest . . . . [A] person's liberty is equally protected . . . .

Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974).

Given these standards, the issue becomes one of establishing the required nature of procedural protections in grant dispute resolution procedures.

There appears to be no case in which a court has faced the question of what process is constitutionally due to grantees or grant applicants which possess protected property or liberty interests.[162] In other contexts, Federal courts have adopted two distinct approaches to deciding the extent of process due: (1) The predominant, balancing-of-interests test used in *Mathews v. Eldridge*, 424 U.S. 319 (1976); and (2) an alternative doctrine first announced in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), in which the adjudication provisions of the Administrative Procedure Act are invoked once a constitutionally-protected interest is found. These two approaches are discussed below in the particular context of grant dispute resolution.

1. The Current Approach: The Process Due Grantees and Grant Applicants Under Mathews v. Eldridge

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court held that the determination of whether a particular agency process met due process requirements would be based on the weighing of three factors: (1) The private interest affected by the Government action; (2) the risk of an erroneous deprivation of such interest through existing procedures, and the probable value of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burden which additional procedures would entail.[163] The *Mathews v. Eldridge* decision was the culmination of a series of Supreme Court cases which held that the extensive, trial-type procedures ordered by the court in *Goldberg v. Kelly*, 397 U.S. 255 (1970), were not to be invoked

162. As noted previously, *supra* at note 155, in State of New Jersey v. Hufstedler the court's conclusion contained no analysis of when constitutional due process was necessary. Beyond State of New Jersey, we have been able to discover only one case, Connecticut Department of Public Welfare v. Department of Health, Education and Welfare, discussed *supra* at note 136, in which a court even suggested the issue of what constitutional process was due to a grantee. However, because the court accepted the argument that Connecticut, as a State grantee, had no entitlement to the due process coverage of the Constitution, the case is of little help.

163. *Id.* at 335.

automatically when a constitutionally protected property or liberty interest was found.[164] Rather, under the three-part *Mathews v. Eldridge* test, the balance struck often results in due process requirements in the administrative setting which are far less than a trial-type hearing.[165]

The *Mathews v. Eldridge* balancing approach is the prevailing standard for determining the constitutional adequacy of grant dispute resolution procedures.[166] However, it must be noted that there are certain difficulties in applying that standard in the context of this discussion. *Mathews v. Eldridge* requires a careful balancing of a particular set of facts. Here, we do not have a specific grant dispute in front of us, in which certain facts—such as who the grantee is, the amount of money at stake, other potentially harmful effects, and whether the dispute revolves around factual or legal disagreements—are known.

Moreover, virtually all of the cases decided under *Mathews v. Eldridge* focus on specific agency procedures in the context of specific disputes. They do not attempt to establish broad guidelines as to whether a particular procedure is valid, and, if so, when and how it should be used. This problem, and the resultant difficulty in drawing larger prescriptive principles from due process cases, was noted by Dean Paul Verkuil:

> The controversy occurs when one seeks to apply these criteria in particular contexts . . . what is lacking is a theory for refining the criteria and establishing a methodology for applying them to evaluate informal adjudication procedures in particular cases.[167]

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164. *See*, Goss v. Lopez, 419 U.S. 565 (1975) (suspension from public school without prior notice and hearing is constitutional); and Wolff v. McDonnell, 418 U.S. 539 (1974) (confrontation and cross-examination of adverse witnesses in prison disciplinary setting not required under due process clause). In Goldberg, 397 U.S. at 267–71, the Supreme Court listed at least ten procedures which must be granted before a recipient's welfare grant could be terminated. These include: opportunity to be heard; timely and adequate notice; and oral presentation of the case; confrontation of adverse witnesses; presentation of evidence to the decisionmaker; cross-examination of adverse witnesses; retention of counsel; decision based solely on the hearing record; statement of reasons for the decision by the decisionmaker; and decision made by an impartial decisionmaker. Goldberg v. Kelly, 397 U.S. at 267–71.

165. *See*, *e.g.*, Dixon v. Love, 431 U.S. 105, 115 (1977) (using Mathews test, trial-type hearing not required prior to revocation of a driver's license).

166. *See*, Catz, *supra* note 15, pp. 1118–129, wherein the author applied this test to grant terminations. *See also*, Gray Panthers v. Schweiker, *supra* (due process procedures of recipient seeking medicaid reimbursements); Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953, 967 (D.C. Cir. 1980) (contractor's right to notice and hearings prior to disqualification from receiving Federal contracts); Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980) (due process procedures prior to termination of veteran's educational benefits); Elliot v. Weinberger, 564 F.2d 1219 (9th Cir. 1977) (due process hearing prior to initiation of recoupment procedures to recover Social Security overpayments); Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977) (due process procedures prior to termination of public school superintendent). Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361 (9th Cir. 1976) (resident physician's rights to notice and hearing prior to dismissal from residency program of hospital); National Association for the Advancement of Colored People v. Wilmington Medical Center, Inc., 453 F. Supp. 330 (D. Del. 1978) *rev'd other grds.* 599 F.2d 1247 (3rd Cir. 1979) (federally-funded inner-city hospital seeking to move services to suburbs).

167. Verkuil, "A Study of Informal Adjudication Procedures," 43 U. Chi. L. Rev. 739–40 (1976).

Given this dual problem—the lack of a particular grant dispute in which to apply *Mathews v. Eldridge* balancing, and the absence of "a theory for refining the criteria and establishing a methodology"[168]—we have chosen to analyze the problems of what process is due to grantees and grant applicants by taking the following approach: *First*, from the approximately twenty "due process procedures" which potentially could be required in a grant appeal,[169] we have consolidated and distilled this list to arrive at *five* procedures which have been discussed throughout this report as the central concerns in grant appeals, namely: (a) notice of the adverse action taken by the Government; (b) opportunity for "some kind of hearing;" (c) right to timely action; (d) availability of "trial-type" procedures at a hearing, including cross-examination, compulsory process, witnesses under oath; and (e) use of an impartial decisionmaker.

Second, we will isolate each of these procedures, and will evaluate as specifically as possible whether the procedure is "due" under the *Mathews v. Eldridge* test.[170] In many instances, our evaluation of whether the procedure is due will depend on the particular factual circumstances surrounding a grant dispute; as the circumstances change, so might the procedures due.

Finally, drawing on this analysis, we will suggest three minimally necessary procedures which would be required under *Mathews v. Eldridge*, in *any grant dispute* in which the grantee or grant applicant has a protected property or liberty interest, regardless of the particular facts of the case.

a. Notice

At the outset, it must be noted that there are at least two notice issues involved in this discussion. *First*, whether grantees and rejected grant applicants should be notified promptly of adverse action taken against them? And, *second*, if so, to what extent that notice should specify the reasons for the action, available appeals procedures, and other pertinent information. Most agencies require that some sort of notice be provided to grantees or grant applicants when adverse agency action is taken.[171] Even with respect to the denial of discretionary grants, some notice generally is required.[172]

The required content of the notice varies considerably. Some agencies require that grantees and grantees with special entitlements receive complete notice of the specific reasons for the adverse action, the proposed sanction, a copy of the available appeals procedure, and advice concerning appeal rights while others specify no requirement for the content of notice.[173]

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168. *Id.*

169. *See* Davis, *Administrative Law Treatise*, § 10.6, pp. 327–28 (2nd ed. 1979); Goldberg v. Kelly, 397 U.S. at 267-71, *supra* note 169.

170. Of course, if a grantee desires a particular procedure included in a hearing which we have not discussed here, a court would use the Mathews v. Eldridge formula to arrive at a decision as to whether such a procedure were due. For any procedure, the doctrinal approach would be the same as outlined in this report.

171. As indicated above on page 196, such notice is required under certain circumstances by the APA.

172. *See, e.g.*, chapter on Public Health Service, *infra*.

173. *See*, 159–60, *supra*.

(1) The Private Interest Involved[174]

The severity of potential harm to a grant applicant depends, of course, upon the nature of the action proposed by the Government. Earlier in this report, we discussed the range of pre- and post-award actions giving rise to appeals. These include: denial of grant applications (initial and renewal), denial of requests for approval to incur expenditures, disapproval of indirect cost or other special rates, cost disallowances, cease and desist orders, voiding of a grant, suspension, termination, and debarment. Obviously, some of these actions may have a more significant effect upon a grantee or grant applicant than others.[175] For example, any complete or partial cut-off of grant funds—through termination, suspension, or voiding of a grant—probably will pose greater harm to a grantee than the mere denial of a request for expenditure of funds. Similarly, a debarment order (which prohibits an entity's receipt of grant funds, through grant or subgrant, for a period of several years) obviously is more serious than any denial of a single grant application. Moreover, there are gradations of severity within sanction categories. Thus, for example, cost disallowances totalling a million dollars obviously have a more harmful effect upon a grantee than cost disallowances totalling a hundred dollars.[176]

All of these variables must be considered in the first element of the *Mathews v. Eldridge* balancing. Indeed, it appears that many grantmaking agencies already have undertaken this kind of analysis. Thus, for example, some agencies (such as HUD) provide hearing rights only for the most serious types of disputes, namely debarment and termination. Furthermore, some agencies (such as HHS and EPA) provide different options for review, depending upon the amount of money at stake in a dispute.[177]

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174. This discussion of the first prong of the Mathews v. Eldridge test—the private interest affected by a grant sanction—involves the same analysis under each of the procedures discussed herein (such as notice, oral hearing, and impartial decisionmakers). Rather than repeat "the private interest factor" five different times, we intend to refer back to this discussion as the analysis of the first factor in the Mathews v. Eldridge balancing.

175. In his now-famous article, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1295–96 (1975), Judge Friendly suggested a hierarchy under which to evaluate the magnitude of the private interest affected by adverse government action. In the hierarchy, individual interests generally ranked higher than institutional interests. While grant actions probably fall below the "grievous loss" felt by welfare recipients in Goldberg v. Kelly, the "institutional" character of a grant should not serve to obscure the devastating individual effects which can attend an adverse grant action, and which therefore might place such adverse actions high on Judge Friendly's hierarchy. Grant sanctions and the resultant withdrawal of money will involve program cutbacks, with possible loss of services or benefits to individuals. Moreover, many grant sanctions lead to staff layoffs, office closings and even termination of businesses (with the resultant layoff of numerous employees). Such a drastic result can occur even in a "routine" case of an audit disallowance.

176. A strict quantitative analysis, however, might be misleading. For some grantees—particularly those which are one-hundred percent federally-funded—a cost disallowance of even a few hundred dollars may have serious repercussions.

177. *See* pp. 155–7, *supra*.

(2) The Probable Value of Additional Safeguards

The relative weight of the second *Mathews v. Eldridge* factor in determining adequate notice procedures—the probable value of the additional safeguard of complete notice versus the risk of an erroneous decision using abbreviated notice—seems to have been decided already by the Federal courts. Thus, as indicated above, courts make clear that notice is "an elementary and fundamental requirement"[178] of due process. Such holdings stem from the basic notion that there would be no such thing as a "protected" property or liberty interest if such an interest could be taken by the Government without any notice or reason being given, so as to allow the grantee or grant applicant to make an informed assessment and/or appeal of any adverse action.

(3) The Government's Interest

Consideration of the final *Mathews v. Eldridge* factor—the Government's interest, including the additional fiscal and administrative burden which complete notice (*i.e.*, notice of the action and a brief statement of the reasons for the action) would entail—seems to depend upon the nature of the action.

With respect to post-award disputes—or disputes involving the denial of entitlement grants—the burden on the Government does not seem to be particularly onerous. Indeed, quite the opposite may be true: If grantees or grant applicants understood fully the reasons for proposed adverse action, they might be less inclined to pursue administrative appeals. Practitioners suggest that, on many occasions, grantees or grant applicants pursue appeals based upon assumptions of agency bias against them and/or an improper understanding of the facts. In any event, such notice is the general practice of agencies.

In cases involving the denial of discretionary grant applications, it first must be emphasized that, in the "real world," one probably never would reach this point of analysis. As shown above, no court has ever held that an applicant for a discretionary grant has a constitutionally-protected interest in the grant award—nor is such holding anticipated. Therefore, it is highly unlikely that a court would reach the issue of "what process is due" in this context.

Nonetheless, we should note that, in the Public Health Service alone, thousands of applications for competitive discretionary grants are awarded each year, and the imposition of *any* requirement upon the handling of those applications would add burden to the agency.

(4) Balancing

Considering these factors, it seems clear that, with respect to virtually all post-award disputes and the denial of entitlement grants, notice of adverse action

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178. Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 13 (1978), discussed *supra* pp. 204–5. *See also*, Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C. Cir. 1981), wherein the Court of Appeals noted that:

> It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a constitutional process.

and the reasons for such action would be required by constitutional due process. If this issue ever were reached with respect to the denial of discretionary grants, the balancing would be more delicate in light of the facts that: (i) the applicant's interest most certainly would be less than that of the grantee in a post-award dispute or an applicant for an entitlement grant; and (ii) the burden imposed on the Government would be greater. Factored into the balancing, however, must be the fact that most agencies (including the Public Health Service and National Science Foundation) currently give *some* notice of adverse action to disappointed applicants for discretionary grants. The incremental burden caused by *complete* notice, therefore, may be minimal.

b. Opportunity for an Oral Hearing

The current availability of an oral hearing for grantees as part of an appeals procedure varies greatly, depending on the grant program and the agency. It is by no means a routine practice. In several agencies, the offer of an oral hearing is dependent on the amount of grant money in dispute.[178] This system suggests an at least implicit weighing of the first factor in the *Mathews v. Eldridge* test—the private interest at stake.

At the outset, it should be understood that the due process alternatives here are *not* between an oral hearing and no hearing at all. The latter situation would not satisfy due process requirements. As clearly stated by the Supreme Court in *Wolff v. McDonnell*:

> The Court has consistently held that some type of hearing is required at some time before a person is finally deprived of his property interest. . . .[179]

Instead, the issue is whether a "paper hearing," in which the grantee or grant applicant may submit briefs and exhibits to a decisionmaker, is sufficient process[180] or whether an oral hearing before the decisionmaker is required. Thus, it appears that once a grantee or grant applicant has a protected liberty or property interest, it is entitled *at least* to a paper hearing, in front of someone in the agency, at some time during the appeals process. This conclusion means that the many agencies which allow suspension or termination of grants without providing for any hearing (paper or oral) may be acting unconstitutionally.

In determining when an oral, as opposed to a paper, hearing is required for grantees and grant applicants, we turn once again to the three-part *Mathews v. Eldridge* test. The first prong of that test, the private interest at stake, was discussed previously.[181] Suffice it to say that the potential loss inflicted on the grantee or grant applicant will vary.

178a. *See*, pages 204–205, *supra*.

179. Wolff v. McDonnell, 418 U.S. at 557–58; *see* discussion *supra* at pp. 155–7.

180. *See* Basciano v. Herkimer, 605 F.2d 605 (2nd Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); Gray Panthers v. Schweiker, 652 F.2d 146, 165 (D.C. Cir. 1981).

