BY THE COMPTROLLER GENERAL

Report To The Congress

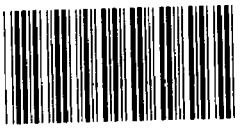
OF THE UNITED STATES

Federal Assistance System Should Be Changed To Permit Greater Involvement By State Legislatures

Recognizing that Federal grant funds are their largest single source of revenue, State legislatures have moved to increase their oversight of these funds. Where State legislatures have taken an active role in the Federal grant process, Federal grant programs have been made more accountable to the public and legislatures are more likely to provide the support necessary to effectively carry out the Federal grant programs. Contrary to what might have been expected, the legislatures' participation has not hampered the efficiency of Federal grant programs.

In spite of these benefits, State legislative involvement is generally discouraged by the restrictive nature of the Federal grant process itself as well by specific provisions of grant programs that assign legislative responsibilities to the State executive branch for determining priorities, designating organizations to administer Federal programs, and evaluating program performance. GAO recommends that these Federal constraints on State legislative involvement be removed.

Because the involvement of State legislatures serves important Federal interests,the Federal Government should also help by giving them access to the variety of Federal management capacity building and information assistance now given to State executive branch agencies.



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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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To the President of the Senate and the
Speaker of the House of Representatives

This report, initiated with the support of the Chairman, Subcommittee on Intergovernmental Relations, Senate Committee on Governmental Affairs, assesses the role of State legislatures in reviewing and controlling Federal grant funds received by the States. The report discusses the need for congressional and executive branch actions to remove existing constraints on State legislatures which are attempting to involve themselves in the oversight of Federal funds.

We are sending copies of the report to the Director, Office of Management and Budget, to the heads of the departments and agencies concerned, and to the executive directors of national associations of State executive and legislative officials.

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

FEDERAL ASSISTANCE SYSTEM SHOULD BE CHANGED TO PERMIT GREATER INVOLVEMENT BY STATE LEGISLATURES

D I G E S T

The Federal interest is not well served when State legislative involvement in the Federal grant process is discouraged. Yet legislative involvement is, in fact, inhibited by constraints in the categorical grant system itself as well as by specific provisions in Federal grant programs assigning functions to the State executive branch that are generally shared with, or exclusively controlled by, State legislatures for State funded programs. (See p. 7.) Furthermore, Federal management capacity building and information assistance is primarily oriented to State executives, and it is not generally available to State legislatures seeking a stronger role in Federal program oversight. (See p. 19.)

As a result, legislatures in many States have been discouraged from becoming involved in the allocation or oversight of Federal grant funds because of their perception, reinforced by State and Federal executive agency officials, that they have no legitimate role. Federal agency officials responsible for 65 of the 75 grant programs reviewed by GAO indicated that legislative proposals and changes to State plans would be ignored unless approved by the Governor or the designated State agency. In some States, legislative involvement has been prohibited by State court rulings which can be interpreted as reflecting a view of the Federal grant process that excludes a role for State legislatures. (See p. 23.)

The absence of legislative involvement adversely affects Federal interests:

--Federal neutrality may be impaired when explicit functions are assigned to only one branch of State government without adequate recognition of the other branch. (See p.32.)

--Federal constraints on legislative responsibility work to diminish the most basic form of accountability in State government: legislative oversight of executive actions. (See p. 33.)

--Prospects for full State support and implementation of grant programs also suffer when legislatures are not involved in the grant program from the outset. (See p. 35.)

On their own initiative, some legislatures have successfully involved themselves in various Federal grant programs, despite the Federal discouragement. (See p. 38.) From a Federal viewpoint, legislative involvement has produced generally beneficial results; the accountability of Federal grant programs to the legislature is enhanced, and the prospects for full State support are improved. (See p. 43.) State legislatures have also shown that they can assume an active role in the Federal grant process; realistic and effective procedures can be developed without causing excessive delays or the needless loss of available grant funds. (See p. 46.)

GAO CONCLUSIONS ON STATE LEGISLATIVE INVOLVEMENT

The States' internal process should resolve the question of who speaks for the State in the grant process. Federal grant conditions which, in effect, assign legislative functions to the State executive branch should be justified by a compelling Federal interest. GAO found no such compelling interest, but it has found that important Federal interests are in fact promoted by State legislative involvement. Enhancing the accountability of Federal programs to traditional State representative institutions enhances the long-range interests of Federal grant programs as well. Furthermore, GAO did not find that legislative involvement compromised the administrative efficiency of the grant process.

Existing Federal discouragements to legislative involvement should therefore be removed to enable legislatures to define their own roles within the parameters of Federal grant conditions. GAO also believes that the Federal Government should continue to designate a focal point for administrative responsibility at the State level. GAO believes that cross-cutting Federal legislation is needed to ensure that Federal laws and regulations designating State officials for administrative roles not be construed to limit State legislative involvement. This would enable legislative assertion of policy for grant programs without risking the loss of grant funds and, in cases of legislative conflict with State executives, would require the Federal Government to honor whatever arrangements are reached by the political or judicial processes of the State itself. (See p. 51.)

The Federal Government should continue to encourage and strengthen the oversight roles of elected officials in Federal grant programs. This should be done by extending to legislatures capacity building and information assistance heretofore provided primarily to State executives. Legislative involvement in the Federal assistance system, although still at a relatively low level, has already demonstrated that it clearly supports legitimate Federal interests. GAO believes, however, primary responsibility for initiating legislative involvement must come from within the States themselves. (See p. 52.)

RECOMMENDATION TO THE CONGRESS

Congress should amend the Intergovernmental Cooperation Act of 1968 to ensure that, on a cross-cutting basis applicable to all Federal grant programs, grant provisions assigning responsibilities to State executive officials not be construed as limiting or negating the powers of State legislatures under State law to appropriate Federal funds, to designate State agencies, and to review State plans and grant applications. (See p. 53.)

RECOMMENDATIONS TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

The Director, OMB, should issue a new directive to Federal agencies reaffirming the eligibility of legislatures for Federal capacity building and information assistance. OMB should also provide greater opportunities for legislative involvement in the grant application review process established by OMB Circular A-95 and in evaluations of grant programs. (See p. 54.)

AGENCY COMMENTS

Copies of a draft of this report were distributed for comment to OMB, the Advisory Commission on Intergovernmental Relations (ACIR), the National Governors' Association (NGA), and the National Conference of State Legislatures (NCSL). Their comments are included as appendixes IV to VII.

NGA, ACIR, and NCSL agreed with the basic message of the report--the Federal Government should be neutral with regard to internal State separation of powers distinctions and should remove intrusive policies which discourage State legislative involvement. NCSL and ACIR fully supported GAO's conclusions and recommendations. NGA, while supporting the concept of neutrality, was concerned that GAO's recommendation was aimed at actively encouraging legislative involvement. GAO's recommendation is only intended to help those legislatures seeking to achieve stronger Federal funds oversight by providing access to Federal capacity building assistance currently provided to the State executive.

OMB, while agreeing in principle that State legislature involvement in the Federal grant process is beneficial, believes that Federal neutrality can only occur when Federal interests do not dictate otherwise. GAO believes that neutrality is itself a key Federal interest. GAO found no cases where other Federal interests would justify violating neutrality

and limiting the involvement of State legislatures wishing to exercise their constitutional responsibilities.

OMB was also concerned that GAO's proposed recommendation to the Congress could inadvertently place Federal agencies in the position of deciding who represents the State for Federal assistance. GAO believes that under its proposed amendment Federal agencies would defer to the States themselves, namely to State judicial interpretations or political resolutions between the competing branches, to resolve internal State separation of powers questions. This would extricate the Federal Government from its current position of funding the proposal of one branch of State government when the other may disagree. OMB did indicate that, pursuant to GAO's report, it would consider reissuing guidance on legislative eligibility for Federal assistance, change the A-95 process to provide for legislative input, and encourage greater Federal Regional Council contact with State legislatures.
(See p. 56.)

Contents

ABBREVIATIONS

ACIR	Advisory Commission on Intergovernmental Relations
CETA	Comprehensive Employment and Training Act
ESEA	Elementary and Secondary Education Act
GAO	General Accounting Office
HEW	Department of Health, Education, and Welfare
HHS	Department of Health and Human Services
HUD	Department of Housing and Urban Development
LEAA	Law Enforcement Assistance Administration
NCSL	National Conference of State Legislatures
NGA	National Governors' Association
OMB	Office of Management and Budget

CHAPTER 1

INTRODUCTION

A growing number of State legislatures have moved in recent years to increase their oversight of Federal funds coming into their States either through appropriating Federal funds or reviewing grant applications for Federal assistance prepared by State agencies. A 1980 survey by the National Conference of State Legislatures shows that 26 legislatures attempted to increase their level of control over Federal funds during the past 2 years, to the point where only 11 legislatures are now considered as having little or no control over Federal funds. This movement has been spurred at the national level by the Advisory Commission on Intergovernmental Relations (ACIR), which has actively encouraged greater State legislative oversight of Federal funds for the past 5 years. Changes in the grant process and in legislatures themselves have been primarily responsible for the recent assertion of legislative authority over Federal funds.

This growing involvement of legislatures with Federal funds has caused intergovernmental conflict. In several recent cases, these legislative initiatives have provoked specific conflicts with Federal grant programs that assign Governors a dominant role in setting priorities. Concern at the Federal level has also been expressed that legislative involvement might impede the effective and efficient implementation of Federal grant programs.

EXPANSION OF THE FEDERAL GRANT SYSTEM PROVOKED LEGISLATIVE CONCERN

The size and nature of Federal assistance to State and local governments has changed dramatically in the past 20 years. In the early 1960s, total Federal grant outlays of $7 billion were provided through 160 Federal grant programs. By 1980, Federal grant outlays had risen to $90 billion and were provided through some 497 separate grant programs, funding nearly every State and local service area.

The fiscal and programmatic impact of Federal assistance on State and local governments has grown accordingly. Federal grant funds now comprise over 25 percent of total State and local expenditures. In fact, figures compiled by ACIR show that the $53 billion of Federal assistance going to State governments in 1978 was the largest single State revenue source, representing over 37 percent of total own source general revenue.

Several features of grants serve to extend the fiscal impact of Federal assistance on State budgets beyond the Federal dollars alone, giving rise to the perception that "there is no such thing as a free Federal grant." First of all, the majority of grant programs require a non-Federal matching share; the minimum non-Federal share required for all Federal grant programs in the aggregate now represents an estimated additional 12 percent of State and local expenditures. Secondly, a number of Federal grant programs are seed money programs where States often become induced to continue programs begun with short-term Federal money. Finally, Federal grants come to States laden with a formidable array of conditions and mandates with far-reaching fiscal and programmatic consequences for State government. One recent study reports the existence of over 1,200 Federal mandates. These include such controversial and potentially expensive requirements as providing barrier-free access to public services for the handicapped, regulating expansion of health care services within the State, and removing juvenile status offenders from the prison system. 1/

The impacts of Federal grants on State priorities and services cannot be ignored by State decisionmakers charged with developing the State budget. Legislatures that do not seek to control Federal grant programs may lose the opportunity to influence the priorities of significant federally funded programs. In addition, they may also lose control over State funds as well due to the second-order impacts of Federal grant programs on State budgets, i.e., matching, continuation of seed money programs, and funding Federal mandates.