181. Page 208, *supra*.

An evaluation of the second factor—the risk of erroneous deprivation to the grantee without an oral hearing and its probable value if included—requires some analysis of the purpose of the oral hearing. Three reasons are given in the case law as to why an oral hearing may be important. First, an oral hearing is a more "flexible" procedure for the participants, in that it permits a party "to mold his argument to the issues the decisionmaker appears to regard as important."[182] Second, when a decision is based on questions of the veracity and credibility of certain parties and their witnesses, a paper hearing is a "wholly unsatisfactory" basis for such a decision.[183] Finally, an oral hearing is a mechanism by which to avoid "careless and arbitrary action when the decisionmaker can retreat behind the screen of paper and anonymity" possible in a non-oral hearing.[184]

Cutting against these advantages of an oral hearing is the third factor in *Mathews v. Eldridge*: the increased financial and administrative expense involved in holding an oral hearing. The magnitude of this additional expense is not clear, however, for two reasons. First, it is not really known how many grantees actually would partake of an oral hearing, especially when it might require coming to Washington to present a case. Second, while the scheduling and holding of an oral hearing would consume Government resources, it is not immediately evident how much additional resources would be involved over and above the time spent in reviewing a written file, and communicating with the parties over incomplete or ambiguous documents and pleadings.

In trying to balance these factors, no conclusive answer emerges, although a couple of points are worth noting. In those grant appeals where there is a factual dispute and several versions of the "same facts" are emerging, the balance clearly would tend to swing toward an oral hearing, especially where an appellant's potential loss is sizeable.[185] Such a flexible oral hearing requirement could be invoked *sua sponte* by the decisionmaker, or raised on motion by the appellant.

c. Timing of a Hearing

Closely related to the issue of whether a hearing must be held is the question of *when* a hearing must be offered. On the assumption that an agency is required to hold either a paper or an oral hearing, must the hearing take place *before* a grant is suspended or terminated, or money returned to the agency, or can the Government go ahead and take the adverse action, and then entertain a grant appeal at some future time? Grantees obviously have a keen interest in this question; for a grantee whose grant is suspended and left entirely without operating funds, the possibility of an agency appeal one year after the disposition

182. Goldberg v. Kelly, 397 U.S. at 269.

183. Elliot v. Weinberger, 564 F.2d 1219, 1232 (9th Cir. 1977). *See also*, Goldberg v. Kelly, 397 U.S. at 269; Gray Panthers v. Schweiker, 652 F.2d at 169–70.

184. Gray Panthers v. Schweiker, 652 F.2d at 162.

185. Thus, HHS' procedures authorize an oral hearing where there are material facts in dispute. *See*, page 166–7, *supra*.

of the sanction could be meaningless.[186] However, as shown above, proceeding through an agency's formal appeals mechanism can be a time-consuming affair.[187]

In some cases, the question of the timeliness of an appeal is of less concern to grantees, because imposition of sanctions is delayed until the appeal is completed by the agency.[188] However, even with these provisions, grantees who face suspension may be unable to receive grant funds during the pendency of the appeal.[189]

A number of court cases have focused on whether pre-hearing termination of benefits are constitutional.[190] Collectively, these cases stand for the proposition that, depending on the circumstances, hearings are not inherently required prior to adverse Governmental action. Utilizing the *Mathews v. Eldridge* approach, a major focus in these cases has been the amount of harm faced by the party who is not given a pre-termination hearing. Also figuring significantly in the cases was the added cost to the Government of potentially providing two procedures: one before termination and a more complete one at some time following termination.

The focus of these cases was the particular factual setting of each case. To this setting the court applied the three *Mathews v. Eldridge* balancing factors. It therefore is virtually impossible to draw any general conclusions from these cases regarding the constitutional requirement of the timing of appeals in the grants context.

d. Use of Trial-Type Procedures

When we discuss the possibility of constitutionally required "trial-type" procedures, we have grouped together five procedures which together cause an oral administrative hearing to resemble a judicial trial. These procedures are: confrontation and cross-examination of parties and witnesses; testimony under oath; compulsory process to compel testimony; and rules allowing discovery with sanctions for non-compliance. Such procedures are relatively absent from current grant appeal procedures. For instance, testimony under oath is permitted in only one agency.[191] Most agencies have not dealt with the issue of compulsory process; DOL and DOJ are two of the few agencies permitting discovery.[192]

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186. This may be particularly so because of the absence of damages as a possible remedy for injured grantees or grant applicants.

187. *See*, pages 168–170, *supra*.

188. *See, e.g.*, HHS, ED chapters.

189. *See, e.g.*, HHS chapter.

190. *See*, Dixon v. Love, 431 U.S. 105 (1977) (revocation of driver's license prior to a hearing); Mathews v. Eldridge, *supra*.; Goldberg v. Kelly, *supra*.; Devine v. Cleveland, 616 F.2d 1080 (9th Cir. 1980) (termination of VA educational benefits prior to a hearing); Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977) (oral hearing prior to recoupment of social security overpayment).

191. *See* page 166–7, *supra*.

192. *Id.*

This relatively casual approach to the need for trial-type procedures may be more a reflection of the agencies' desire to keep grant appeals informal and non-adversarial than it is either a reasoned decision as to what will lead to the most accurate decisionmaking or a reflection of what is legally required under due process. This comment is based on two observations. First, under due process jurisprudence, trial-type procedures, especially cross-examination and confrontation, are required when there are substantial, material factual (as opposed to legal) issues in dispute. "In almost every setting where important decisions turn on questions of fact, due process requires" an opportunity for confrontation and cross-examination.[193] In those cases where a request for use of trial-type techniques has been denied by a court, it has been because the court has found that there are no material facts in dispute, and, therefore, no perceived benefit to be gained from allowing cross-examination, compulsory process or oaths—procedures which may not be necessary to clarify policy or legal disputes.[194] Other than where a case lacked contested factual issues, courts have held that where the challenging party had the benefit of confrontation, cross-examination and compulsory process, the fact that the witnesses did not testify under oath was not sufficient to make the hearing constitutionally infirm.[195]

The second observation is that grant disputes frequently center around disputed factual issues. For instance, in a routine audit disallowance, areas of heated controversy often are factual questions, such as whether spending authority was given for a particular purchase, who gave that authority, and how other grantees are allowed to spend their grant funds.

Keeping these observations in mind—the purpose of trial-type procedures and the frequent factual disputes which arise under grants—one can postulate a distinct type of grant dispute in which trial-type procedures may be required by *Mathews v. Eldridge*. These would be the cases in which a proposed sanction would have significant detrimental effects on the grantee, and where, for reasons already discussed, an oral hearing would be required.[196] With an oral hearing already necessary, the added fiscal and administrative burden put on the Government in making these hearings more formal by the addition of certain trial-type procedures may not be significant. Furthermore, under *Mathews v. Eldridge*, there would have to be significant, material facts in dispute so that the value of additional safeguarding procedures would be evident. Under this particular set of circumstances, a court may decide that due process requires some or all of the five trial procedures in the case of a grant appeal.

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193. Davis, 2 Administrative Law Treatise, §§ 12:1–12:2 (2nd ed. 1979); Goldberg v. Kelly, 397 U.S. at 269–70; Potemra v. Ping, 462 F. Supp. 328, 334 (S.D. Ohio 1978).

194. *See*, Connecticut Department of Public Welfare v. Department of Health, Education and Welfare, 448 F.2d 209, 212 (2nd Cir. 1971); Woodbury v. Mckinnon, 447 F.2d 839, 844 (5th Cir. 1971); N.A.A.C.P. v. Wilmington Medical Center, 453 F. Supp at 342–43.

195. Potemra v. Ping, 462 F. Supp at 334–35.

196. *See*, discussion *supra* at pp. 155–58.

e. Impartial Decisionmaker

Just as "some kind of notice" and "some kind of hearing" are viewed by the courts as minimally necessary to any due process proceeding, an "impartial decisionmaker" also is viewed as an absolute requirement of constitutional due process.[197] However, beyond this most general statement, agreement virtually ceases as to what constitutes an "impartial decisionmaker" in a particular setting.

The type of cases in which the Supreme Court has articulated a relatively clear doctrine of impartiality are not particularly helpful in the context of grant disputes. For example, the Supreme Court has stated that due process does not allow a hearing examiner to have a pecuniary interest in the outcome of a case[198] or have "been the target of personal abuse or criticism from the party before him."[199]

These forms of non-impartiality are not the usual problems for grantees. Rather, the two recurrent issues concerning impartiality of decisionmakers in grant appeals are: (1) Can a hearing examiner be impartial when he/she has responsibility for both the investigative and the adjudicative functions in a grant dispute, *i.e.*, an administrator who makes the adverse grant decision and then is the only person to whom the grantee appeals for reconsideration or reversal; (2) Can a hearing examiner be an impartial adjudicator when he/she is in a close working relationship with the personnel in the agency who were responsible either for the initial adverse grant decision, or for the prosecution of the case on behalf of the agency?

Federal agencies have no consistent practice as to providing or not providing impartial hearing examiners.[200] Only three agencies (DOL, DOJ, and HUD) appear to use administrative law judges. The Department of Education uses non-Government employees (attorneys and non-attorneys); HHS employs hearing officers who are HHS employees, but are removed from the offices which make adverse grant decisions. Less separated are the hearing officers at EPA, who are 142located in the same Office of General Counsel as the attorneys who represent the agency in grant appeals. Still further (or not at all) separated would be the many agencies which allow grant or program officials to review their own decisions or those of other officials in the same bureaucratic component.

In deciding what constitutes an "impartial decisionmaker" in a grant appeal, one must begin with the Supreme Court's statement that the combination of investigative and adjudicative functions is not a *per se* denial of due process.[201] Absent a specific set of facts to apply to a *Mathews v. Eldridge* balance, it is difficult to make a broader statement on due process separation of functions which would reliably apply to the permutations found in current agency procedures. As Professor Michael Asimow was forced to conclude in his report to the Administrative Conference:

197. *See*, Goldberg v. Kelly, 397 U.S. at 271; Withrow v. Larkin, 421 U.S. 35, 47 (1975).

198. Withrow v. Larkin, 427 U.S. at 47; Gibson v. Berryhill, 411 U.S. 566, 579 (1973).

199. Withrow v. Larkin, 422 U.S. at 47.

200. *See*, pages 160–66, *supra*.

201. *See*, Withrow v. Larkin, 421 U.S. at 47–55; Richardwon v. Perales, 402 U.S. 389 (1971).

> This omelette of cases on due process and separation of functions yields few generalizations and many obscurities. A particular instance of combination of functions can be approached only through a balancing process, since there is no single, simple formula for applying due process, much less deciding separation of function issues. . . . All this indicates that procedural due process disputes arising from a combination of functions are almost completely unpredictable; one can only focus on the myriad of relevant variables.[202]

Still, it may be possible to go beyond this "omelette of cases" and suggest one useful criterion, applicable in some instances, by which to judge whether an agency is utilizing a constitutionally "impartial" decisionmaker in the grant disputes context: is the decisionmaker's position within the agency such that he/she has already formed, in the words of Professor Kenneth Davis, "*a 'prejudgment of adjudicative facts' in the case*?"[203] Such a prejudgment, suggests Professor Davis, would arise when the supposedly impartial decisionmaker is more than just familiar with the facts of a case on which he/she must decide; rather, the decisionmaker has already formed and expressed a judgment on the facts.[204] In such a situation, the case law is fairly clear that this decisionmaker is not considered constitutionally impartial.[205]

With respect to current grant dispute procedures, these cases suggest that those agency practices which allow the same administrator to first make an adverse grant action and then to adjudicate the grantee's appeal may be considered to be constitutionally suspect. These procedures should be examined to determine whether prejudgment of a grantee-appellant's case is likely. Also potentially suspect (but requiring especially close scrutiny of the particular dynamics involved) would be those procedures in which the immediate supervisor of the administrator who took the initial decision now is asked to review the appeal. In such situations, it may be possible to contend that there has been a *de facto* prejudgment of the facts by the supervisor. These practices, therefore, may raise constitutional questions regarding prejudgment of a grantee's case.

f. Conclusion on Process Due Under Mathews v. Eldridge

As stated at the outset of this discussion, our analysis of the constitutional process due to grantees and grant applicants with protected property or liberty interests has been necessarily tentative, based on the absence of specific factual

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202. M. Asimow, "When the Curtain Falls: Separation of Functions in Federal Administrative Agencies," *Report for the Administrative Conference of the United States*, 40–41 (August 10, 1980).

203. Davis, 3 Administrative Law Treatise § 19:4, (2d ed. 1980); *See also*, Prygoski, "Due Process and Designated Members of Administrative Tribunals," 33 Ad. L. Rev. 441, 461 (Fall 1981).

204. Davis, 3 Administrative Law Treatise § 19:4, pp. 382–85 (2d ed. 1980). A case apparently involving this issue was considered by EPA. *See* footnote 50, *supra*, and accompanying text.

205. *See*, Stanton v. Mayes, 552 F.2d 908, 912–14 (10th Cir. 1977); Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); American Cyanamiel Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

circumstances and the lack of broad principles in the case law. Still, this discussion has identified certain procedural minimums which must be given by an agency in any grant dispute brought by a grantee or grant applicant with a constitutionally protected interest: (1) There must be a *grant appeals procedure of some type* where a grantee or grant applicant with a constitutionally protected interest can contest the validity of an adverse agency action; (2) Such a grantee or grant applicant must receive *notice* which is sufficient to acquaint the grantee with all of the charges made against it, the legal and factual basis of the charges, and the proposed sanctions; (3) This grantee or grant applicant must receive a *hearing*. Whether there is an entitlement to an oral hearing or only a "paper" hearing will depend on the circumstances of the appeal; and (4) The hearing must be in front of *an impartial decisionmaker*. Beyond these minimums, any court or agency deciding whether a grantee or grant applicant was constitutionally entitled to additional procedures would have to balance the factors articulated in *Mathews v. Eldridge*.

2. *An Alternative Approach: The Process Due Grantees and Grant Applicants Under Wong Yang Sung*

In the 1950 case of *Wong Yang Sung v. McGrath*,[206] the Supreme Court was asked to rule on whether an alien could be deported from the United States after an administrative hearing which did not conform to Sections 554, 556 and 557 of the Administrative Procedure Act. After concluding that the alien had a constitutional right to due process, the Court addressed the problem of what process was due:

> We think that the limitation of hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. *They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency*. 339 U.S. at 50. (Emphasis added.)

Thus, under *Wong Yang Sung*, the first step of the due process inquiry would be exactly the same as that discussed above: Does the grantee or grant applicant have a protected interest deserving constitutional protections? However, upon finding this protected property or liberty interest in the context of a Federal administrative or regulatory scheme, the language in *Wong Yang Sung* suggests

206. 339 U.S. 33 (1950).

that at the least, all of the trial-type protections of the Administrative Procedure Act (§§ 556, 556 and 557) must be afforded to the grantee.[207]

The *Wong Yang Sung* opinion appears to conflict directly with the Supreme Court s current approach to deciding what process is due, as articulated in *Mathews v. Eldridge* and its progeny. The holding in *Wong Yang Sung* does not suggest a pragmatic balancing approach; rather, whenever a protected interest is being taken away, the adjudication procedures of the APA would be invoked automatically as constituting the minimum requirements of due process.