While most Federal grant programs are categorical in nature and define eligibility, priorities, and organization with great specificity, it is nevertheless true that States have discretion under Federal grant programs. First of all, grant programs are voluntary in nature and rely on the discretionary decisions of States to participate. This basic decision by a State constitutes a significant policy decision with potentially far-reaching consequences for State citizens. Secondly, the opportunities for State decisionmakers to determine spending priorities under Federal grants

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1/"Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts," Report by the Graduate School of Administration, University of California at Riverside prepared for the National Science Foundation, June 20, 1979.

have grown during recent years with the advent of General Revenue Sharing and five block grants. As late as 1972, less than 10 percent of Federal assistance consisted of block grant and revenue sharing programs permitting greater recipient discretion. By 1980, 20 percent of Federal assistance dollars were allocated for these programs.

CHANGES IN STATE LEGISLATIVE INSTITUTIONS HAVE ENABLED FULLER FEDERAL GRANT OVERSIGHT

Legislatures have changed and enhanced their capacity to govern over the past 20 years. Institutional "modernization" has also generally enhanced their capacity to review the complex array of Federal grant programs on a more full-time basis. Some of the more significant changes include the following:

--Restrictions on the length of legislative sessions have been reduced or removed in most States. In 1962, 19 State legislatures met annually, and 31 held biennial sessions. By 1978, 43 legislatures, through formal or informal arrangements, held regular sessions in both years of the biennium, and 28 were able to call themselves into special session.

--Compensation for legislative service has increased. From 1961 to 1977, the average rate of increase for the salaries of State legislators for 40 States has been twice that for all other State and local employees in those States. This relatively recent statistic is positively related to strengthening the institutions of the legislature, because higher levels of compensation can discourage high rates of turnover.

--Permanent, professional staff with a variety of skills have been added to enhance the analytical capabilities of State legislatures. This is evident in the movement toward more permanent legislative service agencies performing research and/or policy analysis (from 36 agencies in 1962 to 187 in 1979), fiscal review and analysis (from 36 agencies in 1962 to 88 in 1979), and post audits (from 28 agencies in 1962 to 62 in 1979).

--Procedures and practices have been developed to expedite the legislative process in the interim period between sessions. In about 30 States,

regular House and Senate standing committees perform some interim work between sessions and frequently operate jointly or are augmented by special interim panels and ad hoc study groups.

--Capability to review and analyze the activities of government and oversee the performance of the executive branch in program administration has been enhanced. In 40 States, legislatures carry out their oversight of the executive branch through post audits and program evaluations performed by State legislative auditors and evaluators. Legislatures have recently provided themselves with several mechanisms with which to perform oversight activities. These include post audit and program evaluation "tools," review of administrative rules and regulations, sunset laws, closer review of Federal funds, and enhanced capability for budget review. Thirty-four States have legislative regulation review committees that exercise review over the administrative rulemaking process. Twenty-five States passed sunset legislation between 1976 and 1978. Many legislatures also require fiscal notes and/or economic impact statements on certain types of legislation. Several States have also also initiated computerized legislative fiscal information systems.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objective of our review was to determine the effect of legislative involvement on Federal interests. The interest of the Chairman of the Senate Intergovernmental Relations Subcommittee, Senator James Sasser, was instrumental in our initiating this review. The Chairman suggested that our review examine (1) the barriers that can arise as State legislatures seek a more active role in the grant process and (2) Federal policies that could be implemented to improve State legislative oversight of Federal funds.

We identified four major Federal interests that could be affected either positively or negatively by legislative oversight of Federal funds:

--Neutrality: Under a Federal system of governmment, the Federal Government should remain neutral with respect to the separation of governmental power determined by the States. In one sense, Federal neutrality means avoiding to the maximum extent practicable any distortion or disruption of the

separation of powers distinctions made by the States. In another sense, it means encouragement and support of the distinctions determined by the State. The Federal grant process thus should be assessed with respect to the extent to which Federal programs achieve Federal neutrality. This is not to say that simply because State legislatures traditionally exercise certain responsibilities and functions for State funded programs that Federal grant funds and programs should be treated the same way. However, as discussed in the report, this alternative should be available to them if they so choose.

--Program accountability: The current legislative role in the Federal grant process should be assessed with respect to the extent it sustains, diminishes, or enhances the concept of program accountability. Program accountability can be defined in several ways. On one hand, it implies the ability of the electorate to control the operations of government through their elected representatives; in a different sense, it implies a system of "checks and balances" in which the executive branch is held accountable to the legislature for its actions. The Federal Government has initiated several efforts to assure that Federal programs are accountable to the priorities of the States, including passage of the Intergovernmental Cooperation Act of 1968 and implementation of Office of Management and Budget Circular A-95, which gives Governors review and comment authority over proposals submitted for Federal assistance.

--Ensuring full State support: The ultimate success of many Federal grant programs is dependent upon a full State commitment of authority and resources to the program. A number of seed money grant programs, for example, provide only short-term Federal funding for projects, in the hope that States will continue to support the projects with their own funds. A number of other programs require either matching shares from State funds or passage of enabling legislation to bring the State into conformance with Federal standards and grant conditions. The role of legislatures can be assessed to determine whether their involvement enhances prospects for full State support of Federal initiatives.

--Administrative efficiency: Federal agencies generally work with a single State agency to assure effective management and expedite the timely and proper expenditure of grant funds. Since State legislatures are logically external to this administrative process, their involvement can be assessed with respect to the potential adverse impact on the administrative efficiency of the grant process.

Our review, conducted between September 1979 and March 1980, involved an examination of 75 Federal grant programs. In terms of dollar outlays, they represented the largest grant programs available to State governments accounting for over $43 billion in fiscal year 1979 Federal grant outlays. (See appendix I for a list of these 75 programs.) We interviewed Federal agency officials for each of these programs to determine their understanding of the role of State legislatures as defined in statute and regulation. We also performed extensive legal research, which included reviewing legislative histories for 16 of the grant programs, reviewing both Federal and State case law concerning legislative involvement in the Federal grant process, and interviewing noted legal scholars.

Our field work was conducted in 11 States (Colorado, Florida, Idaho, Illinois, Michigan, New York, Ohio, Oregon, Pennsylvania, South Carolina, and Vermont). Our selection of States, made with the assistance of the National Conference of State Legislatures (NCSL), was based on the need to observe differing Federal funds control approaches and levels of involvement.

In each State, we assessed legislative involvement through a review of appropriate records, reports, and budget documents and interviews with various State officials, including legislators, legislative fiscal and programmatic staff, representatives of the Governor's budget office, the State (A-95) Clearinghouse, the State Central Information Reception Agency, and State agencies responsible for six programs: Law Enforcement Assistance grants, Highway Safety grants, Title XX Social Service grants, Water Quality Management and Planning grants, and Elementary and Secondary Education Act grants for educationally deprived children (Title I) and for educational innovation and support (Title IV). In several States, we also contacted officials of State universities to discuss their special concerns with legislative oversight of Federal research funds. We also contacted Federal regional officials in Atlanta and Seattle to obtain their opinions concerning the nature and extent of legislative involvement.

CHAPTER 2

THE FEDERAL GRANT PROCESS HAS DISCOURAGED LEGISLATIVE INVOLVEMENT

The Federal interest is not well served when State legislative involvement is discouraged. Yet legislative involvement is, in fact, discouraged by the categorical grant system itself as well as by specific provisions in Federal grant programs which, although silent on the role of legislatures, assign legislative functions to the State executive branch. Such functions are normally shared with, or exclusively controlled by, State legislatures for State funded programs.

As a result, legislatures in many States have been discouraged from involvement with the allocation or oversight of Federal grant funds because of their perception, reinforced by State and Federal executive agency officials, that they have no legitimate role. More importantly, in some States, legislative involvement has been prohibited by State court rulings which, although explicitly decided on other grounds, may be interpreted as reflecting the notion that since no legislative role is specified in Federal grant law, none is intended.

The absence of legislative involvement adversely affects Federal interests. First of all, Federal neutrality may be impaired when explicit functions are granted to only one branch of State government without recognition of the other branch. Federal efforts to promote accountability are critically dependent on the internal State oversight process. Federal silence and constraints on the legislative role work to diminish the most basic form of accountability in State government: legislative oversight of executive actions. Prospects for full State support and implementation of grant programs suffer when legislatures are not involved with the grant program from the outset. Legislatures have refused to pass enabling legislation needed to implement Federal grant programs and have also refused to commit State funds to continue Federal seed money programs begun without their knowledge or input.

THE FEDERAL GRANT SYSTEM GENERALLY DISCOURAGES OVERSIGHT BY ELECTED OFFICIALS

It has long been observed that the Federal grant system can weaken the control by State chief executives and other

elected officials over their functional bureaucracies. Our review indicates that Governors and legislatures have similar problems in achieving effective oversight of federally funded programs.

Perennial concerns of State chief executives

The problems experienced by Governors have long been recognized. 1/ Federal categorical grants allow State program specialists to gain substantial autonomy from the Governor, often by invoking highly specific Federal rules and directives as sanctions for administrative actions that may be contrary to State policies or political preferences. State agency officials develop allegiances with their Federal funding sources and administrative counterparts that can dilute the control of their nominal superiors within State governments. Indeed, a 1977 ACIR study reported that 47 percent of State administrators surveyed agreed that their federally financed activities were subject to less supervision by the Governor and the legislature than activities financed solely by the State.

Governors seeking to more fully control federally funded activities must deal with a number of obstacles endemic to the Federal assistance system, including:

--The categorical nature of most Federal programs which limit the Governor's ability to tailor Federal programs to State needs and to implement comprehensive programs to resolve complex problems.

--The growing array of mandates and regulations imposed as grant conditions which impose additional costs and administrative burdens on the State itself.

--The lack of timely information on Federal funds and programs available to central State officials, which places an expensive burden on Governors seeking to gain better control over State agencies' uses of Federal grant funds.

1/An important early documentation of chief executive problems was written by a former Governor. (See Terry Sanford, Storm Over the States, McGraw-Hill, New York, 1967.)

--The tendency of Federal executives to consult only with their functional State agency counterparts in developing new policies and regulations, to the exclusion of the State chief executive.

In response to the concerns of the Governors and other State and local elected officials, the Federal Government has developed policies to recognize and support the role of these officials in the Federal assistance system. Administrative directives have been issued requiring Federal agency consultation with State and local officials in the development of Federal regulations as well as Federal recognition of the indirect costs incurred by State and local central management to control and administer Federal grants.

A gubernatorial role in reviewing and commenting on State applications for Federal assistance has been institutionalized as part of OMB Circular A-95. Federal capacity building funds, although limited, have been available to strengthen the executive management function of State governments especially since congressional passage of the Intergovernmental Personnel Act of 1970 which provides assistance to Governors for personnel improvement. With the passage of the Federal Program Information Act of 1978, the Federal Government intensified efforts to provide information through a central source on grants awarded to each State. Finally, five block grant programs have been established since 1966 giving more discretion to State and local elected officials in determining the uses of Federal funds.

Newly emergent concerns of State legislatures

Our review confirms that State legislatures share many of the Governors' concerns and problems in controlling Federal grant funds. As ever-increasing portions of the State budget and individual agency actions are directly or indirectly affected by Federal funds, legislatures have discovered that Federal grants cause a variety of problems which affect their ability to effectively allocate State revenues, including:

--Potential for duplication, or at least the lack of integration between State and Federal priorities. By 1980, almost 500 grant programs were in operation, representing a Federal financial involvement in almost every major area of State activity.

--Use of discretionary Federal funds which sometimes bypass legislative intent and priorities by beginning programs for which State funds were denied

or expanding programs beyond levels set by the legislature.

--Increased State costs arising from Federal grant conditions. Participating in federally supported programs can lead to higher than expected State funding requirements due to the need to comply with unfunded Federal mandates or to continue programs for which Federal funding declines.

To many observers, these problems threaten the viability of legislatures as "separate but equal" branches of State government and work to erode the accountability of the legislature for significant State policies and programs.

While the above problems argue for increased legislative involvement, that is, legislatures should exert stronger oversight of Federal grant funds, attributes of the Federal grant system tend to discourage legislative involvement by reducing a legislature's incentive to seek a greater role. From the State legislative viewpoint, the cost of increased oversight can be very high, while the potential impact and benefit may be quite low.

Legislative oversight can be very expensive. To react to a virtual deluge of Federal grants, each complicated by differing expenditure conditions, administrative requirements, and documentation procedures, most legislatures have to consider a variety of costly and time-consuming improvements to their existing oversight procedures. Expanded information systems and additional staff may be needed, and new legislative procedures may be necessary to effectively extend oversight to Federal grant programs. These problems, particularly insufficient staff and paperwork burdens, forced the South Dakota legislature to abandon an attempt to review and approve grant applications submitted by State agencies.

The impact of legislative oversight is further constrained by the generally limited amount of discretion available to State decisionmakers within the categorical grant structure. Despite the increased discretion allowed in some programs, the vast majority of grant programs remain categorical in nature and thus limit the range of options available to State legislatures. Legislatures seeking to maximize their impact on public policy often view involvement in Federal programs as an inefficient use of limited time. As a former legislator told us, "Why should I spend my time on Federal programs, which I can't control, when I can spend my time on State programs, which I can control?"

Similarly, the direct benefit to the State arising from legislative oversight is not always readily apparent. Many legislators are aware that many of their decisions could be perceived as negative, not positive, actions since grant funds may be lost. For example, one legislature which questioned the need for recreation planners discovered that eliminating the positions would result in the loss of funds for various recreation programs. Another State's attempt to design the structure of an administering organization according to its own preference would have made it ineligible for continued Federal support. Legislators are also aware that grant funds not spent by one State will probably be reallocated to another State--in a sense, a form of "political blackmail." As one legislator observed, regardless of the "better government" aspects of legislative oversight, he would rather spend Federal funds on nonessential projects in his State than have them reallocated to a neighboring State.

FEDERAL GRANT PROGRAMS DO NOT RECOGNIZE THE TRADITIONAL ROLE OF STATE LEGISLATURES

In addition to these general concerns shared with State chief executives, State legislatures have been beset by a unique problem as well: the widespread assignment of legislative functions to Governors or State agencies in Federal grant programs. Such assignments raise questions about the viability of a legislative role in the Federal grant process.

Federal grant programs do not define a role for State legislatures but do give responsibilities to the State executive branch that far exceed the normal executive role traditionally exercised for State funded programs. This Federal allocation of roles and responsibilities may have been based on the understandable need for the Federal Government to relate to a single focal point within the State on day-to-day administrative matters. However, in developing arrangements premised on administrative necessity, responsibilities that are traditionally viewed as legislative in nature have been assigned to the State executive branch and thereby raise questions about the permissible scope and degree of legislative involvement in the Federal grant process.

The explicit responsibilities defined for State executives by Federal grant programs--to determine priorities, designate agencies to administer programs, and evaluate program performance--are either shared with or exclusively controlled by legislatures for State funded programs. The

absence of a defined role for legislatures in grant programs combined with explicit functions given to the executive branch implies a legislative-executive relationship for Federal funds that is far different from the relationships established for State funds. Legislative approval is generally required to raise new revenues and authorize expenditures for State funds, but is not necessarily required for Federal funds.

Federal programs requiring a State matching share or passage of requisite enabling legislation to conform with Federal standards offer an opportunity for legislative input. However, they do not provide a formal role in priority setting comparable with either the role defined for the Governor in Federal laws or the role defined for State legislatures in State laws and constitutions. Matching requirements in particular can often be met by State executives without legislative appropriation of public funds due to Federal rules allowing in-kind resources to satisfy the State's matching share.

Federal grant programs assign traditionally legislative functions to State executives

In most of the 75 grant programs we reviewed, Federal grant programs assign explicit responsibilities to the Governor and/or State agencies for functions that are either exclusively assigned to or shared by the legislatures when State funds are involved. Furthermore, the Federal Government is typically silent on the role of the State legislature in executing these responsibilities.

Although the reasons for strong State executive roles in Federal grant programs are usually not spelled out in the legislative histories of grant programs, administrative necessity makes it desirable for Federal agencies to designate a single focal point within their State to work with on day-to-day administrative matters. Since most aspects of grant administration are executive in nature, it is also reasonable for Federal agencies to select the State executive counterparts as this focal point. The legislative history of the LEAA program illustrates one example where the Congress was explicit on its reasons for assigning programmatic responsibility to the State executive branch. In this program, the Governor was given authority to direct the State program because Congress felt it would be more convenient and effective to deal with one authority representing the State rather than a body as diverse and pluralistic as a legislature. This sentiment was best expressed in Senator Dirksen's comment that we need "a captain at the top, in the form of the Governor, and those he appoints, to coordinate the matter for a State * * *."

The role of legislatures in reviewing or approving State policies in grant programs has generally been ignored in the development of grant programs, leading to pervasive Federal silence. However, we did note one case where the Congress rejected a role for legislatures in reviewing grant applications submitted under the proposed Domestic Violence Act because of congressional concern over the capacity of part-time legislatures to participate in the year-round cycle of grant activity and the fears that grant projects could be delayed or lost pending legislative approval.

The following responsibilities have been largely assigned to State executives in Federal grant programs.

Deciding State priorities for the use of Federal funds

In general, priorities for the expenditure of State funds are determined by the legislature through the appropriations process. As a rule, money cannot be spent from the Treasury of the State unless it is appropriated by the legislature. State executive officials cannot unilaterally create a legal obligation for State expenditures unless there has first been an appropriation by the legislature. Although Governors can veto appropriations bills, legislatures generally can override gubernatorial vetoes.

Federal grant programs, on the other hand, assign explicit responsibility to the Governor or his designated State agency to decide the State's priorities for the expenditure of Federal grant money without any reference to State legislatures. Seventy of the 75 grant programs we reviewed require a State executive agency or the Governor to prepare and submit State plans or applications for Federal assistance--a process analogous to the submission of agency budget requests to the State legislature for eventual appropriation. The specific provisions in Federal law and regulations vary from requiring gubernatorial approval or submission of the State plan to actual designation of the Governor as the recipient of the grant. To illustrate:

--Legislation establishing the State Energy Conservation program provides that "the Governor may submit to the Secretary, a State energy conservation plan * * *"

--Legislation establishing the Urban Mass Transit program designates the Governor as the recipient of funds for distribution to urbanized areas under 200,000 in population. The Federal agency indicates in proposed regulations that the Governor

"shall determine" the amounts available to each local area, following a suggested Federal formula.

--The Older Americans Act establishing the Grants for State and Community Programs on Aging does not prescribe a role for the Governor in submitting or approving the State plan. However, the agency regulations require gubernatorial approval of the State plan and further state: "The Commissioner does not consider a State plan or amendment for approval unless it is signed by the Governor."

Other Federal programs require the Governor to review applications for Federal assistance to local governments as well. For example, the Urban Mass Transit and Intergovernmental Personnel programs both give the Governor a specified period of time to review and comment on local applications for Federal assistance.

Finally, a role for the Governor in reviewing applications and plans submitted for Federal assistance has been required on a cross-cutting basis for most grant programs. The coordination of federally assisted projects with State and local objectives through review and comment procedures was mandated by the Intergovernmental Cooperation Act of 1968. OMB, in its Circular A-95, "Evaluation, Review, and Coordination of Federal and Federally Assisted Programs and Projects," administratively designated the Governor as the State official charged with this review and comment responsibility. As part of this process, the Governor is given an opportunity to review State plans submitted for Federal assistance and comment on the relationship of the proposed federally funded activities to established statewide policies and programs.

OMB Circular A-95 also established a Project Notification and Review System for each State, providing the opportunity for the review of grant applications for Federal assistance by a State clearinghouse designated by the Governor. Federal agencies can choose to fund proposals opposed by A-95 clearinghouses, but they must state their reasons for doing so. OMB's implementing instructions leave no doubt that these clearinghouses are viewed as the spokesman for the Governor and in fact, were instituted to help the Governors prevent their bureaucracies from circumventing gubernatorial policies by using Federal funds.

State legislatures, on the other hand, usually have no explicit federally recognized role in the review or approval of these State plans and applications. While the clearinghouses are to disseminate information on project proposals to

appropriate agencies affected, legislatures are not mentioned as participants in the process. In fact, legislatures are not recognized in any part of the A-95 grant review and comment process. Furthermore, of the 75 grant programs we reviewed, only the 5 grant programs administered by LEAA provide an explicit role for legislatures in reviewing State plans prepared by the State executive for Federal funding. However, a State legislature's comments on State LEAA plans are considered only advisory in nature and do not have to be addressed by the Governor in the plans submitted to the Federal Government. In fact, some executive officials have argued that the advisory role contemplated for the legislature implicitly supports the interpretation that only the Governor has the final authority to speak for the State under the LEAA program.

Legislative appropriation or approval of Federal funds is required by only one of the Federal programs included in our review--the General Revenue Sharing program. This Federal program requires grant recipients to follow their normal budgetary procedures as a condition for State and local eligibility for these funds.

Designating State organizations to administer Federal grant programs

In our tripartite system of government, the legislature is the traditional repository of the authority to create public offices and designate agencies to administer programs. Furthermore, the legislature has the discretion to determine whether new functions shall be executed by new agencies or through existing organizations.

Federal grant programs, however, generally assign these functions to the State executive branch. Nearly all the Federal grant programs we reviewed require that a State agency be designated to administer the program. The Governor is generally given responsibility to designate the State agency which will administer the Federal programs. Of the 71 programs we reviewed that required State agency designation, the following entities were given authority to designate the State agency:

Designating entity	Number of programs
Governor	41
Federal Government	11
State law (Legislature)	9
Either State law or Governor	8
State Secretary of State	2
Total	71

Appendix I shows the designating entity established for the grant programs in our review.

Several Federal planning programs, e.g., the Health Planning program, also require that States designate substate planning districts. Traditionally, the State legislature has the authority to determine the sub-State delegation of State authority. However, Federal planning programs and OMB Circular A-95 assign this function to the Governors.

Evaluating and overseeing executive administration of programs

Independent oversight by the legislature of executive actions has been a traditional attribute of our system of checks and balances. In recent years, State legislatures have increased their capacity to perform this oversight role through the creation of post audit and evaluation staffs accountable to the legislature. These legislative audit groups have expanded their scope to perform systematic evaluations of the efficiency and effectiveness of programs managed by State executive agencies. As of 1979, 40 States had an auditor selected by the legislature. To supplement the auditing staff, many legislatures have also established performance evaluation groups to review program effectiveness issues.