It is doubtful that the all-or-nothing approach of *Wong Yang Sung* would be currently accepted by a court adjudicating a procedural due process claim. In none of the due process cases decided in the 1970's has the Supreme Court referred to *Wong Yang Sung*. Indeed, there appears to be only one lower court decision, *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1959), which has completely adopted the *Wong Yang Sung* doctrine. In *Adams v. Witmer*, the appellant was denied patents to certain mining claims by the Bureau of Land Management. Appellant challenged the lack of due process in the Bureau's decision. The Ninth Circuit found that the appellant's claim for procedural protections fell outside the adjudication provisions of the APA because no "hearing" was required by any relevant statute. However, the court ordered that the appellant still be afforded the protections of the APA on the following grounds:

> [A]s the appellant's right to his mining claims was a property right, it follows that the requirements of due process necessitate that he have a hearing before he can be deprived of that property right. This constitutional requirement is no less mandatory than would be a mere statutory requirement for hearing. As stated in *Wong Yang Sung* v. *McGrath* [citations omitted], 'The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.'

271 F.2d at 33. *See also*, *United States v. Consolidated Mines and Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971). Other fairly recent cases have cited *Wong Yang Sung* approvingly; however, none have found any constitutionally-protected interests which would give rise to a hearing.[208]

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207. Another possible interpretation of the meaning of the excerpted portion of Wong Yang Sung is narrower and more consistent with Mathews v. Eldridge: Once a balancing of factors under Mathews v. Eldridge dictates that a full trial-type hearing is required in a case involving a Federal statutory scheme, then §§ 554, 556 and 557 of the APA are used to supply the procedures for that Federal hearing. However, Supreme Court cases decided after Wong Yang Sung put this interpretation in doubt in their extension of the Wong Yang Sung holding to statutes that had not previously been construed to require a full hearing. *See* note, "The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act," 12 Harv. J. Legis. 194, 208 (1975).

208. *See*, Chemical Leaman Tank Lines, Inv. v. United States, 368 F. Supp. 925, 936 (D. Del. 1973); DeVyver v. Warden, U.S. Penitentiary, 388 F. Supp. 1213, 1221 (M.D. Penn. 1974).

At least three cases have rejected explicitly the *Wong Yang Sung* approach, adopting a more flexible formula as to what process is due. In *Koniag, Inc. Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), several Alaskan villages appealed an order by the Secretary of the Interior which found these villages to be ineligible to take land and revenues under the Alaska Native Claims Settlement Act. The villages claimed that they were denied due process in the decisionmaking of the Secretary. The Court of Appeals indicated that it was "guided" by *Wong Yang Sung*, but refused to invoke the APA solely because of the *Wong Yang Sung* decision. Instead, the Court of Appeals applied the *Mathews v. Eldridge* balancing test to decide how much process was due.

In *State of Colorado v. Veterans Administration*, 602 F.2d 926 (10th Cir. 1979), the court again side-stepped the implications of *Wong Yang Sung*. The case concerned the issue of whether the Veterans Administration could recoup alleged overpayments made to colleges on behalf of veterans. The colleges contended that they were entitled to due process protections before they could be required to repay the money. The District Court held that *Wong Yang Sung* controlled and that the plaintiffs were entitled to the procedures granted under the APA.[209] On appeal, the Tenth Circuit reversed, stating simply that the APA did not apply where no "hearing" was required by statute. 602 F.2d at 938–39.

Finally, the Ninth Circuit was confronted directly with its own earlier adoption of the *Wong Yang Sung* doctrine in the case of *Clardy v. Levi*, 545 F.2d 1241 (9th Cir. 1976). In *Clardy v. Levi*, plaintiffs argued that they were entitled to full APA due process in Federal prison disciplinary proceedings. Rather than ignoring the *Wong Yang Sung* decision, the Ninth Circuit admitted that the decision appeared to demand that APA procedures be applied to the disciplinary proceedings. However, they refused to apply the *Wong Yang Sung* conclusion, holding that the APA procedures were not designed with the prison setting in mind, and that the Supreme Court lately had taken a more flexible approach in the prison situation.[210]

Because only one court in the last ten years has actually adopted the *Wong Yang Sung* decision, it appears that that decision has lost its vitality. Nonetheless, the case stands unreversed and undistinguished by the Supreme Court. If a court were to find that *Wong Yang Sung* still were good law, the case seems to demand that any agency which seeks to afford grantees less due process than required by the APA has the burden of justifying why APA procedures should not be invoked. It would be a difficult proposition for grantmaking agencies to accept.

Summary on Due Process

The argument that grantees and grant applicants have due process rights which govern dispute procedures is an argument which is essentially untested

209. State of Colorado v. Veterans Administration, 430 F. Supp. 551 (D. Colo. 1977).
210. Clardy v. Levi, 545 F.2d at 1245.

in the courts. Yet this chapter suggests that such an argument may have a solid foundation in the constitutional due process decisions announced by the Supreme Court and lower courts in the last decade. In selected pre-award dispute situations and in all post-award situations, a liberty or property interest may be involved, demanding constitutional protections. The extent of the process which is due in such situations has not been established; however, our conclusion is that due process requires that at least four minimum procedures be afforded to grantees and grant applicants who possess protected interests: (1) *A grant appeals procedure of some type* in which the grantee or grant applicant may contest the validity of an adverse agency action; (2) *Notice* to the grantee or grant applicant in sufficient detail to acquaint the grantee or grant applicant with the charges against it, the legal and factual bases of the charges, and the proposed sanctions; (3) *"Some type of hearing"*—oral or by "paper"; and (4) *Review by an impartial decisionmaker*. Further definition of these requirements, and the applicability of other procedural protections will depend upon the particular facts and circumstances of each case.

V. Conclusions and Recommendations

In this study, we have sought to provide empirical data and analysis of existing grant dispute resolution procedures: the context in which they arise (Chapter I); their nature (Chapter II); the legal nature of the agreements underpinning them (Chapter III); and their consistency with constitutional due process requirements (Chapter IV).

Three major themes have emerged from our study. *First*, there are enormous variations among grantmaking agencies regarding types of grant programs, types of grantees, types of potential disputes, types of appeal procedures, and attitudes towards grant dispute resolution. Most of the larger grantmaking agencies—such as the Department of Health and Human Services, Department of Labor, Department of Education, Environmental Protection Agency, and Department of Energy—have come to grips with the fact that disputes arise under Federal grants, and have developed fairly elaborate procedures for dealing with them. Others, such as the National Science Foundation, Department of Transportation, and Department of Agriculture, have been reluctant to develop elaborate procedures because: (i) they don't perceive the need for them; and (ii) they are concerned that the development of such procedures would encourage disputes.

Regardless of the validity of these perceptions and concerns, the differences among agencies cannot be ignored. Thus, *any recommendations issued by the Conference should afford to each agency as much latitude as possible in tailoring procedures to the characteristics of its own grant programs and grantees.*

The *second* major theme was that there was a decided preference on the part of both the agencies and grantees to resolve disputes informally, wherever possible. Thus, our study showed that even where grantees had seen fit to evoke more formal appeal mechanisms, they frequently favored settlement or informal negotiation and exchange of views. These findings, however, did not preclude recognition of the need for the existence of the more formal procedures. Several

policy rationales emerged for the maintenance of such procedures. Chief among these: the protection of grantees' rights and avoidance of the agencies' involvement in needless and troublesome litigation in the courts; the fact and appearance of reasoned decisionmaking; and the prophylactic effect of having a formal procedure available so that the parties may have some incentive to settle disputes informally. These findings and considerations suggest that *any recommendations issued by the Conference should encourage agencies to use informal dispute resolution procedures wherever possible, but to consider seriously all policy as well as legal reasons for making available more formal-type procedures.*

The *third* major theme is that, at least under certain circumstances, grantees and grant applicants have legal rights to "some kind of notice" and "some kind of hearing." The Administrative Procedure Act requires "prompt notice" of adverse agency action. Under certain circumstances, this notice must include a statement of the reasons for the agency action. Where grant-enabling or other statutes or agency rules mandate greater notice—or hearing—rights and procedures, agencies must follow them scrupulously.

Where additional notice or hearing procedures are not required by statute or rule, agencies should consider the mandates of constitutional due process. Grantees, applicants for entitlement grants, and applicants which are denied funding because of an agency finding of incompetence or lack of integrity appear to have property and liberty interests, the loss of which must be accompanied by due process. In such case, *the agency should provide at a minimum* for:

(1) *Notice to the grantee or grant applicant in sufficient detail to acquaint the grantee or grant applicant with the charges against it, the legal and factual bases of the charges, and the proposed sanctions*;

(2) *"Some type of hearing"—oral or by paper*; and

(3) *Review by an impartial decisionmaker.*

Explicit in these procedures should be the opportunity for the parties to obtain information from each other (through compulsory process, if necessary), to examine and cross-examine witnesses, and to acquire testimony under oath. In addition, the agencies should assure the development of a record sufficient to reflect accurately all significant factual submissions to the decisionmaker and provide a basis for decision.

Not all grantmaking agencies currently provide these procedures.

Finally, the Conference should recommend that agencies make whatever procedures that do exist known and available to all affected parties on an equal and consistent basis. Copies of the procedures should be published in the *Federal Register*. Agencies also should be urged to retain and make available copies of decisions emanating from dispute resolution procedures. Such decisions may assist in grants administration, and eliminate the need for duplicative litigation.

RECOMMENDATION 82–2: RESOLVING DISPUTES UNDER FEDERAL GRANT PROGRAMS

(Adopted June 17, 1982)

Federal grants to governments, public service institutions and other nonprofit organizations have been conspicuous instruments of federal policy since the 1930s. During the past two decades the growth in the number of federal grant programs, and the level of resources distributed through grants, has evidenced the expanded influence of the federal government on the activities of these entities.

Ensuring proper conduct of federal assistance programs has assumed increasing importance as these extraordinarily varied programs have proliferated. Federal domestic grant spending, which now exceeds $100 billion annually, promotes major social goals. Grants, and the activities they assist, often are crucial to beneficiaries whom Congress intends to aid and to recipients who carry out program goals. For instance, over one-quarter of all expenditures by state and local governments now come from federal grants, and thousands of smaller institutions depend on these funds for their very existence.

Each of these grants represents an understanding on the part of the federal government and the grantee that is in the nature of a contractual commitment. The number and intensity of disputes over grants have risen in recent years, following both the increased reliance on federal grants by other institutions and a growing federal budget stringency that has decreased the generosity of federal funding and increased the rigor of audit review. These disputes run the gamut from those that involve nearly pure questions of federal policy and agency discretion to those that affect substantial grantee expectations or involve particularized adverse determinations about individuals.

Disputes may arise initially over the making or withholding of a grant, the amount of funds committed, or the terms and conditions imposed. Once the grantee has undertaken the project, controversies may occur over what actions the grantee has been funded or authorized to take, the grantee's relationships with program beneficiaries, subgrantees, or subcontractors, and other incidents of ongoing project administration, including grantee compliance with the terms and conditions of the grant. Disputes may arise in the form of audit disallowances. Finally, an agency may choose to terminate or debar a grantee or refuse to provide continued funding based on the agency's belief about the adequacy of a grantee's performance of previous projects.

In prior recommendations, the Administrative Conference has called on all federal grantmaking agencies to adopt informal procedures for hearing and re-

solving complaints by the public that a recipient's administration of a grant fails to meet federal standards (Recommendations 71–9 and 74–2). While some agencies have carried out these recommendations, many still do not afford grantees or other persons affected by the operation of federal domestic grant programs any channels for impartial consideration of their complaints. Congress has provided few directives in this area, except as to a few agencies like the Departments of Education and Labor, and actual agency practices in handling grant disputes have varied considerably.

This recommendation goes beyond the Conference's prior statements to focus on the rights that agencies should provide to grantees and applicants for grant funds. Few agencies afforded grant recipients any substantial appeal rights until the mid-1970's; some still fail to do so. In recent years, several agencies have begun to create processes to resolve some types of disputes with grantees and certain types of grant applicants. Their experience indicates that these appeal procedures, while sometimes flawed, have been useful for protecting grantees' rights and for helping agencies to avert needless and troublesome litigation, improve oversight of significant administrative problems, ensure that policies are applied fairly and consistently, and make decisions on a rational, justifiable basis.

Given the importance of these programs, the nature of the interests involved, public policy factors, and considerations of fairness enunciated in recent constitutional decisions, the Administrative Conference believes that all grantmaking agencies should maintain procedures to hear appeals regarding certain kinds of agency actions. For example, grantees generally have a special interest in debarment, termination, suspension, or certain kinds of renewal or entitlement situations. Also, disputes regarding some expenditure disallowances arising from audits, or other cost and cost rate determinations, may be crucial to a grantee, requiring payback of large sums. Because of the potential significance of these types of actions, and their relative infrequency, agencies should establish appeals procedures for them. On the other hand, thousands of applications for competitive discretionary grants are denied each year, and the imposition of any broad appeal hearing requirement for this type of action could be quite burdensome to some agencies.

While the variety and complexity of federal domestic grant programs (and grant disputes) ultimately renders uniform procedural prescriptions inappropriate, this recommendation sets forth some general considerations that agencies should find useful to guide them in assessing the adequacy of their present methods of resolving grant appeals. The Conference believes that an agency should have considerable latitude to tailor procedures to the characteristics of its programs and grantees, and in the great bulk of appeals agencies need not match the protections required in adjudications governed by the Administrative Procedure Act, 5 U.S.C. §§ 554–557. The recommendation begins with, and centers on, the notion that informal action—including opportunities for conversations with relevant program officials and their superiors, mediation or ombudsman services, and similar devices—should form the core of the resolution process. Still, agencies should be aware that at least some disputes may arise, especially in post-

award cases involving contested issues with substantial funds at stake, in which some kind of more formal agency review should be made available.

In making this recommendation, the Conference is aware that some agencies maintain appeal procedures which are more elaborate than those described below but provide equal or greater safeguards and protective measures. This recommendation is not intended to cast any doubt on the propriety of such procedures, or to assess the need therefor in light of specific programs or agency goals and concerns.

Recommendation

I. Scope and Intent of the Recommendations

The recommendations in Part II concern procedures for disputes involving domestic "grantees" and "vested applications." A "grantee" may be a nonprofit or community service organization, a unit of state or local government, a school, corporation or an individual who has executed a grant agreement or cooperative agreement with a federal agency. A "vested applicant" is one who is entitled by statute to receive funds, provided the applicant meets certain minimal requirements; or one who applies for a noncompetitive continuation grant, and has been designated in some manner as the service deliverer for a designated area or is operating within a designated multi-year project period. Part II deals with agency-level processes for handling complaints by disappointed applicants for discretionary grant funds. The procedures recommended herein are not intended to displace existing hearing mechanisms already required by law in some programs. They apply only to grant programs carried on primarily within the United States.

II. Complaints by Grantees and Vested Applicants

A. Informal Review and Dispute Resolution Procedures.

1. Each federal grantmaking agency should provide informal procedures under which the agency may attempt to review and resolve complaints by grantees and vested applicants without resort to formal, adjudicatory procedures. The informal procedure could take several forms, including, for example, advance notice of adverse action and the reasons for the action, opportunity to meet with the federal officials involved in the dispute, review by another or higher-level agency official, or use of an ombudsman or mediator. Attempts to resolve disputes under these informal procedures should be pursued expeditiously by the agency within a definite time frame. Notwithstanding these time limits, a complainant's invocation of more formal appeal procedures should not prevent further efforts to settle, mediate, or otherwise resolve the dispute informally.

2. The existence of informal review procedures should be made known to affected grantees and vested applicants in the manner described in paragraphs 3 and 12, below. Agencies should encourage their program and decisional officials to resolve grievances informally, and provide training to improve their abilities to do so. In undertaking such training, agencies should work with those

agencies that already have begun to make use of mediation and other conciliatory approaches, such as the Departmental Grant Appeals Board in the Department of Health and Human Services, and existing groups with expertise in these methods of dispute resolution.

B. Notice of Agency Action.

3. Upon issuance of an agency decision which (if not appealed) represents final agency action, each grantmaking agency should provide prompt notice of its action to the affected grantee or vested applicant. If the action is adverse to a grantee or vested applicant, the agency's notice, at a minimum, should provide a brief statement of the legal or factual basis for the action; state the nature of any sanctions to be imposed; and describe any available appeal procedures, including applicable deadlines and the name and address of the agency official to be contacted in the initial stages of an appeal.

C. Administrative Appeal Procedures.

4. Each federal grantmaking agency should provide the additional opportunity for some type of administrative appeal in at least certain kinds of grant-related disputes. This appeal may be conducted orally or in writing, depending on the nature of the dispute, and may be expedited where appropriate. In determining whether an administrative appeal should be afforded and the form of any such appeal for particular classes of disputes, agencies should consider the probable impact of the adverse action on the complainant, the importance of procedural safeguards to accurate decisionmaking in each class of dispute, the probable nature and complexity of the factual and legal issues, the financial and administrative burden that would be imposed upon the agency, the need for a perception of the government's fairness in dealing with grantees and vested applicants, and the usefulness of appeal procedures to give feedback on administrative problems.

5. In light of the factors described in paragraph 4, each federal grantmaking agency should provide the opportunity for some kind of administrative appeal with regard to adverse actions involving:

a. The performance of an existing grant, including disputes involving debarment, termination, suspension, voiding of a grant agreement, cost disallowances, denials of cost authorizations, and cost rate determinations;

b. The denial of funding to applicants for entitlement grants, including disputes involving the applicant's eligibility, amount of funding to be received, and application of award criteria or pre-established review procedures; and

c. The denial of applications for noncompetitive continuation awards where the denial is for failure to comply with the terms of a previous award.

6. Where an opportunity for an administrative appeal is afforded, the agency should take into account the factors set forth in paragraph 4 and select from among the following forms of proceedings to provide the one most appropriate to the particular case:

a. Decision based on written submissions only;

b. Decision based on oral presentations;

c. Decision on written submissions plus an informal conference or oral presentation; or

d. Full evidentiary hearing.

Where a hearing or conference is useful to resolve certain issues, the agency may limit the hearing to those issues and treat remaining questions less formally. In addition, the agency should provide some form of discretionary expedited appeal process for disputes. In such proceedings, the agency may, for example, shorten time deadlines, curtail record requirements, or simplify procedures for oral or written presentations.

7. At a minimum, these administrative appeal procedures should afford grantees and vested applicants the following:

a. Written notice of the adverse decision (See paragraphs 3 and 12);

b. An imparital decisionmaker (for instance, a grant appeals board member, a high level agency official, a person from outside the agency, an administrative law judge, or certain other agency personnel from outside the program office), with authority to conduct the proceedings in a timely and orderly fashion;

c. Opportunity for the agency, complainant and any other parties to the appeal promptly to obtain information from each other, and to present and rebut significant evidence and arguments;

d. Development of a record sufficient to reflect accurately all significant factual submissions to the decisionmaker and provide a basis for a fair decision; and

e. Prompt issuance of a written decision stating briefly the underlying factual and legal basis.

8. Each federal grantmaking agency should determine in advance, and specify by rule or order, the scope of the authority delegated to the decisionmaker in administrative appeals. For example, agencies should specify in advance whether the decisionmaker has the authority to review the validity of agency regulations or the consistency of agency actions with governing statutes.

9. Agencies should accord finality to the appeal decision, unless further review is conducted promptly pursuant to narrowly drawn exceptions and accordance with preestablished procedures, criteria and standards of review. If the decisionmaker is delegated, or asserts, authority to review the validity of agency regulations, the agency head should retain an option for prompt final review of the decision in accordance with applicable procedures.

10. Once these administrative appeal procedures are invoked, the decisionmaker should discourage all ex parte communications on the appeal unless the parties consent to such communications. Any ex parte communications that do occur should be disclosed promptly, and placed in the appeal record.

11. Agencies should encourage prompt decision of appeals by creating time limits or other guidelines for processing grant disputes, and should pay particular attention to resolving appeals over decisions regarding renewal and continuation grants in a timely manner. These timetables might be fixed generically or in accordance with the complexity of particular cases. Decisionmakers'

compliance should be monitored by the agency pursuant to a regular caseload management system.

D. Public Notice.

12. Grantmaking agencies should give advance notice and afford an opportunity for public comment in developing informal review and administrative appeal procedures. Agencies should ensure that available procedures are made known to grantees and vested applicants. Notice of such procedures should be published in the *Federal Register*, codified in the *Code of Federal Regulations*, and included in grant agreements and other appropriate documents, in addition to the individual notice described in paragraph 3.

13. Agencies should collect in a central location, and index, those written decisions made in administrative appeals. These decisions should be made available to the public except to the extent that their disclosure is prohibited by law. Whenever a grantee or vested applicant cites a previous written decision as a precedent for the agency to follow in its case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

III. Complaints by Discretionary Grant Applicants

A. Informal Review Procedures.

The Conference previously has called on agencies to develop criteria for judging discretionary grant applications and to adopt at least informal complaint mechanisms to ensure compliance with these criteria and other federal standards. (See Recommendations 71–9 and 74–2.) The Conference reiterates its belief that these procedures can benefit agency performance.

B. Public Notice.

Each federal grantmaking agency should ensure that available informal review procedures and administrative appeal procedures are made known to grant applicants. Notice of such procedures should be published in the *Federal Register*, codified in the *Code of Federal Regulations*, and included in application materials and other appropriate documents. (See also Recommendations 71–4 and 71–9.)

IV. Implementation of Recommendation

Each federal grantmaking agency should, within one year of the adoption of this recommendation, report in writing to the Administrative Conference the steps the agency intends to take, consistent with the above guidelines, to improve its dispute resolution process.

REPORT IN SUPPORT OF RECOMMENDATION 74-2

STANDARDS AND PROCEDURES FOR THE DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

*Margaret Gilhooley**

The government's distribution of assistance has a public impact comparable to that of government regulation. Yet assistance is often regarded as an incidental activity, suitably left to agency discretion and the sway of "politics." The public interest would be better served by applying to assistance the standards of administration expected of regulatory programs. Assistance should be distributed in accordance with articulated criteria which promote the statutory objective of the program, and the agencies should make complaint procedures available for affected persons who assert non-compliance with federal standards.

This regularization of discretion in assistance programs would improve their operations, not hinder them, for it would provide the programs with the direction essential for their achievement of their statutory aims. It would also better ensure impartiality in the distribution of aid, involve interested persons in compliance-monitoring, and improve public understanding of the government's purposes. These advantages are examined in the first part of this report, along with the considerations which affect the form and specificity of federal standards. The concern for pluralism and federalism in our society both moderate the appropriate degree of central direction and increase the importance of its public formulation. The second part of this report outlines the minimal elements agencies should provide in the complaint procedures they develop for their assistance programs. The aim is to show that an open process of assistance administration is feasible as well as desirable.

I. Need for a Regularization of Discretion

A. Assistance as a Major Government Activity

1. *Scope of Recommendation*

(Recommendation A)

This proposal is focused upon those assistance programs in which agencies have the most discretion, as it is in these programs

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that structuring is most needed. Agency discretion is at its widest when the agency can choose the recipients, determine the amount of awards, fix the terms and set the objective to be attained. The entire Recommendation applies to the discretionary assistance programs in which agencies have a substantial choice as to all or most of these elements. The Recommendation applies to all types of federal assistance irrespective of the form of aid. Thus its coverage extends beyond grants to include such programs as surplus property distributions and loans.[1] It does not, however, cover assistance provided in the form of the services of federal personnel, because of the additional complexities the agencies face in having to take personnel policies into account in developing their distribution criteria. Consequently, programs like the National Health Service Corps are excluded.[2]

The Recommendation does not apply to any assistance program in which the federal agency has little or no discretion as to the distribution of aid. Thus, benefit programs, such as Social Security, in which individuals receive awards on the basis of statutory entitlement, are beyond the scope of this proposal. Also excluded are "formula" grant programs, since by statute the states are identified as the recipients. Lastly, the proposal is inapplicable to government procurement programs on the theory that the agency's discretion is sufficiently guided by the statutory and regulatory provisions specifying an awards basis and establishing dispute procedures.

It may be that this proposal should be applied more broadly to the excluded programs. Even though the agency has little choice about the identity of recipients, it may have latitude in specifying the things they must do with the aid, and in deciding how much they should receive.[3] The interpretation of statutory requirements may involve discretion. It would seem beneficial for agencies to articulate their objectives and standards when implementing this type of discretionary authority as well. Whether the agencies need to do more in this regard is left for now for more specific study. Attention here is concentrated upon the agency allocation actions, which are even more wholly discretionary, as in these the agencies must confront most bluntly the difficult underlying question: why should some receive while others do not?

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[1] 40 U.S.C. § 484; 12 U.S.C. § 1749.
[2] 42 U.S.C. § 254b.
[3] E.g., 29 U.S.C. §§ 49d, 49g (1970); 42 U.S.C. §§ 246, 3733 (1970).

2. *Importance of Assistance*

If assistance is used in its broadest sense, its economic impact as measured by the cost to the federal government is enormous, over $100 billion a year.[4] As limited to discretionary programs the annual federal cost is not insignificant. These expenditures affect the immediate recipients and applicants, the ultimate beneficiaries, geographic areas and types of activities. The impact of this spending on national economic life has only recently become the subject of intensive interest and research. The staff of the Joint Economic Committee, in its "first step" study of the range of federal subsidies, reported that these subsidies constitute an "incredibly diversified and pervasive system" of assistance to the private economy, that only a "meager understanding" exists of the economic effects, and that the subsidy system seems "somewhat" out of control in that "it continues to grow despite the fact that we know so little about it." [5]

Assistance represents government intervention to alter the distribution of services which would otherwise prevail under market conditions. Though less studied than regulation, assistance has a similar public importance. It is one means available to the government to allocate and direct the nation's human and material resources to achieve an intended purpose, analogous in many respects to licensing. In licensing, the government gives a limited group the right to make money by providing services to the consuming public; in assistance, the government gives a limited group the tax money which enables them to buy services or provide services for a portion of the public. Like licensing, assistance can be used to establish minimum standards for public services, to check prices for scarce resources and to benefit particular groups. The quality and quantity of professional services can be increased, for instance, through changes in occupational licensing requirements or through conditioned subsidies for improved professional training.

Assistance has in practice been used by the federal government to a considerable extent in shaping social and economic affairs.

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[4] See U.S. Office of Management and Budget, *The Budget of the U.S. Government*, Fiscal Year 1974 66–68, 364–368, Table 17 (1974) (included for this purpose are 1973 estimated expenditures for income security, most of those for "physical resources," and the "general government" outlay for law enforcement aid).

[5] Staff of Joint Economic Comm., 92d Cong., 1st Sess., Study of *The Economics of Federal Subsidy Programs* 1, 4–5. (Comm. Print 1972); for other studies of "the grants economy" see K. Boulding & W. Pfaff, *Redistribution to the Rich and the Poor, The Grants Economics of Income Distribution* (1972).

Historically, federal grants have played a major role in the development of the nation's agriculture, colleges, transportation systems and economically "underdeveloped" areas—one needs but to recollect that the transcontinental railroads were financed through federal land grants. In more contemporary circumstances, federal assistance programs have had a considerable impact on how, where and whether Americans live. For example, highway aid, urban renewal, welfare and medical research grants have had consequences that match that of any other governmental activity. Assistance is also of particular social importance because it represents the distribution end of the redistribution of wealth through taxes. Assistance is also the principal means by which the federal government affects matters traditionally left to community control. The federal government gets its leverage through its purse over such sensitive areas as police functions, land use, family assistance and the welfare of the poor.

3. *Assistance as "Different"*

Assistance, though, is often considered to be "different," acceptably administered informally, without explanations, and even politically. All grant, benefit and loan programs continue to be statutorily exempt from the procedural requirements for the issuance of proposed rules.[6] In grant programs, adjudications and judicial review are usually explicitly called for only in formula programs, to protect the rights of the states to their statutory allotment of funds.[7] All other grants are commonly called "discretionary" because those affected have no administrative recourse from the agencies' determinations. Traditionally, at all governmental levels, assistance programs have had an inadequate development of executive controls over the conduct of officials, making direct courtsuits one of the few means of enforcing legal standards.[8] The distribution of federal assistance frequently has

[6] 5 U.S.C. § 553 (1970). The Conference has recommended that this exemption be repealed and that in the meantime the agencies observe these requirements as a matter of policy; Recomm. 69–8 (No. 16) "Elimination of Certain Exemptions from the APA Rulemaking Requirements," Admin. Conf. of the U.S. Recomm. and Rep. 305 (1970).

[7] E.g., 42 U.S.C. §§ 1316, 3758, 3759.

[8] See L. Jaffe, *Judicial Control of Administrative Action* 459–500 at 474–75 (Abr. stud. ed. 1965).

the appearance of politics about it.[9] Announcements of awards are routinely made through Congressional offices, as if to suggest the good offices which brought about the agency decision. A frequent reaction to a proposal that agencies state their distribution criteria is: be realistic; it's all political; it's a pork barrel; it's only money.

The aim here is to examine the contention that, because assistance "only" involves money, it can legitimately be dispensed with less public concern. One justification for this suspension of the rule of law is that the government does not act coercively. It does not exclude those not receiving its dispensation from the activity, under threat of sanction. Anyone is free to sponsor basic research or provide housing for the poor—if they can afford to do so. And frequently they cannot, or at least cannot at an effective level. If these projects could be funded without federal action, the government would presumably not have wasted its money by establishing the program. The scale of aided activities and most of the recipients are dependent in practice, if not by law, upon government approval for their endeavors. Questions have been raised whether even the federal revenue system can afford the costs for all the subsidies it provides, but as of now, in any case, it continues to do so, and it is often the only entity in a position to promote alternative means to finance and regulate services it has led people to expect.