The Federal Government is concerned with the oversight and evaluation of its grant programs at the State level. Of the 75 programs we reviewed, officials of 36 programs indicated that they provide for the State to evaluate the program. However, in all cases the Federal agencies indicated that the State agency is responsible for evaluating its own performance. For example, the regulations for the State and Community Program on Aging (Title III, Older Americans Act) require the State agency to annually conduct written evaluations of projects carried out under the State plan by local planning

agencies. Officials for only seven programs told us that they encourage legislatures to evaluate the programs as well.

Of the 36 programs, only 13 indicated that evaluations by legislative staff would be eligible for Federal reimbursement. However, most of these programs allowing cost reimbursement for legislative evaluations require State agency approval prior to funding.

State agency control over State evaluation processes can deprive legislatures of the full benefit of the evaluations. For example, LEAA programs in South Carolina are evaluated annually by the State planning agency. However, the legislature does not receive reports of the evaluation results which could be helpful in its own oversight of State programs. In one case, even though one project received a poor evaluation, the State agency involved requested State funding the following year by arguing that the project in fact had received a positive evaluation.

Federal reliance on operating agencies to evaluate themselves raises questions about the independence or objectivity of this evaluation process. In the related field of auditing, our Standards For Audit Of Governmental Organizations, Programs, Activities, and Functions clearly articulates the principle that auditors must maintain "an independent attitude." In articulating the concept of independence, the standards state:

> "To achieve maximum independence, such auditors and the audit organization itself not only should report to the highest practicable echelon within their government but should be organizationally located outside the line-management function of the entity under audit."

Federal grant requirements imply legislative involvement but do not constitute a meaningful role

Federal grant provisions implicitly requiring legislative action generally do not provide a practical policymaking role for legislatures in the grant process. Of the 75 grant programs we reviewed, 59 potentially require legislative action because of grant provisions requiring either a State match or the passage of substantive legislation enabling the State to conform with Federal grant regulations or standards. Specifically, 26 of the 75 programs required the passage of State enabling legislation, while 51 required a State match.

State legislative action required under Federal programs is generally reactive in nature, and this provides only a negative role. In effect, the legislature can react to executive grant proposals and plans by either refusing to appropriate required State matching funds or by rejecting needed enabling legislation. This gives legislatures some leverage. However, unlike the State appropriations process it does not permit the legislature to substitute alternatives for executive proposals. Indeed, failure by the legislature to provide match or enabling legislation usually places the State in jeopardy of losing the entire Federal grant. Legislatures are thus presented with the unenviable choice of either accepting executive grant proposals which they may find questionable or accepting the political onus of losing Federal grant money. Thus, the legislature must pay a high price if it chooses to express its policy preferences in this manner. For example, those legislatures that have not passed certificate of need laws required for the Federal Health Planning Program will trigger the loss of not only the Federal planning grant but also other major Federal grants for health services, e.g., Medicaid.

While matching provisions can provide a role for State legislatures, several Federal rules facilitate executive circumvention of even this role. First, most Federal agencies must honor nonappropriated in-kind resources from grantees as matching shares. In-kind resources can consist of such things as existing State facilities, overhead costs, private volunteers, and donations. State agencies can use in-kind matching resources to satisfy the entire match and not have to depend on an appropriation of public funds by the legislature. For example, Federal Highway Safety officials told us that a Federal grant to construct mile post markers may be matched with existing State expenditures for driver education.

The Colorado legislature can legally control Federal grants only through the State match, since its State court prohibited legislative appropriation of Federal funds. However, this legislature's fiscal staff told us that programs with in-kind match are difficult for them to control. Control over in-kind matching is frustrated not only by the considerable accounting problems involved but also by State constitutional questions. Specifically, the State court has ruled that detailed legislative restrictions on the salary and time allocations of individual staff constitute an unconstitutional infringement on the executive powers of administration. Yet, legislative control over in-kind match would, in fact, have to involve legislative review of the allocation of the time of State personnel expenditures, equipment, and other indirect items allocated for match. As a result, some grants with

in-kind match are received without the knowledge of the legislative fiscal staff.

Legislative control of Federal grants through match can also be precluded by matching the Federal program in the aggregate for the entire State. Most large grant programs allow States to satisfy the matching requirement in the aggregate on a statewide basis. For the most part, State executives have the flexibility to allocate Federal funds to State projects without any match as long as other projects in the State have sufficient overmatch to compensate. This flexibility was used in the State of Pennsylvania to authorize a federally assisted project opposed by the legislature. Because of aggregate matching, the Governor was able to support a special prosecutor project opposed by the legislature. Even though the LEAA program required a 10 percent match in the aggregate by the State, Federal funds were nevertheless made available for this project without any State match because the State provided enough match in the aggregate from other projects.

FEDERAL CAPACITY BUILDING SUPPORT CAN REINFORCE EXECUTIVE DOMINANCE OF THE GRANT SYSTEM

The prominent role of the State executive branch in the Federal grant process is reflected in the orientation of Federal technical and financial assistance for institutional improvement to State executive agencies. Federal funds and technical assistance available to improve the policymaking and management institutions of State governments are not usually available to legislatures without executive approval, in spite of an 11-year old OMB policy recognizing the applicability of Federal assistance for legislatures.

The executive orientation of Federal capacity building assistance not only reflects the prominent roles given to Governors in many grant programs, but may also serve to reinforce it at the expense of the legislatures. Such assistance further strengthens the role of the Governor in the grant process, by funding grants increasing the executive's capacity to plan and evaluate public policy for Federal programs, while the relative position of the State legislature is weakened, because Federal funds to enhance their fiscal oversight and evaluation capacity are not usually available. Legislatures seeking a strong oversight role for Federal funds are also not getting the kind of information and technical assistance on grant conditions and funding level changes which is needed to effectively monitor and control Federal grant activity even though this kind of assistance is routinely provided to the State executive branch.

Federal capacity building funds

We identified four Federal programs that provide assistance unrelated to any functional area to strengthen the general capacity of State officials to plan and implement their own programs. Of these, only one--the National Science Foundation's Intergovernmental Science program--has a policy of sharing its limited funds between State legislatures and Governors. This program provided about $700,000 in 1980 for improvement in State legislative processes on a national basis, as well as grants of $25,000 to each legislature to improve its science and technology assessment capacity. Based on its 8 years of operation, officials of this program indicate that the receipt of Federal funds by legislatures has not posed administrative problems. Legislatures have designated appropriate internal focal points to receive and administer these funds.

Legislatures are not directly eligible for Federal assistance in the other programs--Comprehensive Planning Assistance (Department of Housing and Urban Development); Economic Development Planning (Department of Commerce); and Intergovernmental Personnel Improvement (Office of Personnel Management). This practice occurs despite a 1969 OMB policy requiring Federal agencies to consider State legislative applications for Federal funds on an equal basis with State executive funding requests unless specifically precluded by statute. Yet two of the four general capacity building programs have excluded legislatures through administrative policy.

Officials of HUD's Comprehensive Planning Assistance program expressed an unwillingness to fund legislative proposals because this would dilute the program's ability to fund executive applications. Similarly, while the authorizing legislation establishing the Economic Development Planning program is neutral about the funding recipient, the Federal agency has chosen Governors as the authorized recipients. These Federal program officials consider State legislatures to be ineligible for funding.

The administrators of the Intergovernmental Personnel program (IPA), which provides $20 million for State and local management improvement and training, feel that their statute prevents funding of applications from individual State legislatures unless they receive the approval of the Governor's designated agency. Similarly, officials of programs giving capacity building or planning assistance for specific functional areas (e.g., LEAA, Appalachian Regional Commission) stated that individual State legislatures can receive funding

but only if approved by the State executive as part of the State plan.

Some Federal agencies we contacted funded legislative improvement projects through grants to the National Conference of State Legislatures (NCSL)--the national organization representing the legislatures of all 50 States--but not to individual legislatures. For example, the Intergovernmental Personnel program has funded NCSL to conduct an extensive training program for State legislators and their staffs throughout the country. NCSL is also receiving funding from HUD to assist State legislatures in strengthening their financial relationships with local governments.

The lack of direct access to Federal funding sources can discourage legislative grant applications. One report has noted that several legislatures withdrew funding requests due to the necessity of obtaining the approval of the executive branch. 1/ Legislatures have also objected that, under OMB Circular A-95, grant applications from the legislatures must also be sent to the State A-95 clearinghouse--which is designated by the Governor--for review and comment prior to Federal funding action. An earlier study reported that a number of Federal grants actually received by legislatures were channeled either through a university or a State executive agency. 2/ For example, the Oklahoma State Legislature's application for a HUD grant to analyze State planning was initially denied but later approved through an application filed by the State planning agency.

Legislatures' access to Federal information and technical assistance is very limited

Federal technical assistance and information to support the implementation of Federal grant programs are typically provided only to the State executive branch and are not directly available to State legislatures. Yet, legislatures seeking to review State grant applications and appropriate Federal funds need timely information on projected Federal grant outlays, Federal grant availability, and Federal grant conditions mandating additional State costs or programmatic changes.

1/"Federal Grants to State Legislatures" - A report of the New York State Assembly Ways and Means Committee, July - August 1977.

2/F. Robert Edman, "Federal Grants-in-Aid to State Legislatures, State Government, Vol-XLIV, No. 3, Summer 1971, pp. 154-161.

Federal agencies administering the 75 grant programs we reviewed told us that information on changes in grant programs, e.g., future budgetary outlays and changes in regulations, is sent only to the State agency or the Governor in nearly all cases. With two exceptions, none of these Federal programs routinely provide information on changes in grant regulations or outlays to the legislature. In fact, Federal officials responsible for over 30 percent of the Federal programs we reviewed said they would not provide technical assistance to committees of the legislature even upon request. Some Federal agencies that have provided information assistance to legislatures said that they do so only after consultation with the State agency administering the program.

Several Federal agencies included in our review did provide active outreach programs of technical assistance to State legislatures. These agencies felt that legislative involvement was critical to the ultimate success of the grant program within the State, especially when legislative action was needed to pass requisite laws enabling the State to participate in the program. The Energy Conservation program, for example, provides funds to NCSL to develop energy conservation standards required by the program. NCSL receives funding from several other agencies to help legislatures understand those Federal programs that require legislative support in the States, including water quality management and health planning regulations.

Several Federal initiatives to better inform legislatures have also been undertaken on either a Government-wide or departmental basis. First of all, since 1969, the Federal Government has given States information on actual Federal dollars received by State agencies for all grant programs. This grant award information is made available to a State Central Information Reception Agency designated by the Governor in consultation with the legislature. OMB is instituting a new system to provide more timely information on Federal grant expenditures for each State. This system--the Federal Assistance Award Data System--will provide the information to a State agency designated by the Governor in consultation with the legislature. This system offers a promising new source of public information on Federal assistance activities within each State.

Also, since 1972, HEW Region X (now Department of Health and Human Services) has operated a liaison program with State legislatures. This program covers all HHS grant programs in the region and facilitates HHS participation in State legislative hearings, helps prepare HHS opinions on proposed State legislation, and seeks to assure quick responses to legislative inquiries about Federal grant requirements. While several

other Federal regions have made some effort to contact legislatures, this Region X program is the only case where staff has been specifically assigned to legislative relations.