Moreover, the lack of coercion is a dubious base for distinguishing assistance from a coercive activity like licensing. Coercion plays a similar background role in both. The agencies get their daily operating significance, not from the threat of force, but from the carrot they have to dispense. They differ in how the government's coercive power is exercised to create that carrot. In the case of assistance, the government uses its coercive ability to collect taxes to gather the money the agency dispenses. In licensing, the government uses its power to exclude others from the activity. The principal activity of both agencies is similar: they choose initially among desirous applicants, and they determine the terms of service through the duration of the program. More importantly, in both areas, concern should not be limited to

[9] For examples of the impact of "politics" on the distribution of federal aid, see discussion in ABA National Institute on Federal Urban Grants, 22 Ad. L. Rev. 161–64 (Tufo), 230–235 (M. Semer) (1970); Cahn & Cahn, *The New Sovereign Immunity*, 81 Harv. L. Rev. 929, 943 (1968); Rocky Mountain News (Mar. 12, 1974) ("Impeachment committee members recipients of out-of-the-ordinary pork barrel favors."). "Politics" is a factor in enforcement decisions as well, see Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 Duke L. J. 1; M. Derthick, *The Influence of Federal Grants* (1970).

the immediate winners and losers of awards—coerced or not as the case may be—but with the impact of the agency's program on those ultimately served and the degree to which that impact accords with the public purpose in creating the program. To promote that purpose effectively, assistance programs need to observe the better practices urged upon regulatory agencies, of structuring their discretion.

"Politics," though, is sometimes offered as a separate justification for the different treatment of assistance. If Congress could not influence the selection process, the argument goes, it would never enact needed programs. The same argument could be made about any government activity if it were considered acceptable for Congress to influence them in this way. Under this proposal, agencies should make their discretionary decisions only in accordance with what the law states, and not with some unstated "political" understanding about who gets what. This proposal does not eliminate politics, however, if "politics" only means a legislative bargaining process. Congress can establish its program goals and selection criteria when it passes a law, and the agency should be guided by the enacted provisions. Increased congressional articulation should lead to better programs, even assuming that it leads to fewer ones. The process of articulation should induce the Congress to think through the endeavor with more depth, and to assume greater responsibility for the consequences of its decisions.

B. ADVANTAGES OF STRUCTURING DISCRETION

In sum, the proposed Recommendation calls upon the agencies administering federal assistance to identify publicly the performance outcomes they expect to achieve through their program; to develop standards, based on that formulation, for awarding and conditioning assistance; and to utilize public procedures for developing and enforcing the standards. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of its decision-making by creating a pressure for analysis and generalization of program aims. Applicants and recipients benefit from more consistent and predictable terms, and the open opportunity to seek an award. The interested public can monitor compliance in a way that promotes program purposes. It also makes the agency actions more comprehensible to all involved.

1. *Policy Articulation and Program Rationality* (Recommendation B1)

Agencies should formulate the outcomes they want because only by doing so are they likely to realize attainable objectives. Assistance agencies are frequently delegated great discretion by Congress to promote a public purpose, identified only in general terms. The statute may merely name a public concern for attention, and give little guidance on how to achieve it or how to reconcile conflicting interests.[10] Comparably broad statutory standards occur in other government programs, and the Administrative Conference has generally urged all federal agencies to define adequate criteria to guide their decisions.[11] The advantages of doing so, in extending fairer and more predictable treatment, and in promoting "good government" have been noted. Like other large organizations, government agencies also have a management interest in adequately defining their standards, as such definition gives better guidance to personnel, and reduces the inefficiency of repeatedly resolving anew the same issue.[12]

Appropriately stressed in this context is an additional program advantage that follows from the effort of articulating agency policy—it counteracts the tendency to avoid the risks of decision-making. If the agency announces a definite policy on a difficult matter, it is likely to encounter criticism from those with differing viewpoints. It also stands to be judged by the outcome of its policy. To avoid these troubles, the agency officials may never formulate any overall policy. Instead they may make their choices on an *ad hoc* and individual basis, and they may fail to give any affirmative guidance to recipients about what they are expected to do. This can be a problem in any governmental program, but may be a greater one in assistance because all the individual activities aided are good causes. The agency may fund a project,

[10] *E.g.*, 42 U.S.C.A. § 3736(a)(2); 49 U.S.C. §§ 1601–1612 (1970); 42 U.S.C.A. §§ 3801–91.

[11] Recommendation 71-3, "Articulation of Agency Policies," Admin. Conf. of the U. S. Recomm. and Rep. 24 (1973); see H. Friendly, *The Federal Administrative Agencies; The Need for Better Definition of Standards* (1962), also printed in 75 Harv. L. Rev. 863, 1055, 1263 (1962); Davis, *Discretionary Justice*, especially 97–103 (1969).

[12] See, A. Etzioni, *Modern Organizations* 53 (1964), quoting M. Weber, *The Theory of Social and Economic Organization* (329–30 (1947)) ("Rational organization is the antithesis of ad hoc, temporary, unstable relations. . . . Rules save effort by obviating the need for deriving a new solution for every problem and case; they facilitate standardization and equality in the treatment of many cases."); Bruce, What Goes Wrong with Evaluation and How to Prevent It, 1 Human Needs 10–10 (1972) (according to an HEW Assistant Administrator the "largest single cause" of ineffective evaluation studies may be the failure to derive agreed-up specific performance outcomes from broad statutory statements.)

which is indeed worthy, without sufficiently examining whether it is a priority project, or whether it will effectively achieve the statutory aim.

The absence of federal direction is likely to have grave consequences for the program. The funded projects will operate, of course—that's what the receipt of funds makes possible. In a sense, though, they have been abandoned. Without guidance, the recipients will devise their own endeavors, which may indeed be worthy but most likely they will reflect assorted views and immediate local concerns. As a result, the programs may fail to meet the general public need for which they were created, and will be criticized some day when Congress and the public ask what has been accomplished with the time and resources provided. Moreover, the individual programs will encounter, on an isolated basis, the pitfalls lying in wait for any activity that promotes change. Those who oppose the program can seize upon the inevitable incidents of controversy to launch a broad attack upon the recipient. The outcome may be determined by the local balance of political forces, in the absence of established federal rules dealing with sensitive policy problems. When these rules exist, they guide the recipient to avoid difficulties, and, in the fray, they help it, for the rules serve as an outside appeal and justification: we are doing what the federal government requires.[13] Some of the problems in federal assistance programs have been attributed to this failure of Washington officials to plan, anticipatorily, to deal with program realities, and to state policy where it is most needed.[14]

To serve the interests of their recipients, the public and their own coming day of accountability, federal assistance agencies should recognize their responsibility for the overall success of their discretionary programs. The first step in meeting that responsibility is each agency's identification of the attainable re-

[13] Note, The Legal Services Corp.: Curtailing Political Influence, 81 Yale L. J. 231 (1971).

[14] *E.g.*, A. Kahn, *Studies in Social Planning*, 64–67 (1969); Hazard, *Law Reforming in the Poverty Effort*, 37 U. of Chi. L. Rev. 242 (1970); S. Carey, *Falling Down on the Job: The United States Employment Service and the Disadvantaged* (1972). These shortcomings redound to bring criticism upon the federal agency. For example, the Law Enforcement Assistance Administration's acceptance of state funding proposals which underfunded the cities and other interests of statutory concern brought criticism, Congressional hearings, statutory amendments and finally increased regulatory attention. See Pub. L. No. 91-644, 84 Stat. 1883, *amending* 42 U.S.C. § 3733, (1964 ed. Supp.), codified at 42 U.S.C. § 3733 (1970); Advisory Comm. on Intergovernmental Relations, Report A-36, *Making the Safe Streets Act Work* 52 (1970); hearings on H.R. 14341, 15947 and Related Proposals, Subcomm. No. 5, House Comm. on Judiciary, 91st Cong. 2d Sess., Serial No. 17 (1970); Law Enforcement Assistance Administration, *Memorandum to State Planning Agency Directors*, No. 10, Change No. 1, p. 21 (March 1, 1972).

sults it wants to achieve through its program and any obstacles that hinder achievement of its goals. It should then work to bring about the desired outcomes by establishing suitable criteria for selecting recipients, and suitable terms governing their operations. The agency should look upon the actual program outcome as a test of the adequacy of its goals and implementing policies. It should examine its policies, in relationship to the results, at regular intervals and as experience dictates.

The agency's formulation of its objectives should be made in the form of a public statement. This helps educate agency personnel, recipients and those affected by the program. In addition, the published form may induce the agencies to face the breadth of their task and to generalize a sufficiently long-term and comprehensive policy. It also puts the responsible agency officials permanently on record on their policy decisions, and that gives them a personal incentive to think ahead.

The identification of obstacles in a program is an important part of developing agency policy. For example, a program which provided preschool aid for poor children recognized that the program might become an all black one in the South because white children might not enroll if not sought out and encouraged to participate. Grant applicants were instructed to advertise their openings and to canvas eligible households. While the obstacles should ordinarily be publicly identified, in some circumstances it may be self-defeating to do so. If the unpopularity of the program with local political officials is one of the obstacles to the program's success, it may only harden resistance to express this difficulty.

The agency's formulation of program objectives and performance outcomes can become a hindrance to the program and a mere exercise if the agency does not sensibly and seriously use it as a means of achieving the program's objectives. The process is not meant to produce a "body count," in which program accomplishments are measured solely by the more-easily-quantifiable indicia of activity without adequate attention to the program's more complex goals. To avoid this, the agencies need to give this matter special attention. They should endeavor to develop adequate measurements for the range of their goals, or recognize the limitations of the measurements which they are able to develop. An agency can also appear to have satisfied the purpose of this Recommendation by issuing statements which superficially are adequate but which are unanalyzed justifications for letting things ride. The articulation process can help the agencies achieve

better programs but only if the agencies are convinced enough of the value of the process to use it meaningfully.

There is also a risk when agencies give their programs clear direction that the policy direction will be a poor one on the merits, and that, as a consequence, numbers of programs will be led astray. The only reliable correctives for that human susceptibility to error are continued analysis and the open complaint procedures hereafter proposed.

2. *Fair Treatment of Recipients*
(Recommendations B2 and B3)

The agency's articulation of its funding terms and criteria facilitates fair treatment of those similarly situated, an advantage as pertinent in assistance programs as in any others. Even those who ultimately receive funds have an interest in the advance general statement of any requirements. Like licensees, assistance recipients need a predictable basis for planning and they do not want to be subjected to requirements not consistently imposed on others. At present, individual grants are sometimes treated like private contracts, with the government adding terms as it pleases, which the applicants have scant bargaining power to question. As a result, little attention may be given to the applicability of the terms and "special conditions" to other similar proposals. When agencies impose a term, not found in their general regulations, they should indicate the occasions for its use.

Of even more concern in this discussion is the importance of the formulation of the agency's funding terms and criteria in providing even-handed treatment to the class of those eligible for aid, both applicants and ultimate beneficiaries. Equal treatment is rightfully expected from the government unless differences are justified by the promotion of a public purpose. The articulation of funding criteria facilitates the making of awards on both an impartial and a program-related basis because it leads to wider notice and premises selection on satisfaction of the official criteria.

The government does not always provide enough money to make aid available to all in similar circumstances: to finance public housing for everyone with a low-income, or a mass transit system for every community. Thus, many assistance programs ration out public services. The scarcity and value of the aid creates a danger that favoritism, politics and even corruption will play a role. To avoid this at the citizen distribution level, on

due process grounds, a court has required the issuance of agency criteria for allocation of the limited vacancies in government-financed housing.[15] A similar concern, and a similar remedy, seems appropriate in regard to the government's wholesale manner of distributing aid among areas of applicants.

The full implication of the articulation process will be to impel assistance programs towards one of three bases for providing aid: entitlement for all meeting minimum eligibility standards; competitive awards to the applicants who best meet the selection criteria and somewhat special treatment of experimental programs for the duration of the experiment.

a. *Entitlement.* Entitlement awards already exist in assistance in the form of the non-discretionary selection present in benefit and formula programs. This approach to selection is possible in discretionary programs, making a number of awards for the same purpose, if the agency can specify minimum eligibility requirements, related to the program's objectives, which select the proper number of recipients. For example, if a program were established to provide vitamin supplements in school lunches, every school with a lunch program might be given a right to aid. Congress has provided for the award of grants for the education of Indians to be made to local educational agencies on the basis of the number of Indians attending the local schools.[16] If more applicants meet the criteria than can be aided, the agency should refine its definition of eligibility, use criteria to assign priorities, or move to a more competitive model.

b. *Competitive Awards.* When the number of eligible applicants exceeds the number of awards to be made, the agency should specify its criteria for choosing among them. To return to the hypothetical example of the vitamin distribution program, if aid were insufficient to supply every eligible school, selection might be based upon the applicant's ability to aid the most children in need. The regulations for "annual interest grants for construction of academic facilities" set out eligibility criteria, and priorities for awards. In the first priority category are public institutions, developing institutions and those enrolling 20% or more of their students from low-income families; among these, aid goes to those in the most urgent need of new facilities, and those com-

[15] Holmes v. Housing Authority, 398 F.2d 262 (2nd Cir. 1968) (the decision focused on the state-aided housing program rather than on the federally-aided program for which some objective allocation criteria existed); see *Morton v. Ruiz*, 42 L.W. 4262 at 4272 (Feb. 20, 1974); Clagett, *Informal Action-Adjudication-Rulemaking: Some Recent Development in Federal Administrative Law*, 1971 Duke L. J. 51.

[16] 20 U.S.C. § 241bb, see 40 C.F.R. § 35.555.2 (pollution enforcement control projects).

mitted to the enrollment of substantial numbers of veterans.[17] The agencies have issued more specific funding criteria for some of their programs.[18]

When the agency specifies the standard guiding its choice, it also opens the awards process to competition. Competition helps ensure that the award will be made to the most meritorious project, and it is fairer to all those eligible since each has an opportunity to seek aid, even the non-regulars. These factors have made "competitive bidding" the accepted standard for the government's action in awarding valuable procurement contracts.[19] Competition is appropriate in assistance, as well, for the same reasons, but the award basis need not necessarily be that of the "lowest bid." Nor would it be necessary for the agencies to announce the competition via the procurement methods of published notice and sealed bids. The assistance agency can use any system that gives potential applicants effective notice and a fair opportunity to seek an award.

Developing the appropriate selection criteria is not without difficulty. It is a decision which the agency should make after considering the program's performance objectives. For instance, it might decide to award education aid to those who can best increase the reading performance for poor students. Numerical formulas, and "objective" standards, have the advantage of ease in application, but their use is limited in these and other award programs by their adequacy to guide the proper decision. Judgment will often have to be left to the decision-maker, but the agency should provide meaningful guidance in its standards about how officials should proceed.

Factors in addition to performance may enter into selection—geographical distributions being a prevalent example. Administrative responsiveness to area interests is often considered to be political, but to a degree it is appropriate in a federal system that distributes power partially on this basis. The agencies should identify its effect, though, so that it can be assessed by Congress and the public.

Still, in some programs, there may be no program-related basis to pick one applicant over another. Many are eligible and each could do the job in a substantially equivalent manner. If no basis of choice can be stated, low-cost may be the appropriate criterion,

[17] 45 C.F.R. § 170.82.

[18] See 39 Fed. Register 9440 (Mar. 11, 1974) (educational broadcasting); 24 C.F.R. Pt. 556 (Basic Water and Sewer Facilities Grants).

[19] See Speidel, Judicial and Administrative Review of Government Contract Awards 37 Law and Cont. Prob. 63 (1972).

or some arbitrary selection basis—the date of application, a periodic rotation through the alphabet of applicants, or even a lottery. But it may be possible to adapt the availability of this aid to other public needs. Unitary projects, providing many jobs, might be located, for instance, in economically depressed areas. The selection basis should still be stated, in order to encourage serious analysis of whether the project really will promote long term development, and to enable other areas, with similar needs, to compete for aid.

c. *Experimental Projects.* In research, demonstrations, problem-solving and other experimental programs, the agency may not be able to detail fully the outcome sought or the means of its accomplishment, because it does not fully know it. In that circumstance, great reliance has to be placed upon the competence of the researcher, and that may need to be subjectively weighed. As a result, the agency needs to retain some ability to choose recipients without having to justify its decision. The appropriate checks on the agency discretion are for the agency to state its program's research purpose, to specify its criteria as fully as its experience permits, to provide as much competitive opportunity as feasible, and to encourage public assessment of the research agenda and accomplishments.

Similar considerations apply in any newly established developmental program, even those which are not intended to be experimental as a permanent program feature. In their initial stage, they are experimental in the sense that they have to develop their selection criteria. To this extent they may be unable to articulate their criteria for a time and will have to make some allocations on a subjective basis. The program may have multiple objectives and there may be conflicting views about its major aims. When this is so, the agency should recognize the experimental character of its program and it should fund recipients in order to test out and evaluate the various conceptions of its goals. Afterwards, the agency should be able to assess which goals are achievable and it should formulate more objective criteria for its future awards.

While agencies may not be able to articulate fully their criteria in experimental programs, to the extent they can they should do so, and they should make the awards process as open and competitive as possible. Agencies have made some efforts to state publicly their criteria and research priorities. The Environmental Protection Agency, for instance, annually publishes the results of its research planning process "identifying the research objectives to be pursued by the agency and the approximate amount of

funds to be available" for grant and contract assistance.[20] The National Oceanic and Atmospheric Administration has published its objectives and selection criteria for funding "estuarine sanctuaries" as natural field laboratories; it specified the zoogeographic classifications which it wanted to fund in the program.[21]

To provide open access to participation, general requests for proposals might be issued, even though some of the assessment have to be subjective. In small programs, though, the administrative cost of soliciting these proposals might be out of proportion. When general proposals are not feasible, the agency should devise some other competitive arrangement. Competition might be limited to negotiations with researchers of established competence but, at the same time, some research money might be made available for supporting innovative proposals coming from new sources.

Encouraging public assessment is of particular value in research programs. It can be done by obtaining comments on proposed major awards, and by holding periodic public meetings on the agency's research agenda and accomplishments.

Analysis in advance by other researchers is helpful because of the difficulties in being sure that admittedly-uncertain projects have been thought out as fully as they could be. The certainty of public review afterwards creates a continuing reminder to the agency and the researchers that they are expected to be accomplishing something. Some projects will fail, the risk being built in, but overall the agency should come up with some successes or at least some conclusion about the value of continuing the effort.

Special difficulties in assuring fair allocations arise in those experiments and demonstrations which involve the provision of services to a limited public.[22] These should not go on forever on their research rationale. When their effectiveness has been shown, if not discontinued, the services should be made available to all eligible or rationed out in accordance with their new rationale. The task is like that in allocating other limited public services, but it may be more complicated, as the tendency will be to continue existing projects in place, for reasons of economy, even though their original non-competitive selection may have been made on the basis of typicality, rather than effectiveness. The

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[20] 40 C.F.R. § 40.120–3.

[21] 15 C.F.R. Part 921, 39 Fed. Register 8924 (Mar. 7, 1974); see 39 Fed. Register 8927 (Mar. 7, 1974) (library research and development).

[22] See Willcox, *Public Services under a Government of Laws.* (unpublished speech 1968).

agency should anticipate these transfer problems to an extent in setting up the program, keeping in mind its purpose of coming to some conclusion within a definite period. The ultimate disposition, however, has to turn upon what is learned through the experience.

d. *Continuing Assessment of Fairness.* These categories, of entitlements, competitive awards and experiments, slide into one another, and programs can move from one to another, as the selection basis becomes more or less regularized and specific in response to the exigencies of meeting the public need. What remains constant is the necessity in all of them to keep re-examining the underlying public need and the fairness of the program's allocation of public goods. That fairness question is a conspicuous one in competitive programs which ration out aid among numerous applicants. It exists as well in entitlement programs, on an even larger monetary scale, if one considers the disparate treatment given the eligible class over others, whose situation may not be all that different.

The equity issue goes well beyond being a procedural one, but administrative procedure has a relevance to its examination. For the justification of these differences in treatment is that they meet a public need, and the adequacy of that explanation, for the most part, is tested by the public's willingness to accept it. Thus, by insisting on a public surfacing of the justification for program choices, administrative procedure serves an even larger public interest—that of making it possible for the public to refine its sense of common fairness.

3. *Provision of a Feedback Structure*
(Recommendation C Generally)

The promulgation of agency standards works to improve compliance and to make public interest in the programs a force for achieving the agency's objectives. The agency's public statement of its objectives and its terms for awards creates a constituency which expects their fulfillment. It also clarifies the responsibility for failures. The recipient-operators will be accountable for their efforts to meet the stated objective, but the agency will be responsible for the program failures that result from the misidentification of objectives.

The standards also provide the frame of reference for the essential feedback of grievances to management through complaint procedures. Agency officials should recognize that the effec-

tive operation of their program is mainly achieved through its official rules and policies. In a large continuing organization, the official statements are the means of communication that relate the diverse interests of the participants to a common purpose. Without their articulation, and without a means to bring operations and the formal policy into conformity, the participants lose touch with one another and the program. The consequence of that breakdown frequently is that the top officials do not know about the actual state of affairs, and developing difficulties, until confronted by a major program failure.

The official rules are frequently seen, however, as obstacles in the way of getting things done. Programs succeed, it is thought, in spite of the red tape, put together by energetic people who "care" and do not dally over the technicalities. That approach undoubtedly succeeds in instances, but usually only for projects that receive concentrated attention. More seriously, it does no good for the long-term operation of the program. For one thing, it frees other officials to pick and choose the policies to be discarded. When the existing rules are genuinely in the way of program success, the problem is their content or deficiencies in their application, not the existence of rules as such. The remedy is either to re-write the rules or better supervise their implementation.

The establishment of complaint procedures brings latent problems with the official standards to the surface for attention. The problems may be isolated ones or readily correctable: a case of an individual error or a poorly-drafted rule. They also may reveal deeper program failures: the inadequacy of the stated selection criteria to guide the choices that in fact have to be made; an unexpected obstacle; a pattern of resistance. They may even show an unresolved conflict between officially endorsed goals. The complaint proceedings may serve to work out these issues, by permitting the concentrated examination of a concrete case-problem. If not adequate, the agency should use the other mechanisms at its disposal to work out a new policy: additional research, investigations, public discussion, changes in the rules, or whatever.

Complaint procedures are especially valuable for this feedback purpose because they involve those outside the agency. The independent position of the complainants permits them to tell the agency executives that the official standards are not being observed in practice. Even so, interested persons only do this, and the complaint procedures only works to serve this necessary function, if the agency has established standards. Without a stated

agency policy, the dissatisfied public does not know the ground-rules and to whom it should complain. Furthermore, without some statement of what they can rightfully expect, those who deal with an organization are at the mercy of the discretion of low level officials. Rules protect. Their issuance as official policy gives those benefitted by their content the wherewithal to assert their claim. Finally, the standards shape the issues to be raised in the complaint procedures, thereby helping to keep the process manageable. This benefit is more fully explored in the last part of this report.

4. *Involvement of the Public in Policy Development* (Recommendation B5)

The public should have the opportunity to participate in the development of all assistance aims and standards but most especially in these. The notice-and-comment rule-making procedures of the Administrative Procedure Act are appropriately used for this purpose as they permit wide participation without undue interference with the administrative process. The Administrative Conference has already recommended the deletion of the statutory exemption of grant, benefit and loan programs from the APA's procedural requirements for proposed rule-making.[23] This recommendation notes the applicability of those procedures to these agency decisions. It is precisely because agency decisions in formulating goal and criteria are controversial and difficult that they benefit from being publicly aired. The agency has the opportunity to learn in advance from the public comments of pitfalls and deficient analysis, thus avoiding program failures in operation.

Of fundamental importance is the value of public proceedings in forming a public understanding about governmental purposes. The public's acceptance of aims is their principal justification. People are aware that governmental actions affect their daily lives, but they often do not understand what, if any, reason lies behind the decisions, let alone what influence they can have on them. To make its actions comprehensible to the public, the government first has to ensure that there is some rationality to them, by articulating its standards. In addition, it should develop its policies through public proceedings, the more important the decision, the more visible the proceeding.

[23] Recomm. 69-8 (No. 16) "Elimination of Certain Exceptions from the APA Rule-making Requirements," 1 Admin. Conf. of the U.S., Recomm. and Rep. 305 (1970).

The government benefits from these public discussions. Its policies are shaped by the public's willingness to accept changes. Promotion of public transport, for instance, depends upon individual decisions not to drive. The government needs to know what types of changes are most acceptable, and the public has to understand the reasons for the change. Public discussion focused around a proceeding to consider priorities in awarding aid can prove mutually educational and beneficial in working out an acceptable policy.

The federal agency may also find it useful to provide more than the bare minimum statutory procedures in developing rules of unusual complexity or considerable public interest. Accordingly, the agency may provide oral conferences, evidentiary hearings or other procedures. It may even be appropriate to hold regional meetings and conferences as a convenience for the affected public, or to develop regional rules when justifiably they are of limited geographic effect.

C. RESTRAINTS ON FEDERAL DIRECTION OF ASSISTANCE (Recommendation B4)

Notwithstanding the need for purposeful direction of assistance programs, several factors operate to restrain the federal agency and the specificity of its issuances. These limits are imposed by statute, by the recipient's independent operating responsibility, by a concern for pluralism and by the deference to federalism prevalent in the structuring of assistance programs. As a result, the appropriate federal role is usually that of enunciating general objectives for the program, dealing with crucial problems, and specifying program terms only to the degree practicable and needed. Excessive detail and mandated uniformity is likely to detract from the achievement of the program's objectives.

1. *Statutory Limits*

If the statute gives a federal agency no discretion in dispensing funds, the program does not come within the scope of the recommendation. Even when programs are within it, the agency should observe all applicable statutory provisions in exercising that discretion. For example, statutes may restrict the eligible class to public agencies, or indicate some priority purposes for funding.

2. *Promotion of Pluralism and Operational Flexibility*

No one wants the federal government to be running everything.

The avoidance of government-mandated uniformity is a particular concern in the assistance area as the recipients are often those whose independence is of special public interest—universities, the providers of professional services, the mothers of families. Furthermore, in any endeavor, the people responsible for operations are hampered by excessive detail or the insistence on a single approach. The allowance of grassroots initiative can also have a payoff in the form of new and unexpected program solutions. Too, simply letting people do things their own way increases the program's popularity. Sheer diversity should not be stifled just to make things uniform. From the other perspective, Washington officials cannot anticipate all the varying conditions that arise throughout the country. Wisely, they may not want to encumber themselves in the detail and complexity necessary to run everything as a standard operation.

For these reasons, it is in the interest of all to confine the central role, but it is still necessary to have one. The public interest demands that some entity assume the responsibility for establishing an organizing common purpose for the endeavor and the federal agency is well placed to do that. The formulation of goals by it also helps to ensure the due independence of the other participants. It sets the task for which they are accountable, thereby freeing them from the insinuation of other compromising obligations. Indeed the more specific the federal requirements, the greater clarity there is about the extent of the recipient's obligations.

Furthermore, the federal agency should not use the concern for the recipient's flexibility as an excuse never to descend from generalities to deal with the real operating problems and failures. It should face the crucial issues and give meaningful direction about what it wants accomplished. Thus, the federal agency should ordinarily provide the program with general direction, but in articulating standards, it should be only as specific as it has to be. As a starting point, it should seek a balanced formulation, being clear about the purpose of its requirements. Further adjustments should be made on the basis of experience. It should feel less constrained in giving specific guidance to its own personnel about the criteria for awards decisions, than in setting requirements for recipients about the day-to-day operation of aided programs.

This need to abstain from governmental domination of other social entities is not just an assistance phenomenon. Regulatory agencies defer to the right of "free" enterprises to run their own affairs. Since regulatory licensing faces similar concerns, it may serve as a useful source of examples on how to give federal direction of those activities in which governmental intervention is required. The Federal Communications Commission, for instance, in implementing a requirement for community programming, has to both avoid the generality of that mere phrase and, at the same time, the imposition of detailed chronological and substantive content. Instead, an intermediate degree of specificity, calling for a total amount of programming of the required type, may best accommodate the community need with the licensee's responsibilities.[24]

3. *Delegations to States*

The states administer many federal assistance programs, particularly those in the formula category. This makes a concern for federalism a relevant consideration, but to a large extent, it represents only a special form of the other restraint on the federal agency just discussed. Thus, the approaches already suggested apply in this area as well.

The states constitute in a governmental form an expression of the concern to check and limit national powers. The areas in which they are delegated a major assistance role are often areas like social services, and law enforcement, in which there has been a traditional reluctance to have either any central executive control or any government interference at all. This concern for varying local situations, diverse community values and avoidance of government intrusion all operate to moderate the imposition of strict federal controls. On the other hand, adequate articulation is important because otherwise the local concerns might obscure the general public cause that occasioned the increased federal involvement. The states have accepted responsibility for running these programs in accordance with the federal statutory purpose and provisions. Accordingly, the federal agency should exercise its responsibility, when given it, to give the programs direction and to ensure faithful compliance with the law and necessary administrative requirements.

[24] See FCC "Primer on Ascertainment of Community Problems by Broadcast Applicants," 36 Fed. Reg. No. 4092 (Mar. 3, 1971).

II. Complaint Procedures in Regard to the Application of Standards

(Recommendation C)

The importance of having complaint procedures has already been indicated: the procedures aid the agency by providing an independent reading on program implementation, and they benefit applicants and others affected by providing some recourse from official misconduct. These reasons are applicable in all types of programs, and to the range of decisions made by the agencies.