FEDERAL GRANT PROVISIONS DISCOURAGE LEGISLATIVE INVOLVEMENT

Federal grant programs which assign traditional legislative responsibilities to State executives without recognizing the legislatures can discourage attempts by State legislatures to control the use of Federal grant funds. Although Federal grant programs do not explicitly prohibit legislative oversight, the interpretations of Federal grant law by four major actors in the grant process have served to discourage or prohibit legislative involvement in specific cases:

--Federal agency officials who indicate that legislative attempts to change plans and organizational patterns developed by the executive branch could cause the State to become ineligible for Federal funds.

--State courts which have prohibited legislative appropriation of Federal funds in four States. These rulings can be interpreted as reflecting the notion that since no role for legislatures was defined by the Federal Government, none was intended.

--State agencies that have used Federal grant provisions defining explicit executive branch roles to ward off oversight efforts by their State legislatures.

--State legislators themselves who choose to abstain from controlling Federal grant programs for a number of reasons, including their own perceptions that legislative initiatives are not recognized by Federal grant programs.

Federal agencies' interpretations can prohibit legislative assertion of authority in conflict with the Governor

Federal grant programs do not recognize legislative changes to State executive plans unless approved by the Governor or the designated State agency. As a result, Federal grant programs

can be used by State executives with Federal approval to fund programs that are contrary to established legislative priorities and policies. Furthermore, efforts by legislatures to change plans submitted by State executives may violate Federal grant conditions, thereby triggering the loss of the entire grant to the State.

None of the Federal grant programs we reviewed explicitly prohibit legislative appropriation of Federal grant funds. However, legislatures that use the appropriations power to change State plans that conflict with the policies of the Governor or State agency may violate Federal grant conditions. Most Federal officials we contacted believe that State implementation of legislative changes opposed by the Governor would in itself violate the grant conditions which define the Governor as the grant recipient. As a result, States implementing legislative proposals opposed by the executive branch could be penalized by losing Federal grant funds.

Officials of 65 Federal programs told us that they would have to ignore legislative objections or changes and fund the Governors' proposals in cases where these two branches of State government could not agree. Some Federal program officials stated that since only the State executive branch is required by grant regulations to review or approve the State plan, they are legally obligated to fund the executive branch approved plan, regardless of legislative objections. Federal agencies have no objections to legislative proposals or changes agreed to by the Governor.

Some Federal agencies have seriously constrained the permissible range of legislative involvement in priority setting under their programs. Legal opinions issued by LEAA have stated that, while legislative appropriation of LEAA grant funds is allowed, the legislature may not "substitute its judgment for that of the Governor in determining how these funds should be expended or allocated." In the celebrated case of Shapp v. Sloan, LEAA took the position that an attempt by the Pennsylvania Legislature to change the Governor's allocation of LEAA funds violated LEAA program conditions vesting ultimate program control with the Governor and his planning agency. LEAA threatened to terminate funds to the State if the legislature prevailed. The legislature's appropriation action was upheld by the State's

highest court. 1/ LEAA, however, has not taken action to terminate funds to the State.

Similarly, Federal vocational education officials said that Federal funds for State advisory councils on vocational education may be appropriated "for informational purposes only" and that the legislature cannot substantively change the program proposed by the State agency. Recently, Federal vocational education officials rejected an attempt by the Kansas Legislature to restrict official hospitality expenses incurred by the federally funded State advisory council. Pointing to a provision of the Federal law prohibiting "programmatic and administrative control by other State boards, agencies, or individuals," the Federal agency concluded that legislative appropriations that reduce Federal funds violate the grant conditions. The agency has thus held all Federal vocational education funds to the State in abeyance until the legislative action is rescinded.

Comments by other Federal agency officials indicate that future attempts by legislatures to control Federal funds in opposition to the Governor or State agency could meet with Federal agency opposition, with uncertain consequences for Federal program funding to that State. For example, an official responsible for Federal grant programs for the aging told us that legislative appropriation of Federal grants under the Older American Act would be "a mockery of the planning process" which clearly provides a strong role for the Governor in reviewing and approving the State plan. Officials of the Food Stamp program told us that if a legislature disagreed with the Governor's plan, they "would expect the Governor to spend the money in contradiction of the legislature thus invalidating the legislature's position."

The perceptions by some Federal officials of the role of legislatures in public policymaking for Federal programs are at odds with the central policymaking role defined for legislatures in State constitutions. An official with the Interior Department's Outdoor Recreation program told us that legislatures may act in a public advisory role in commenting on the

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1/The Supreme Court dismissed the Governor's appeal in Shapp v. Sloan, 480 Pa. 449, 391 A. 2d 595 (1978), appeal dismissed for want of substantial Federal question sub.nom., Thornburgh v. Casey, 440 U.S. 942 (1979).

State plan. Federal Highway Safety program officials said that State plans submitted by the Governors represent balanced programs responsive to State needs; legislative involvement would skew these carefully made plans.

Federal programs that designate the Governor as funding recipient and grant broad gubernatorial discretion can particularly inhibit legislative involvement. For example,

--Governor's discretionary fund, Comprehensive Employment and Training program (CETA) - Federal program officials stated these funds are exclusively the Governor's money and that legislative intrusion is contrary to the intent of the program. The Labor Department's Solicitor wrote that legislative appropriation of CETA funds could constitute a violation of grant conditions on the grounds that "the Governor would be hindered in the exercise of the administrative discretion assigned to him by the Federal statute."

--Urban Mass Transit program - The Federal law provides that certain sums for urbanized areas be "made available to the Governor for expenditure * * *." The Transportation Department's General Counsel concluded that legislative interference with the expenditure of these funds could be precluded in the grant programs where the Congress has directed that grants be made directly to an executive officer or agency of the State.

--Appalachian Regional Development program - Over $350 million in Federal grant funds were allocated in fiscal year 1979 by a joint Federal-State Commission composed of a Federal agency co-chairman and the Governors of the 13 States in the Appalachian region. According to Commission staff, the Governors are considered to be the States' representatives and they alone determine funding priorities.

State legislatures that seek to change the State agency designated by the Governor can also run afoul of Federal grant conditions. Officials representing several agencies indicated that Federal funding would be suspended if the legislature overruled the Governor and designated its own agency to administer the grant program. Prior to a 1976 amendment requiring

legislative approval of the State planning agency under LEAA, the Federal agency had ruled that an attempt by the Illinois Legislature to designate the State planning agency by law for the LEAA program was invalid unless the Governor agreed to this designation. The Federal agency indicated that even if the legislature overrode the Governor's veto, the Governor's approval would nevertheless be federally required.

An attempt by the South Dakota State Legislature to designate an agency different from the Governor's choice to administer Federal Older American Act funds aroused the opposition of Federal HEW officials on the grounds that the Governor's authority to designate would be compromised. At Federal initiation, a compromise was negotiated between the Governor and the legislature. Interestingly, the Federal statute and regulations for this program only require the State, not the Governor, to designate a single State administrative agency.

Some State courts prohibit legislative appropriation of Federal funds

Notions of the differential roles assigned to State executives and legislatures in the Federal grant process have been critical to the outcome of several conflicting State court decisions. The Federal silence on the role of legislatures has enabled diametrically opposed rulings to emerge from six States. The highest courts of four States--Colorado, Arizona, New Mexico, and Massachusetts--have prohibited legislatures from appropriating all or most Federal grant funds. 1/ Pennsylvania and New Hampshire courts on the other hand, have affirmed the authority of their State legislatures to appropriate Federal funds or to change the Governor's designation of a State agency to administer Federal grant programs. 2/

The four State courts prohibiting legislative appropriation of Federal funds all concluded that Federal funds were trust or custodial funds, not State funds, given to the State executive by Federal agencies to execute Federal policy.

1/MacManus v. Love, 179 Colo. 218, 499 P. 2d 609 (1972); Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 528 P. 2d 623 (1974); State v. Kirkpatrick, 86 N.M. 359, 524 P. 2d 975 (1974); Opinion of the Justices to the Senate, 378 N.E. 2d 433 (Massachusetts, 1978)

2/Shapp v. Sloan, 480 Pa. 449, 391 A 2d 595 (1978); Opinion of the Justices, 381 A. 2d 1207 (New Hampshire, 1978)

The courts have given two explicit reasons for these holdings. First, there is the "separation of powers" concept. In MacManus v. Love, the Colorado Supreme Court held that the State legislative appropriation of Federal grant funds constituted "an attempt to limit the executive branch in its power of administration of Federal funds," and accordingly the appropriation violated the explicit State constitutional doctrine of separation of powers. Although the MacManus case was decided in light of an explicit constitutional provision, the same "separation of powers" concept appears in at least two of the other decisions. 1/ The following remark from the Massachusetts Opinion of the Justices is indicative:

> "Moreover, legislation requiring that Federal funds, including those received in trust by officers and agencies of the executive branch, be paid into the State treasury and be expended only on appropriation by the legislative branch, would result in the legislature's interfering with the right and obligation of the executive to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws."

The second basis for these decisions has been the concept that Federal grant funds are "custodial" funds, not subject to the legislatures' power of appropriation. In each of these four cases, the State legislature's power of appropriation was limited to "State funds" or "public funds" and did not reach "custodial funds" or "funds held in trust."

Although these four decisions have been explicitly based on State constitutional grounds these decisions can also be understood as implicitly reflecting a State court interpretation of the nature of the Federal grant process. In these decisions the courts made a basic assumption about the nature of Federal grants, that is, Federal grant programs are exclusively executive in nature. Or, in the words of the Massachusetts Supreme Judicial Court, legislative appropriations of Federal funds would be "interfering with the right and obligation of the executive to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and

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1/State ex rel. Sego v. Kirkpatrick, 86 N.M. 359; 524 p.2d 975 at 986 (1974); Opinion of the Justices, 378 N.E. 2nd at 436.

administer the laws." The view that Federal programs are essentially executive in nature is further enhanced by Federal grant program provisions which are silent on a legislative role but assign legislative functions to the State executive branch.

These rulings appear to agree with the contention argued by one Governor that since no legislative role was specified none was intended by the Congress. A legal scholar has written that these rulings appear to be based largely on the courts' perceptions of the Federal grant system and may constitute "disguised Federal law holdings." 1/ Significantly, the Massachusetts Opinion did acknowledge the importance of Federal grant arrangements by noting that "not all Federal money is received in trust." Specifically, the court authorized legislative appropriation of unrestricted Federal funds received to reimburse State costs.

The State courts ruling in favor of legislative appropriation of Federal funds viewed the grant process differently. The Pennsylvania court noted that within grant conditions established by the Federal Government "there remains with each grant the necessity to establish spending priorities and to allocate available monies. This is properly a legislative function." Further interpreting congressional intent, the Court found no conflict between State legislative appropriation and Federal grant provisions: "As long as the funds are not diverted from their intended purposes and the terms and conditions prescribed by the Congress are not violated, there is no inconsistency between the provisions of the Federal programs and State legislative administration of the funds." 2/

Similarly, the New Hampshire Supreme Court ruled that legislative redesignation of the State agency to implement the Federal Health Planning program was entirely in keeping with the legislature's constitutional power to determine "the manner in which public policy is executed." The court further stated that Federal assignment of State agency designation to the Governor under the Federal program was not intended to preclude or preempt the constitutional exercise of authority by

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1/George Brown, "Federal Funds And National Supremacy: The Role Of State Legislatures In Federal Grant Programs," The American University Law Review, Vol. 28, No.3 (Spring, 1979), p. 288.

2/Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595, 605 (1978).

the State legislature. In noting that the Federal grant was made to the "State," the Court ruled that the Federal act does not confer on the Governor the right to disregard the State's constitutional process.

These conflicting State court decisions have not yet been resolved. Although the U.S. Supreme Court did dismiss an appeal by the Governor of Pennsylvania who sought to overturn that State court's decision upholding appropriation, the court's ruling does not appear to constitute a dispositive resolution or provide precedent for other States. 1/ One legal scholar notes that the Court's ruling may have been based on jurisdictional rather than substantive grounds. 2/

State executive branch officials believe that Federal grant provisions preclude legislative involvement

While the legal issues may be unresolved, some State officials of the executive branch believe that Federal grant provisions preclude legislative review. For example:

--The Governor of Washington vetoed an attempt by the legislature to change the LEAA State Plan through appropriation on the grounds that legislative appropriation violates the federally mandated planning process establishing supreme executive authority for the State Plan. A State official indicated that the legislature has apparently accepted this interpretation and has not since attempted to change the State's use of LEAA funds.

--The Governor of Pennsylvania argued that legislative appropriation of Federal funds violated a number of Federal statutes delegating specific authorities to the Governor. This became the basis for his court challenge to the legal validity of the Pennsylvania Legislature's appropriation of Federal funds.

1/Shapp v. Sloan, 480 Pa. 449, 391 A 2d 595 (1978), appeal dismissed for want of a substantial Federal question sub. nom, Thornburgh v. Casey, 440 U.S. 942 (1979).

2/See George D. Brown, "Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs," p. 311.

--The Governor of New Mexico chose the Community Action Agency to administer the Federal Low Income Energy Assistance program. The Legislative Finance Committee was on record favoring the State Human Services Agency to administer this program because this agency claimed that its administrative costs would be lower. The Governor refused to change his agency designation despite this legislative opposition noting that the Federal grant program assigned him the designation authority.

State legislative officials believe that Federal grant provisions exclude legislative involvement

A number of factors discourage legislative involvement in the Federal grant process, including the belief by legislative officials in several States that their involvement in certain Federal programs is precluded by Federal grant provisions giving explicit discretion and authority to the executive branch.

In our fieldwork, we found that a number of basic internal issues can also impose barriers to State legislative involvement, including short legislative sessions, absence of interim procedures to control funds received when the legislature is out of session, gubernatorial veto of legislative attempts to appropriate Federal funds, and limitations in some States on the ability of legislatures to use appropriations statutes to convey substantive program guidance. The table in Appendix II enumerates the impediments to active legislative oversight reported by State legislative officials in a 1979 NCSL survey.

Legislative interest in the oversight of Federal funds seems to be the key factor that enables legislatures in some States to overcome these internal and external limitations and achieve control over Federal funds. Although Federal grant provisions themselves have not prevented some legislatures from asserting control, they nevertheless have served to discourage oversight efforts in other States:

--Fiscal committee staff directors of the New York State Legislature told us that their involvement in the LEAA program is limited because of the discretion given to the Governor under this program. Similarly, legislative staff also feel that the dominant role defined for State agencies has precluded legislative involvement in the planning

and review of Highway Safety, Educational Innovation and Support, and Title I, Elementary and Secondary Education Act (ESEA), and Water Quality Planning and Management grant programs.

--Staff of the Colorado and Michigan Legislatures feel that their legislatures have no influence in the selection of State agencies to administer Federal programs due to Federal grant provisions which give the Governors this responsibility. For example, a Colorado staff official told us that the legislature does not believe that the Department of Social Services should administer Federal Aging grants, but it cannot designate another agency because only the executive branch has authority under Federal laws to designate the State agency to administer this grant program.

The significance of these Federal grant provisions as a perceived barrier is further demonstrated by the fact that this impediment ranked third in a list of 18 potential barriers ranked by State legislatures in the 1979 NCSL survey. (See App. II).

DISCOURAGEMENT OF LEGISLATIVE INVOLVEMENT DOES NOT SERVE THE FEDERAL INTEREST

When legislative involvement is discouraged, Federal interests can be adversely affected:

--Federal neutrality does not exist when the executive branch of State government is assigned functions normally shared with or exclusively controlled by the legislature for State-funded programs.

--Accountability for program performance is diminished when executive branch agencies do not receive legislative oversight. As a result of their extraordinary discretion and apparent authority enjoyed under Federal programs, State executives have initiated programs either in direct conflict with expressed legislative intent or without legislative knowledge--sometimes with Federal encouragement.

--Prospects for full State support of grant programs diminish when legislatures are not involved. When legislatures are not involved, needed legislative

action to secure full implementation of Federal programs within the State may not be forthcoming, e.g., passage of needed laws to conform with Federal guidelines, and appropriation of State funds to continue the programs when Federal grants terminate.

The Federal Government is not neutral

Federal grant programs do not observe the traditional separation of powers within the State. Rather, through the assignment of legislative functions to the State executive branch, Federal grant programs may alter the traditional constitutional relationship between the State legislature and the executive branch. The structural bias in favor of State executives often found in Federal grant programs helps create a State resource allocation process for Federal grant funds that can be in marked contrast with the basic power of the purse exercised by legislatures with regard to the appropriation of State funds.

With State funds, legislative approval is required before programs can be initiated or changed. Furthermore, legislatures can initiate new programs or change the priorities of existing ones, usually subject to gubernatorial veto which it can override. Thus, it can be said that legislatures have final authority to speak for the State in allocating State funds.

Under Federal grant programs, however, legislative approval is not federally required prior to major program initiation or change. While some legislatures have succeeded in asserting their traditional authority through State laws mandating appropriations of Federal funds, other States have been prevented by court rulings from doing this. Even in those States where legislatures appropriate Federal funds, legislative proposals and initiatives must still receive executive approval before the Federal Government will consider funding. Unlike State funding, the legislature cannot override the executive decision if the State is to retain Federal funding. Thus, the Governor has final authority to speak for the State in Federal grant programs.

Accountability Is Limited In Federal Grant Programs

Where legislative approval of Federal grant programs is not required by Federal or State laws, officials in some States can

initiate and execute programs and policies with Federal grants without legislative review of the policies or oversight of the program's effectiveness. When the legislature is not involved, public accountability of programs is limited.

The Federal grant process permits this breach of accountability because Federal grant programs enable the State executive branch to initiate and operate programs without legislative approval. Although some State legislatures have successfully initiated oversight efforts, the Federal grant process discourages legislative involvement. In some cases, State agencies have operated programs with Federal funds in direct conflict with expressed State legislative intent. In other cases, federally funded programs begun without legislative knowledge must later receive State appropriations to continue when Federal funds terminate. The ultimate effect is that legislative priorities may not be reflected in State discretionary decisions for Federal assistance programs. To illustrate:

--The Commerce Department's Economic Development and Planning Assistance program approved a planning grant for Colorado, even though Federal officials were aware of legislative opposition. Faced with legislative refusal to authorize additional personnel positions, Federal officials worked with the Governor to fund the program using personal services contracts.

--The New York State Education Department used Federal education funds to compensate for a 50 percent cut made by the legislature in an instructional project. A legislative study noted that this project was duplicative of other State programs and that the Federal grant would have been used for higher priority projects if the legislature had been involved.

--The Pennsylvania Board of Probation and Parole used LEAA grants to hire 131 parole agents after the legislature specifically refused this proposal the year before, following a full hearing held by the House and Senate.

--The Ohio Bureau of Employment Services plans to expand a federally funded program despite the fact that the legislature recorded its opposition during the appropriations process.

--South Carolina's State agencies used Federal reimbursement funds accumulated in nonappropriated accounts to maintain staff and budget levels in spite of an 8 percent budget reduction ordered for all State agencies in fiscal year 1975-76. One reason for the existence of this surplus fund was that State agencies gave the legislature the erroneous interpretation that Federal reimbursement for social services expenditures had to be used for program expansion, not State cost reduction. South Carolina's Department of Youth Services also used Federal social service reimbursements to provide the $166,666 State match for a $1.5 million LEAA grant, thus bypassing the legislative review that the requirement for a State match should trigger. The Department subsequently expanded the program over the next 3 years using these accumulated Federal reimbursement funds after the legislature refused to provide State funds for expansion.

--State agencies in Massachusetts spent Federal funds for service augmentation that was intended to cover employee insurance costs. According to a legislative study, only a small portion of the $8 million in Federal payments for this purpose was actually turned over to the State for group insurance coverage, compounding the State's liability for future fringe benefit funding.

--The Virginia State Department of Health expanded a program originally represented as a demonstration nutrition program to a statewide program by using Federal nutrition funds which became available when the legislature was not in session. Basic decisions to accept the funds and to use the State Health Department's local divisions to administer the program rather than local governments were made without legislative input.

Full State support for Federal grant programs is jeopardized when legislatures are not involved

If a federally funded program is to receive full State support, the legislature cannot be ignored. Failure to involve the legislature in planning or reviewing the program

can diminish chances for eventual State support. For example, the Surface Strip Mining program delegates enforcement of Federal standards to the States if requisite enabling legislation is passed. Yet, Federal officials indicated that legislatures in two States delayed passage because they were not adequately informed of the program. The program of one State may not be amended in time to meet Federal deadlines and result in Federal preemption of the program without State involvement.

When the Federal Government funds seed money programs, the goal is to achieve State continuation of the program with State funds. While the pressure to continue State funding can be strong, we have noted some examples where legislatures refused to continue State funding for programs where their early involvement or knowledge was minimal:

--A toxicology laboratory begun with Federal funds was closed when the Pennsylvania Legislature refused to continue funding with State money. The legislature believed that this project duplicated services available elsewhere.

--The South Carolina Legislature refused to authorize State funds to add to a Juvenile Placement and Aftercare program that was begun with Federal funds. The legislature became aware of the expansion only after staff had been hired and new offices opened.

--The Colorado Legislature's Joint Budget Committee informed the responsible State agency that it could not support the use of State funding to match declining Federal grants for community mental health centers. The committee believed there were higher priority needs within the State's total mental health system.

Federally funded planning programs can be meaningless unless followed by State implementation of the plans. When the legislature is not involved in the planning process, implementation is problemmatic. For example, the Federal Government funded Massachusetts to develop an economic development plan without any legislative involvement. Because the plan was implemented through executive orders it had to be entirely redone when the Governor left office. Federal Economic Development officials told us that, in retrospect, it may have been a mistake to work exclusively with the Governor in a program that could benefit from legislative involvement.

Several Federal planning and regulatory programs dependent on passage of State enabling legislation for implementation have recognized the importance of the legislature. For example, the Federal health planning program includes in its performance standards used to evaluate the State planning agency an assessment of the State agency's efforts to gain legislative support for its plans.

CHAPTER 3

STATE LEGISLATIVE OVERSIGHT OF FEDERAL GRANT PROGRAMS: BENEFICIAL, INCREASING, BUT STILL RELATIVELY LOW

Some legislatures have successfully involved themselves in various Federal grant programs on their own initiative despite the Federal discouragement discussed previously. The absence of a Federal role definition for legislatures has inhibited but not prevented a growing number of legislatures from determining their own responsibilities.