Further discussion will be directed at establishing the feasibility of the adoption of this proposal by the agencies. The report covers the availability of the procedures, the minimum rights of the complainants, the obligation to resolve protests, the need for agency initiative, and remedial problems.

1. *Availability of Complaint Procedures*

(Recommendations C2 and C3)

The procedures apply with respect to any matter governed by a federal standard. The standards may be statutory or regulatory, and the term includes the criteria developed by the agency for distributing aid. The complaints may come from applicants, recipients, beneficiaries or anyone, if they were intended to be benefitted or protected by the standard in issue.

Thus, the procedures apply to the federal action in denying and awarding aid, and in imposing conditions or failing to do so. They also would be available when affected third persons claim that a recipient has failed to observe federal standards in his aid application or in the operation of an assistance program. The agency might receive complaints, for instance, that an environmental impact statement should have been filed in connection with a research project. One criteria for the award of estuarine sanctuary grants is whether they conflict with existing or potential competing uses.[25] It should aid the program to learn of possible conflict from complaints.

The procedures would be available only with respect to matters which are governed by federal standards and only for these persons intended to be protected or benefitted by the standard. These limitations help to make the procedures manageable. It limits those who can complain and what they can complain about. An allegedly wrong decision cannot be protested by those unaffected.

[25] 15 C.F.R. § 921.12, 39 Fed. Reg. 8924 (Mar. 7, 1974).

An unpopular decision cannot be objected to except on the grounds that a federal standard has been violated.

If appropriately no federal standards exist in regard to an issue, no complaints need to be heard. Thus, in experimental programs if the choice of a recipient has to be subjective, it would be acceptable for the agency to refuse to hear complaints solely about the merits of its choice. This does not mean that the proceedings should be entirely unavailable in experimental programs. They should be available if a showing can be made that the award was improper under whatever standards may exist. Profit-making agencies may be ineligible for aid; if nonetheless such an award were made, the losing applicants should be able to complain about the violation of the standard. In the other types of awards programs—the entitlement and competitive ones—awards should be subject to the complaint procedures, without exception, whenever disputes about the application of standards are appropriately raised. As already discussed, agencies should have standards to guide their selections in these regular and continuing programs; thus the agency should be able to explain its decisions in applying its awards criteria and the other program requirements.

The established standards help to make the complaint procedures manageable, in another way, by guiding the complaint officer in resolving the complaint. They give him the test for the appropriate decision, through an examination of the language and purpose of the federal requirements. Still, a discretionary element often remains as to the exact choice made in carrying out even a well-defined standard. If the initial decision was not unreasonable, the decision should be allowed to stand. The aim in these procedures should be to check excesses by officials, not to second-guess them.

Even with these limits, the procedure will be unmanageable in those areas in which the agencies should have standards if they either have none or they have poor ones, which are ambiguously or insufficiently stated. The cure is not to sweep the problem into obscurity by not establishing a complaint procedure, but to have the agency improve the definition of its standards. The complaint process helps in this by maintaining a continuing pressure on the agencies to do a better job. The process may also produce a case law which advances the specification of requirements but the development of major policy initiatives is more appropriately done by the agency through rule-making procedures. The primary function of the complaint procedure is like that of more formal adjudications, to resolve disputes about the application of existing

standards, not to be the main vehicle for evolving new policy and standards.

2. *Minimum Rights for Complainants*
(Recommendation C2)

Under the proposal, those affected would have at least the right to submit written evidence and argument to support their complaint. This imposes a minimal burden on the agency, like that in notice-and-comment rule-making. The agency has to consider the submissions and respond as it judges best in the light of the protest and the standard. The principal check this puts on the agency is the need to justify its decisions to those concerned, a not insubstantial pressure for correctness, but one that imposes minimal cost and time burdens on the agency.

Steps should also be taken to ensure that those affected by decisions are aware that the complaint procedures exist. Of course, those whose actions are complained of should be informed and they should have an opportunity to respond and participate on an equal basis. The complaint should be resolved within a reasonable time. The participants should be notified of the outcome and the reasons for the decision.

Additional procedural rights for the complainants should be provided where possible, and when important issues are raised these protections can include an opportunity for an oral conference with the agency decision-maker, oral argument, evidentiary hearings and re-evaluation at a higher and independent level within the agency.

3. *Disposition of Protests*

Within the structure established by the agency for raising different types of complaints at certain times or before certain officials, the agency's responsible official should have to resolve any complaint of a violation properly raised.

The decision to be made depends upon the terms of the applicable federal standard, as does the kind of relief to be given. If, for instance, the standard involved requires the denial of funds upon a finding that federal law has been violated, the agency would be required by the law to do that, once it made the finding that a violation exists and has not been cured. The standard may, though, call for the exercise of agency judgment about the seriousness of the violation before it imposes certain sanctions. The agency may have to decide that there has been "sub

stantial" non-compliance before it can terminate funding. The relevant standard may give the agency the discretion to bring about compliance in ways other than by denying funds. It might be able to add conditions to the assistance award, or might be enough for the recipients to begin to take steps towards compliance. The agency should take whatever action is consistent with the terms and purpose of the standard in question.

4. *Agency Initiative*

The recommendation calls upon the agency to identify the procedural format appropriate for its program and to take the necessary steps to institute it, including legislative approval where required or appropriate. The number of programs and their variety makes it both unwise, if not impossible, to specify standard procedures, other than the essential minimum, which would apply to all of them. If the agencies are convinced of the usefulness of this recommendation, they are in the best position to develop procedures suitable for their program—they have the necessary acquaintance with its needs and special features. After the agencies have had some experiences in using the procedures, it may be possible to specify arrangements most appropriately used in certain situations, but that has to await more development.

Agency initiative is important for additional reasons. The complaint procedure is one part of the agency's overall scheme for developing and implementing program decisions. If it is to utilize the feedback from the proceedings effectively, the agency needs the flexibility to develop the arrangements suited to its organizational arrangements. Furthermore, it is important to recognize that the agency's responsibility for enforcement is a broad and continuing one. The complaint procedures do not exhaust the need for other agency efforts to ensure compliance. The agency should not take a passive role, turning over to the affected the burden of detecting and protesting violations. The agency should take affirmative action to secure adherence. Such efforts may include increased scrutiny of applications, on-the-scene inspections by agency personnel, outside audits, and agency-initiated termination proceedings. The complaint procedures are an important addition to the agency's enforcement program, but it is not a substitute for it.

The agency has a number of alternatives to consider in developing the procedural format for its complaint procedures. These

include the ability to direct recipients to establish complaint procedures, which affected persons have to exhaust. It can also regulate the timing of disputes. Complaints about the violation of standards in a grant application, or about past operations, might have to be raised at the time of federal funding action. The minimal nature of the complaint procedures gives the agency considerable leeway to develop more manageable proceedings and to invent new ones. It also has a responsibility to consider the impact of its procedures within the context of the other procedural remedies available to the aggrieved. The establishment of federal relief may have consequences upon them by virtue of primary jurisdiction or exhaustion of remedy requirements.[26] The federal agency should consider whether court review, at the federal or state level, would be an appropriate enforcement measure for particular decisions, and it should take appropriate action to obtain legislative authorization.

5. *Remedies*

Complaint procedures are sometimes claimed to be impractical because of the difficulties in developing remedies which will provide adequate recompense while not halting the course of important public projects. There are, though, many possibilities for remedial relief not fully tried in assistance. Suggestions about some of these were made in Conference Recommendation 71–9.[27]

The suitability of remedies should be evaluated in relationship to the purpose of the overall effort. The aim in establishing complaint procedures is to have the law enforced in accordance with its intent. It is more important to make relief available, since it deters misconduct, than to have it be perfect. The relief should be sufficient to make it worthwhile for the aggrieved to seek redress but it need not necessarily provide exact recompense or be precisely restorative of the pre-existing situation if that is not possible or would seriously hinder the agency program. Of course, if the law requires that a certain remedy be made available, once a prescribed violation has been found to have occurred, the agency would have no choice but to provide it, be it denial of funding or whatever. If that is too severe a remedy, the agency should consider asking Congress for more discretion in providing suitable relief.

[26] See Tomlinson & Mashaw, "The Enforcement of Federal Standard in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement," 58 Va. L. Rev. 600, 651–54 (1972), 2 Adm. Conf. of the U.S. Recomm. and Rep. 531, 582–85 (1973).

[27] Recomm. 71–9, 2 Adm. Conf. of the U.S., Recomm. and Rep., 50 (1973).

Remedies take several forms—declaratory orders, injunctions, damages, civil fines, even criminal sanctions. Agencies should consider their suitability. The agency could halt funding of all or part of the program. It might simply declare the existence of a violation and use that declaration to negotiate changes. It might order compliance, or apply additional conditions to bring about compliance.

There are particular difficulties in providing relief with respect to award disputes. There may be program reasons for wanting to have the recipients begin operation quickly. The agency may therefore be reluctant to halt a program while a complaint is resolved. The agency may also be concerned about making all its awards before its spending authority lapses at the end of the fiscal year. One approach would be to expedite the complaint determination. If it is not possible to halt the award and transfer it to the wrongful loser, he may still be given some relief in the form of a priority on funding in the next funding period. The appropriations problem might be dealt with by considering as obligated for fiscal year purpose any funds about which a dispute is pending when the funding period expires.[28] If that is not permitted under an agency's statute, it should consider asking Congress for this authority or some other measure adequate to meet the need.

Damages may be a possible remedy in some programs. Their present use seems restricted because of the difficulties thought to exist in developing an appropriate damage formula and in finding a way to provide recompense without interfering with the Congressional control of appropriations. These difficulties seem surmountable, especially when seen in the perspective of the similar task encountered in giving relief to government contractors. It has been suggested, for instance, that the recently-recognized rights of wrongfully denied bidders could be remedied by rerunning the bid, but, if that would create intolerable delay in a necessary project, damages might be provided in the form of lost profits.[29] Assistance recipients are often "non-profit" but their loss might be measured by a "liquidated" amount or by the "indirect costs" for overhead they would otherwise have received. To pay off these awards, an arrangement might be made like that for Court of Claims awards for successful contractors with payments made out of a special appropriation or even out of the agency's appropriation.

[28] West Central Missouri Rural Dev. Corp. v. Shultz, Cir. A, No. 1237–73 (D.D.C. June 20, 1973).

[29] See Speidel, *supra* note 19.

This survey is not meant to propose any particular new remedies for adoption, only to demonstrate that complaint procedures need not be unavailable because of a lack of suitable remedies. The possibilities for relief are there; they need but to be developed into a practical form through some imaginative work by the agencies.

III. Delegated Assistance Programs (Recommendation D)

State, local and non-profit agencies are often delegated a major responsibility not only to administer federal assistance program but also to make discretionary decisions about further distributions, determining who the recipients will be and the terms of awards. Community action programs are an example.[30] Delegates may also have discretion, more limited as to topics, which nonetheless has considerable impact. For instance, local agencies receiving public housing grants can determine eligibility criteria for admissions.[31]

These discretionary decisions for the delegate affect the program's fairness and performance. The delegates need a structuring of their discretion for the same reasons that apply to federal agencies. Indeed, the need may be greater, because the division of authority may lead to confusion about who is responsible for what. If the program is successful or encounters difficulties, the identification of the delegate's policy helps clarify what has happened and why.

1. *Articulation of Objectives, Criteria and Requirements*

Accordingly, if it has the power to do so, the federal agency should require the delegate to observe this Recommendation. The delegate should articulate the performance objectives guiding its discretion, its eligibility and awards criteria, and its funding requirements. The delegate programs may fall into the same categories as federal ones, some of them being experimental in nature, others being limited to competitive or entitlement awards. The same considerations already discussed apply when the delegates programs are of these types.

[30] 42 U.S.C. §§ 2782–2812 (OEO); cf. 42 U.S.C. § 246 (Comprehensive health planning); 42 U.S.C. §§ 3701–3795 (law enforcement assistance).

[31] 42 U.S.C. §§ 1401–36.

2. *Delegate's Procedures*

The delegates should observe public notice-and-comment procedures in developing their policies on these matters, but it would be inappropriate to require observance of the federal Administrative Procedure Act. If the delegates are state and local government agencies, they may be governed by acts providing suitable public procedures of their own. In other cases, appropriate public procedures should be developed to govern these decisions.

Similarly, in dispensing discretionary assistance, the delegates should make complaint procedures available for those affected by its decisions allegedly not conforming with the government criteria and requirements developed by the delegate.

3. *Federal Review*

The decisions of delegate agencies in developing their criteria and requirements, within their discretionary authority, are important because of their impact on the program's success and upon the program's public. It is desirable to resolve in advance of implementation any questions about the propriety of the delegate's decisions under federal standards.

Under Part C of this Recommendation, complaint procedures would apply with respect to the federal action in approving the grant. If such federal review is not already provided for by statute, the federal agency should establish it by regulation, if it can. It should take special care to provide notice to those potentially affected by the decisions and to create suitable and convenient protest procedures at an appropriate time. That may be in connection with the federal action in funding the recipient.

IV. Relationship to Previous Conference Recommendations

The Conference has already urged agencies administering discretionary grant programs to adopt "minimum procedures" including the issuance of regulations specifying its "criteria or standards, and priorities among criteria or standards, for the selection of grantees . . ."[32] This Recommendation expands and refines that part of the Recommendation. Like the previous one it urges agencies to articulate their standards but it emphasizes the program reasons for doing so. It also deals with a new topic, the manner in which the agencies should develop their criteria,

[32] Recomm. 71-4 "Minimum Procedures for Agencies Administering Discretionary Grant Programs," 2 Admin. Conf. of U.S. Recomm. and Rep. 25 (1973).

by first identifying the objectives and performance outcomes sought in the program. The complaint procedures here proposed were not a part of the former Recommendation. The current proposal also recognizes a distinction between experimental programs and other types of aid, and it is this distinction which helps to make the complaint procedures feasible. In experimental programs, agencies may not be able to develop standards and to that extent they will not have to make the procedures available. This Recommendation also modifies the previous one by recognizing that in experimental programs the agencies will not always be able to comply fully with the recommendation that they articulate their criteria. The present Recommendation also has a wider coverage in that it applies to the discretionary distribution of any type of assistance, not grant programs alone. The earlier Recommendation remains in effect, though, as it covers several topics not dealt with here, such as the avoidance of conflicts-of-interest, notification of agency action and the public availability of notices.

The Conference has also dealt with grant programs in Recommendation 71–9, "Enforcement of Standards in Federal Grant-in-Aid Programs," but that one has a different emphasis and coverage, notwithstanding some overlap.[33] That Recommendation urged agencies to adopt complaint procedures, similar to those urged here, in grant programs which provide support or services to citizens. That category included formula grants as well as the discretionary distribution programs dealt with here, but it exempted research, training, demonstration and individual fellowship grants. Its emphasis was on the enforcement of standards, not their development, and its concern was with the enforcement of standards that affected individual beneficiaries and other citizens, not those affecting the applicants and recipients of aid. Thus, this proposal differs in making complaint procedures available in a wider range of programs and in making them available to the recipients and contenders for aid as well as affected third parties.

[33] *Supra* note 27.

RECOMMENDATION 74–2

PROCEDURES FOR DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

(Adopted May 30–31, 1974)

The provision of assistance by the Government has a major impact upon the general public, as well as upon those who seek aid and those who particularly benefit from it. As with any other governmental activity of similar importance, in dispensing assistance agencies should not be free to act completely within their own discretion, *ad hoc*, unguided by standards and insulated from the complaints of those who dispute the propriety of agency decisions. Such unchannelled discretion not only creates the occasion for arbitrary action, but also prevents the agencies from giving their programs the effective policy direction essential for the achievement of statutory aims.

This Recommendation calls upon each agency which has discretion in the distribution of assistance under a domestic program to identify publicly the specific results it expects the assistance to achieve; to develop criteria based on that formulation for awarding aid; and to utilize public procedures for developing and enforcing the program's criteria and other requirements. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of decision-making by creating a stimulus towards analysis and specification of program aims. Applicants and recipients benefit from more consistent and predictable assistance terms, and from the open opportunity to seek an award. The affected public can monitor compliance in

a way that promotes program purposes. And agency actions become more comprehensible to all involved.

The Conference has previously adopted two recommendations directed to particlar categories of assistance programs covered by the present Recommendation and urging, with respect to those categories, some of the same measures here proposed. Moreover, those earlier recommendations, since they were more narrowly focused, set forth procedures in addition to those here proposed, useful for the particular types of assistance programs they covered. Recommendation 71–4, dealing only with discretionary grant programs, urges, as does the present Recommendation, the development of criteria by rulemaking and sets forth particularized public notice and applicant notification procedures appropriate for that type of Federal assistance. Similarly, Recommendation 71–9, directed only to grant-in-aid programs, describes in some detail complaint procedures and information systems particularly applicable to that type of Federal assistance. The present Recommendation is not meant to supersede those earlier proposals; but where it suggests additional procedures not there described, it is intended to supplement them.

RECOMMENDATION

A. Scope of the Recommendation

In its broadest sense, Federal assistance includes any expenditure made by the Government to provide goods or services to the public, whatever the form of transfer; thus it includes money grants and benefits, in-kind aid, financing, insurance, and the permitted use of public goods. This Recommendation is directed to domestic programs for the provision of all forms of assistance except services (where personnel considerations must be given special account). Since, however, the purpose of the Recommendation is to regularize agency exercise of discretion in the distribution of assistance, its provisions do not apply to programs in which no such discretion exists (e.g., "benefit" and "formula" programs in which aid is distributed on the basis of statutory entitlement); nor do they apply to contractual agreements covered by the Government's procurement regulations and its system of award and dispute procedures.

B. Articulation of Objectives, Criteria and Requirements

1. *Statement of Objectives and Criteria*

Each agency that has discretionary authority to determine the recipients under an assistance program, and the terms, amounts and purposes of awards, should publicly state the specific results which it expects the assistance to achieve. The agency should also identify any major technical obstacles hindering the achievement of these objectives, describe its strategy for overcoming them and make this statement public where doing so would not frustrate accomplishment of the program's goals. On the basis of such formulation, the agency should articulate the criteria guiding its actions in making awards. Periodically, the agency should review the adequacy of its program objectives and assistance criteria in light of the results achieved and changes in the public need.

2. *Nature of Assistance Criteria*

To ensure performance-related, impartial choice in selection of recipients, whenever possible the agency's assistance criteria should provide for the award of aid either on an entitlement basis, to all who meet specified requirements, or on a competitive basis, to those who best satisfy stated selection factors. While considerable judgment may be left to the decision-maker in their application, the criteria should provide sufficient guidance to enable determinations to be made on a rational and justifiable basis.

In research, demonstration, developmental and other experimental programs, however, an agency will not always be able to specify its assistance criteria fully because of uncertainty about the results to be sought and the means of their achievement. To a corresponding degree, the choice of a recipient will involve greater judgment and in many instances subjective choice. Nevertheless, at each stage of program development, the agency should refine its selection basis and provide as equal an opportunity to compete as it can.

3. *Requirements Imposed on Recipients*

The agency should state clearly any specific results it expects the recipient to achieve. Where possible it should promulgate these and any other requirements it imposes on the operation or fiscal administration of assisted programs in the form of generally

applicable rules, in preference to attaching such requirements as special conditions to particular assistance agreements.

4. *Degree of Specificity*

Agencies should state their objectives, criteria and requirements with as much specificity as practicable, and with clear indication of their purpose. Since, however, flexibility in the actual operation of assistance programs is useful, and diversity of approach often necessary, requirements relating to the manner of operation of recipients should be only as detailed and specific as is necessary to realize the program objective.

5. *Procedures for Development*

Agencies should develop their assistance criteria and generally applicable requirements through a procedure involving public participation, by following the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. §553.

C. Complaint Procedures

1. *Establishment of Complaint Procedures*

Agencies benefit by encouraging affected persons to report instances in which, in their belief, Federal standards (including the criteria for distribution of aid and any statutory or regulatory requirements) are not being observed in program administration. Such reports provide a source of information concerning operational problems and successes, supplementing whatever audits and field inspections the agency may conduct. Assertions that standards are being disregarded are indicative of program problems that the Federal agency must solve, by revising its own operations, by invoking sanctions for non-compliance or by reexamining the adequacy and appropriateness of the requirements themselves. Consequently, assistance agencies should make procedures available by which persons may formally report that Federal standards intended to benefit or protect them are being violated.

2. *Nature of Procedures*

Agencies should permit dissatisfied persons a suitable opportunity to submit information and argument in support of their assertions. The agency should specify the complaint procedure or procedures applicable to each of the programs it administers.

D. Application to Delegated Programs

In some programs, assistance recipients have been delegated an administrative role like that of Federal agencies in discretionary programs: to delegate-recipient agency dispenses assistance and exercises some discretionary power to decide who will receive aid, in what amounts, on what terms, and for what purposes. An example is the role of community action agencies under the Economic Opportunity Act, 42 U.S.C. §§2701, et seq. In such programs, if it has the power to do so, the Federal agency should direct such recipients to observe Part B of this Recommendation, and to adopt procedures in accordance with Part C for receiving reports alleging violation by the recipient of its own established objectives, criteria and requirements. Reports alleging that the recipient's objectives, criteria and requirements do not accord with Federal standards should be entertained at the Federal agency level.

Statement of Malcolm S. Mason

Although this is an important Recommendation which takes a broad and sound view of the need for structured administration and discretion in an area where structure is largely absent, it is not sound in its present form as applied to new and creative programs.

If this Recommendation in its present form had been adopted ten years ago and had been honored, there would have been no Head Start. Programs that require decisive action and the unleashing of enthusiasms that have been suppressed, of courage hidden in unexpected places, would be talked to death, analyzed to death, bureaucratized to death.

As applied to that kind of program, this Recommendation, instead of promoting rationality of decision-making, would promote rationalization and jargonization of decision-making. By creating painful consequences for those who may have the right goals and the right approach but have articulated them less self-defensively than others, they would not counteract, they would encourage, the tendency to avoid risks inherent in making decisions.

In the case of Head Start, which I take only as an example sufficiently familiar to be recognized, those who thought they were improving cognitive achievement as a primary objective and those who recognized that as a spurious goal but felt they were achieving family solidarity and dignity, through participa-

tion in the children's education, as a primary objective, and several other factions, would have debated endlessly and the program would never have started. Because, under this Recommendation, a stated objective carries consequences, they would have been forced to fight on the statement of objectives or to compromise and water down the program.

The Recommendation should have been adopted only after excluding expressly the Head Start kind of program and only after deleting the gratuitously inappropriate reference under Part D to the Community Action Program as one that should specifically be subject to this Recommendation. The Conference should have explicitly undertaken, and I hope it will now undertake, separate fresh thought to the kind and extent of structural discretion that is appropriate for the sort of program typified by Head Start.

RECOMMENDATION 71-9

ENFORCEMENT OF STANDARDS IN FEDERAL GRANT-IN-AID PROGRAMS

(Adopted Dec. 7, 1971)

Federal agencies annually disburse billions of dollars in grants-in-aid to State and local governments and to private entities to subsidize activities in such areas as welfare, housing, transportation, urban development and renewal, law enforcement, education, pollution control and health. While State and local governments and private organizations are the direct recipients of the grants, the intended ultimate beneficiaries of the grant programs are private persons helped by the expanded level of support or services made possible by Federal funds.

In administering these grants both public and private grantees must observe the Federal grant standards established to assure the accomplishment of Federal purposes. Federal agencies have often encountered difficulty in enforcing compliance by the grantees with the Federal standards. A factor contributing to this difficulty is that many Federal agencies do not have adequate procedures for resolving questions of compliance and for handling complaints by private persons affected by a grant-in-aid program that the program does not comply with Federal standards. A further contributing factor is that the principal sanction presently available to Federal agencies for securing compliance is to cut off the flow of Federal funds. This sanction raises a serious problem because, unless its threatened imposition prompts compliance, it stops worthwhile programs and adversely affects the interests of the innocent private persons whom the Congress intended to benefit through the program of Federal financial assistance.

OFFICIAL RECOMMENDATIONS

To aid in alleviating this situation the following recommendations are proposed with respect to each Federal program in aid of State, local or private activities through which support or services are provided to individual beneficiaries or to the public generally. However, the recommendation does not apply to research, training, or demonstration grants to government units or private organizations or individuals, or to grants such as fellowship grants to individuals that primarily benefit the recipients of the grants.

A. The Federal Administrative Complaint Procedure

The Federal grantor agency should have an administrative procedure for the receipt and impartial consideration of complaints by persons affected by the grant-in-aid program that a plan, project application or other data submitted by a grant applicant or grantee as a basis for Federal funding does not meet one or more Federal standards. This procedure should afford the complainant an opportunity to submit to the grantor agency for its consideration data and argument in support of the complaint, and should afford the grant applicant or grantee involved a fair opportunity to respond. If the agency determines that the complaint is apparently ill-founded or is insubstantial, it should notify the complainant of its determination and should state in writing the reasons therefor. If the agency determines that the complaint appears to be substantial and supported by the information at hand, it should so notify both the complainant and the grant applicant or grantee of its present determination in this respect and should state in writing the reasons therefor. If the agency exercises discretion not to make a determination on one or more issues raised by a complaint, it should so notify the complainant in writing. The agency should pass upon all complaints within a prescribed period of time.

The complaint procedure administered by the Federal grantor agency should also provide for the receipt and impartial consideration of complaints that a grantee has in its administration of the funded program failed to comply with one or more Federal standards. It is anticipated that many grantor agencies will find it necessary to limit their consideration of such complaints to situations in which the complainant raises issues which affect a substantial number of persons or which are particularly important to the effectuation of Federal policy and will, therefore, dispose of most individual complaints concerning grantee administration by referring the complainant to such complaint procedures as are required to be established by the grantee. The grantor agency should seek by regulation to define the classes of cases that it will consider sufficiently substantial to warrant processing through the Federal complaint procedure and those classes of cases wherein complainants will be required to pursue a remedy through available complaint procedures administered by the grantee.

B. The Grantee's Administrative Complaint Procedures

The Federal grantor agency should require as a grant condition the establishment by the grantee of procedures to handle complaints concerning the grantee's operation of the federally assisted program. These procedures should afford any person affected by an action of the grantee in the operation of the program a fair opportunity to contest that action. The "fair opportunity" to contest will necessarily vary with the nature of the issues involved and the identity and interests of the complainant. In all cases, however, the complainant should have the right to submit to the grantee for its consideration data and argument in support of the complainant's position.

C. The Information System

The Federal grantor agency should seek to assure that persons affected by a grant-in-aid program receive adequate information about the program in order that they may take advantage of the Federal and the grantee complaint procedures. The Federal grantor agency should require as a grant condition that all program materials (regulations, handbooks, manuals, etc.) governing the grantee's administration of a program supported in whole or in part by Federal grant-in-aid funds and all plans, applications and other documents required to be submitted to the Federal agency as a condition to the receipt of Federal funds should be readily accessible to persons affected or likely to be affected by the operation of the funded program. Plans, applications and other documents that provide the basis for Federal funding should be made readily accessible to interested persons no later than the time of their submission to the grantor agency for approval and at an earlier time when required by law.

The Federal grantor agency should seek to assure that the grantee's system for dissemination of program materials and grant submissions takes account of the nature, location and representation of affected persons. For example, as a part of a plan to make such materials readily accessible, program information might be deposited not only in the offices of the grantee but also in public and university libraries and in the offices of affected interest groups and their legal representatives. It might also be necessary to require the provision of descriptive summaries of technical rules or project applications or to require an oral explanation of program features, for example, the complaint procedures, which are critical to the protection of a beneficiary's interests. The Federal agency should make parallel efforts to disseminate materials relating to its administration of the Federal grant program.

D. Range of Sanctions

The Federal grantor agency should seek to develop an adequate range of sanctions for insuring compliance with Federal standards by grantees that apply for or receive Federal financial assistance. The sanction of the total denial or cut-off of Federal funds should be retained and used where necessary to obtain compliance, but the agency should have available lesser sanctions that do not result in the prevention or discontinuance of beneficial programs and projects. This range of sanctions should include in appropriate cases:

1. The public disclosure by the agency of a grantee's failure to comply with Federal standards and an indication of the steps believed by the agency now to be appropriate.

2. An injunctive action brought by the agency or the Department of Justice in the Federal courts to require the grantee to fulfill any assurances of compliance with Federal standards made by the grantee or to enforce the Federal standards attached to the grant.

3. The disallowance as a program or project cost of an expenditure by the grantee that does not conform with Federal standards, or other partial denial or cutoff of funds that affects only that portion of a program or project that is not in compliance with Federal standards.

4. The imposition on a grantee who has not complied with Federal standards of additional administrative requirements specially designed to assure that the grantee brings its operations into compliance with Federal standards and redresses the effects of past noncompliance.

5. The transfer of a grant, or the awarding of subsequent grants under the same or related grant-in-aid programs, to a different grantee if the original grantee violates Federal standards.

Where an agency lacks statutory authority to invoke one or more of the above sanctions and such authority would provide an appropriate means of insuring compliance with Federal standards in a grant-in-aid program administered by the agency, it should seek the necessary authority from the Congress.

E. Other Performance Incentives

The agency should also consider the provision of incentives, such as the contribution of an increased matching share or the awarding of additional grant funds, to grantees who fulfill certain Federal goals. Where the agency lacks statutory authority to provide compliance incentives and such authority would provide an appropriate means of ensuring effectuation of Federal objectives in a grant-in-aid program administered by the agency, it should seek the necessary authority from the Congress.

RECOMMENDATION NO. 16

ELIMINATION OF CERTAIN EXEMPTIONS FROM THE APA RULEMAKING REQUIREMENTS

RECOMMENDATION

In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking proceedings. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon nongovernmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas.

Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the Federal Register, as to an entire subject matter concerning which rules may be promulgated. Each finding of this type should be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so.