While there is a clear trend toward stronger legislative influence in the grant process, the methods of involvement and degrees of oversight achieved remain, understandably, highly variable. The different political and legal circumstances as well as traditional legislative practices of the States have necessitated great diversity in the methods of legislative involvement. Moreover, the overall degree of legislative oversight of Federal grant programs remains relatively low due to the generally discouraging features of the grant process and the varying legislative perceptions of the cost, impact, and benefit of involvement in any given grant program.

From a Federal interest viewpoint, legislative involvement, where it has occurred, has produced generally beneficial results. Accountability of State agencies to the legislature is restored, and prospects for full State support are improved. State legislatures have also shown that they can assume an active role in the Federal grant process--realistic and effective procedures can be developed--without causing excessive delays or the needless loss of available grant funds.

LEGISLATIVE INVOLVEMENT IN THE GRANT PROCESS: A GROWING AND VARIABLE PHENOMENON

Responding to the dramatic changes in the Federal grant system in the last two decades, many State legislatures have begun to reassess their responsibilities concerning federally supported State programs. In the absence of a Federal role definition, many legislatures are taking the initiative to define a role for themselves in the grant process. Currently, legislative involvement is marked by great diversity in the methods or approaches developed in the separate States--a natural result of the varying State circumstances and traditions and the lack of a federally defined role. Given

the substantial Federal discouragement of legislative involvement and the need for legislatures to individually respond to the continuous conflict of internal reasons for and against such involvement, legislative oversight of Federal grant programs remains sporadic. There is great diversity in the way a given grant program may be regarded by different legislatures and in the way a given legislature may react to different grant programs.

Diversity in approaches to legislative oversight

The National Conference of State Legislatures (NCSL) recently completed a 3-year study which clearly identifies a general trend toward stronger legislative influence over Federal funds. For example, in its 1980 report, NCSL documented renewed legislative interest in this subject. In 1978 and 1979, 26 legislatures attempted to increase their oversight of Federal funds, with 16 successfully initiating or implementing control mechanisms. More importantly, NCSL now considers 12 legislatures to have a high degree of oversight of Federal funds, a significant increase from the 7 legislatures less than 3 years ago.

NCSL has identified four generalized approaches to achieving legislative involvement. These are

--formal appropriation of Federal funds,

--accepting or authorizing the receipt and expenditure of Federal funds prior to their use by the executive branch,

--participating in developing State plans and reviewing individual grant applications, and

--developing comprehensive information systems to continuously track Federal receipts.

A given legislature can maintain what it considers to be an adequate level of involvement by emphasizing one of the above approaches; another, by combining several approaches. An approach selected by one State, however, may be totally inappropriate in another due to different political or legal circumstances.

Each of these generalized approaches is also subject to unique implementation, due to relative differences in traditional legislative practices and procedures. As a result,

two legislatures may use the same general approach but in fundamentally different ways. For example, while NCSL has identified 22 legislatures which are in some fashion involved in reviewing grant applications, only two exert binding review prior to submission; and in one of these States, the binding review is applicable only during the time when the legislature is formally in session.

Appropriation of Federal funds is a similarly variable control mechanism in actual practice. NCSL has identified 38 States which exercise some degree of appropriation control over Federal funds during the normal budgetary process. Our work in 11 States revealed great variability in implementing this control mechanism. Although nine of the States included Federal funds in their appropriation acts, actual appropriation techniques varied widely.

Three legislatures routinely appropriated specific sums of Federal funds to specific programs. Three other legislatures used lump sum appropriations at the agency or division level; for example, a biennial appropriation of $180.8 million to a State bureau with no programmatic specification. In two States, the type of appropriation varied by State agency and Federal grant program. In one State, lump sum appropriations were made but in fact were open-ended; increases in appropriated levels without legislative authorization were possible.

Legislatures also vary in the extent to which appropriations bills cover all Federal funds received. Of the States we visited only one legislature appropriated all Federal funds received by State agencies. In the other States, some grants, such as higher education financing or pass-through grants to sub-State governments, were excluded from the appropriation process. On a nationwide basis, an NCSL survey showed that 31 of 38 States appropriating Federal funds exclude grants to State institutions of higher learning. This is presumably in recognition of the special status traditionally accorded State universities by State governments.

Actual degree of legislative oversight is relatively low

Implementing any control mechanism, of course, merely provides the opportunity for legislative involvement. The existence of a control mechanism does not guarantee effective oversight. Additional data that we and NCSL collected suggest that the degree of legislative oversight of Federal grant programs, although increasing, remains relatively low.

Although NCSL has determined that 12 legislatures have achieved a high degree of oversight of Federal funds, it has also noted, that a nearly equal number, 11 legislatures, have limited or no control over Federal funds. Legislative fiscal officers in two-thirds of the States responding to an NCSL questionnaire acknowledged that oversight of Federally funded programs is generally not as extensive as oversight of State funded programs. Interestingly, four of the officials who responded in this manner represented States considered by NCSL to have high degrees of legislative oversight.

The actual degree of oversight achieved by legislatures not only varies on a State-by-State basis, but also on a grant program basis within States. The extent to which a legislature may review a particular grant program depends on several factors, including but not limited to

--the amount of State and Federal funds involved,

--the extent to which participation in a grant program commits the State to future expenditures, and

--the amount of State discretion allowed.

For the NCSL questionnaire, the fiscal officers were asked to rank their legislature's oversight of 11 specific grant programs (General Revenue Sharing, 2 block grants and 8 categorical grant programs) with respect to 5 key program elements: objectives, organization, budget, personnel, and substate fund distribution. Responses to the questionnaire were quite revealing of the current variation in legislative oversight:

--Only five of the programs were subject to a moderate degree of legislative oversight; the other six were ranked as receiving slightly higher than minimal oversight. Not surprisingly, the programs receiving moderate oversight were those which permitted substantial State discretion (revenue sharing and the block grants) or required substantial State financial commitments (Aid to Dependent Children and Medicaid).

--Only one of the program elements, budget, received a ranking of moderate legislative oversight; the other four elements were ranked significantly lower.

Appendix III shows the degree of oversight for each program as viewed in the aggregate and for the budget program element.

Our work in 11 States revealed similar variations in legislative oversight. One State legislature exercised no formal control over Federal funds, despite the fact that such funding constituted over 25 percent of the State's total expenditures in the last 5 years. In another State, the legislature was prohibited by a State court ruling from directly appropriating Federal funds; it achieved some degree of control by establishing conditions for using State matching funds.

Legislatures in the remaining States had direct control over Federal funds but exercised variable levels of oversight. In these nine States, we assessed the degree of oversight for four grant programs: Title XX Social Services block grant; Law Enforcement Assistance Administration (LEAA) formula block grant to implement the State's law enforcement and criminal justice program; Water Quality Management and Planning project grants (section 208 program); and Title I, Elementary and Secondary Education Act (ESEA) formula grant to improve programs for educationally deprived children. The following table, based on interviews with legislators, legislative staff and State agency officials, illustrates that a given grant program will receive different degrees of oversight by different legislatures.

Degree of oversight a/	Grant Program			
	Title XX	LEAA	Sec. 208	ESEA
Extensive	5	2	2	-
Moderate	2	4	3	1
Minimal	2	3	4	8

a/The above numbers represent the number of States in which a specific degree of oversight was achieved for a particular grant program.

Although the current status of legislative involvement in the Federal grant process can be generally described as varied but low, this fact should not mask the significant recent gains that legislatures have achieved. In fact, variability in methods of involvement and degrees of oversight achieved is predictable given (1) the absence of Federal recognition of a legislative role coupled with the presence of substantial Federal discouragement and (2) the widely varying political and legal circumstances and the traditional legislative practices of the

States. Diversity in the methods and degrees of oversight is undeniable, but one other fact is also undeniable: there is a clear and growing trend toward stronger legislative influence which may significantly affect the operation of the Federal grant process. Future effects can only be predicted; but what have been the effects of legislative involvement to date?

LEGISLATIVE OVERSIGHT OF FEDERAL GRANT FUNDS HAS PRODUCED BENEFICIAL RESULTS

Legislative oversight of Federal grant funds is increasing, and the net effect from a Federal interest viewpoint has been generally beneficial. In the States we visited, legislative involvement has clearly increased the accountability of federally supported programs and enhanced prospects for full State support of grant programs. Moreover, legislative oversight has not led to excessive delays in the grant process; flexible procedures have been developed to satisfy both the legislature's need to be involved and the agencies' need to maintain procedural efficiency.

The Federal grant process has benefited from legislative involvement

As previously discussed, legislative involvement has varied widely as legislatures have individually determined where and to what extent oversight of Federal grant programs would be exercised. Where such oversight efforts have occurred, the Federal grant process itself has, from a Federal interest standpoint, benefited from improved accountability of grant programs to the State and enhanced prospects for full State support of grant projects. Several of the legislatures we visited have been quite active in extending oversight to various Federal programs and ensuring that legislative priorities are incorporated into federally supported programs.

In several States, the legislatures have been actively involved in determining priorities for Title XX Social Services funding. In Florida, the legislature has redirected Federal funds between various programs to ease administrative requirements and maximize Federal contributions. In Pennsylvania, the legislature removed and supported with State funds several programs previously funded under Title XX to insure that basic social service programs remained fully funded. In Ohio, the legislature broadened eligibility categories for the aged, directed a substantial share of Title XX funds into mental health and retardation programs, and limited Federal funding for State administrative costs.

In Florida, because of legislative actions during the appropriation process, the State's comprehensive law enforcement plan was amended to (1) delete some projects which were low priority items and (2) revise funding arrangements to make better use of available State money. For example, the State agency recommended that the State assume the costs of certain programs (e.g., pre-trial intervention and counseling/social service programs). However, the legislature chose to fully fund these activities with Federal monies which it shifted from other programs (e.g., juvenile delinquency programs) considered to be better candidates for full State support. In Oregon, the legislature established clear priorities for Federal funds under the 55-MPH enforcement program and provided substantial direction to the executive branch concerning how Federal water quality planning funds should be used.

Several legislatures have reviewed Federal grant programs with respect to the long-term effects on State priorities. In Vermont, for example, a legislative committee reviewed the costs and coordination problems between the Federal Education of All Handicapped Children Act and existing State special education programs; the report estimated future funding needs and provided organizational and programmatic alternatives.

Legislative oversight has led to cost reduction and containment as well as the elimination of unneeded or ineffective programs. For example:

--In Colorado and Michigan, the legislatures have been instrumental in containing program costs. The Colorado Legislature has developed average caseload and unit cost figures to estimate funding needs. For example, the State agency operating the Medicaid program was denied a supplemental appropriation in 1979 because it was contracting for services at an average rate higher than the unit cost figure set by the legislature. In Michigan, the legislature and the Governor initiated a task force to develop cost containment options for the Medicaid program. By adopting the task force recommendations, the legislature hopes to reduce total costs by almost $40 million.

--In Florida, the legislature directed that $25,000 of Federal Educational Innovation and Support funds (Part C, Title IV, Elementary

and Secondary Education Act) be used to initiate a study of self-insurance by school districts. The study recommendations were implemented, and State costs have been reduced by $3 million to $6 million annually.

--The Michigan Legislature has begun to add program evaluation requirements as part of an agency's appropriation. One interesting result has been the cancellation of a social services computer project which was begun without legislative authorization. For 3 years, a State agency had been using personnel and funds, without legislative approval, to establish the system. In 1978, the legislature identified the project and appropriated funds ($1.7 million in Federal funds and $800,000 in State funds) but required an evaluation. In 1979, after the project was evaluated as expensive, unneeded, and unused, the legislature refused funding, thereby terminating the project.

--In Oregon, the legislature replaced the Federal Aid to Dependent Children/Unemployed Fathers program with a new State program which emphasized developing specific work skills and attitudes rather than merely providing public assistance. The new program was ineligible for Federal funding due to its employment requirements. In effect, the legislative action amounted to a rejection of $14.4 million in Federal funds.

In the 11 States we visited, executive branch representatives were generally in favor of legislative oversight of grant programs. We contacted State agency officials responsible for five Federal grant programs (law enforcement, social services, water quality planning, highway safety, and elementary and secondary education programs) for their opinions concerning legislative oversight. Of those who offered opinions, 32, or 64 percent, believed that legislative oversight had been useful and necessary; an additional 10 percent of the respondents felt that oversight should be increased. The officials noted that legislative involvement led to a clearer statement of State priorities and a stronger commitment by the State, not just an agency, to particular programs. Only 26 percent of the agency officials felt that legislative oversight was unnecessary or not useful, complaining that it (1) amounted

to a time-consuming double justification of the program, once to the Federal grantor agency and once to the legislature, or (2) simply led to denial of grants for political or constituency related reasons.

Legislative involvement does not significantly delay the grant process

Legislative involvement can be accomplished without disrupting the administrative efficiency of the grant process. In the States we visited, legislatures have developed a variety of flexible procedures to permit oversight without causing excessive administrative burdens or the needless loss of available grants.

Critics of legislative oversight of Federal grants argue that involvement by legislatures will disrupt the efficiency of the grant process. They point out that legislatures are naturally external to the administrative aspects of the process (i.e., application, award, and receipt of funds) and that the continuous flow of Federal funds to States during a particular fiscal year prevents any meaningful control, especially in States having part-time legislatures. Thus, the argument goes, even if legislative oversight is appropriate, the negative effects of such oversight would overwhelm any potential benefits.

These criticisms are not necessarily valid. For example, 86 percent of the 55 State agency officials we interviewed felt that legislative oversight practices have not led to excessive administrative burdens. Only four officials felt that legislative oversight had caused unneeded or excessive information requests. Interestingly, in the two States where legislative committees hold binding review authority over grant applications prior to submission, none of the executive agency officials considered this control mechanism as excessively burdensome.

The continuous flow of Federal funds does pose control problems for legislatures which appropriate grant funds. But even in States where the legislatures are not in session full-time, the problems have not been insurmountable. In the nine States we visited which exercised some degree of direct appropriations control over Federal funds, a variety of procedures have been developed to handle Federal funding not anticipated at the time of budget preparation.

--In one State, budget levels may be increased without legislative authorization by representatives of the

executive branch subject to certain restrictive criteria (e.g., additional Federal funds cannot be used to circumvent legislative intent).

--In another State, the executive office of the Governor may approve the expenditure of unanticipated Federal funding only after consultation with representatives of the legislature's appropriation committees.

--In two States, a joint legislative/executive committee has the authority to increase spending levels above appropriated amounts.

--In two other States, a joint, bi-partisan committee of the legislature operates year-round to approve increases to spending limitations.

--Lastly, three States use supplemental appropriations by the full legislature to revise appropriated amounts. While this approach is clearly the most restrictive and time-consuming, each of the States has built flexibility into its control mechanism. For example, in one State, interaccount transfers of up to 2 percent are permitted without legislative approval. In another State, the Governor may authorize additional spending up to $5 million to prevent "substantial human suffering."

The efficacy of these approaches in minimizing the unnecessary loss of available Federal funds was apparent during our field work. Of the State agency officials we contacted, 42, or 76 percent, reported that they had not lost or experienced delays in the receipt of grant funds due to legislative oversight procedures. Of the 13 officials who answered affirmatively:

--Seven complained of delays associated with the need to obtain supplemental appropriations prior to spending the grant funds. While none of these officials reported that any awarded grants had been lost, some noted that they may choose to ignore an opportunity to apply for a grant if they consider the potential time delay serious enough.

--Five referred to decisions by the legislature to refuse available grants. While these grants were technically "lost," it was not due to legislative procedural delay but a direct decision to not participate for substantive reasons.

--Only one reported a legitimate case where grant funds were lost because the legislature failed to authorize spending quickly enough.

The significance of the single case where available grant funds were lost due to legislative control mechanisms is questionable. The amount of lapsed funds was very small with respect to all the Federal funds received by this State agency--slightly more than one-tenth of 1 percent. Secondly, the funds were lost because the agency's supplemental appropriation was received too late to allow all available funds to be spent. A legislator from the appropriations committee felt that the agency could have obtained the necessary spending authorization earlier if it had made a strong presentation to the legislature.

Our observations concerning the virtual absence of grants lost due to legislative involvement supports similar conclusions reached in a study by the Department of Health, Education and Welfare. In its 1979 report to the Senate Appropriations Committee, the Department concluded that "the few examples of delay cited * * * suggest to us that * * * [legislative involvement] does not currently present a serious impediment to the effective and efficient operation of our grant and contract system."

Finally, Federal officials indicate that no loss of funds or serious delays occurred in the now expired Anti-Recession Assistance program as a result of the Federal requirement mandating State legislative appropriation of these funds in the same manner as State revenues. The absence of delays caused by legislative actions is especially significant due to two constraints imposed by this program: (1) funds were to be appropriated by States within 6 months and (2) States could not use their special interim control procedures to appropriate the funds received when the legislature is out of session but had to fully appropriate these moneys in the same manner used for State revenues.

All of the foregoing can be defined, from a Federal interest viewpoint, as beneficial effects of legislative involvement. Accountability has been clearly increased as legislatures fulfill their constitutional responsibility to act as a "check and balance" on executive branch proposals. As noted by State agency officials, prospects for full State support of Federal grant programs are increased when all State officials, including the legislature, are involved in basic decisions concerning the programs. And lastly, legislative oversight does not inevitably result in excessive administrative burdens or the needless loss of available Federal grants. The record

of legislative involvement to date indicates that such oversight, with its attendant Federal interest benefits, can be achieved without disrupting the timely and efficient implementation of Federal grant programs.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

By concentrating responsibility within the State executive branch, the Federal grant system inadvertently helps to erode the traditional relationship between these two branches of State government. Furthermore, if the pace of State legislative oversight of Federal funds continues to increase, more intergovernmental conflict is likely to arise in the future as active State legislatures come into conflict with Federal grant provisions specifying strong State executive roles.

The Federal grant system is essentially a cooperative venture in which the Federal Government is assisted by States and localities to achieve certain national objectives. As long as the Federal Government uses States to implement these objectives, it should respect the States' own internal constitutional and political systems; that is, it should take States as it finds them.

Federal grant conditions which, in effect, assign legislative functions to the State executive branch should be justified by a compelling Federal interest. However, we could find no compelling Federal interest to justify discouraging State legislative involvement in the oversight of Federal grant programs. In fact, we did find that important Federal interests are promoted when State legislatures are involved in the Federal grant system. Enhancing the accountability of Federal programs to traditional representative institutions of the State enhances the long-range interests of Federal grant programs as well. Furthermore, we did not find that legislative involvement compromises the administrative efficiency of the grant process. In fact, legislatures are just as anxious as State executive officials to avoid the loss of Federal funds for their States, even though they may have different priorities for their expenditure.

REMOVING FEDERAL CONSTRAINTS ON LEGISLATIVE INVOLVEMENT

Federal constraints on State legislative involvement should be eliminated. Federal grant provisions assigning legislative functions to State executive officials may have originally been established for administrative convenience but have cast doubt upon and even denied the legislature's proper exercise of its own authority to define State policy. A more neutral Federal position can only be achieved by Federal policy statements which clearly recognize that legislatures may define their roles as they see fit within the general parameters of Federal grant conditions.

We also believe, however, that administrative necessity legitimately calls for the Federal designation of a focal point within the State for administrative matters. In dealing with the Federal Government, the State focal point should, however, represent the entire State's position following whatever deliberative process is established within the State. It should not be allowed to use federally conferred responsibility to alter traditional checks and balances established within State government.

The Federal Government should explicitly recognize in law the principle that the State's own procedures govern the determination of State policy with respect to Federal grant programs. We believe this can be best accomplished by ensuring that grant conditions designating administrative focal points within State governments not be construed as negating or diminishing the exercise by the State legislature of its powers to appropriate Federal funds and designate entities within the State to administer Federal programs. By dispelling the apparent conflict between legislative involvement and Federal grant conditions which specify explicit executive roles, legislatures could assert a policy making role within the parameters of Federal grant conditions at no risk to grant funds received by the State.

Furthermore, it would enable Federal agencies to defer to normal State procedures in resolving executive-legislative disputes over State policies when Federal grant programs are at issue instead of supporting the executive as Federal agencies currently do. Further, this clarification may help guide State courts to define the boundaries of legislative powers in the appropriation of Federal funds. Finally, this kind of Federal position would permit State legislatures, if they so choose, to define, free from Federal interference or direction, the nature and extent of their own roles in the oversight of Federal funds.

Similarly, Federal neutrality should be restored in situations where it is required that single State agencies be designated to administer Federal grant programs. A Federal policy safeguarding the right of the legislature to exercise its traditional responsibilities to organize State governments for Federal grant programs needs to be articulated. The policy would also promote the Federal interests in achieving program accountability and in ensuring continuing State support and commitment to Federal programs.

THE FEDERAL GOVERNMENT SHOULD HELP LEGISLATURES ACHIEVE THE CAPACITY TO PERFORM FEDERAL FUNDS OVERSIGHT

Since we found that legislative involvement can promote important Federal interests, we believe that the Federal Government should help legislatures achieve the capacity to effectively oversee Federal grant programs. This should be achieved primarily by enhancing legislative access to Federal technical and financial assistance. This could provide the opportunity for legislatures to improve their oversight of Federal programs by offering assistance now primarily available to State executive branch officials. Once legislatures have made fundamental commitments to Federal funds oversight, the Federal Government should help enhance their capacity to review Federal programs.

Providing support to those legislatures with active interests does not, in our opinion, violate the principle of neutrality. First, the kind of assistance we recommend would not lessen the authority available to the executive branch. We are recommending that the capacity building and information support currently provided to State executives be made more equitable by a fuller recognition of legislatures as partners in the Federal system. Finally, we are referring here to Federal support for general legislative capacity in an institutional sense, not to Federal support of legislative positions in specific policy disputes on which the Federal Government should be neutral.

The Federal role, however, can only be supportive. Although it is true that the executive-oriented, restrictive nature of the grant system has been responsible for many of the problems and barriers faced by legislatures seeking to control Federal funds, we believe that the responsiblity for achieving more effective oversight must rest with the individual State legislatures themselves. Successful legislative oversight can

only occur when the motivation comes from within the State itself. The Federal Government can remove barriers that it imposes to more effective oversight and can facilitate oversight efforts by self motivated legislatures. It can not and should not bear the responsibility for stimulating legislative interest or creating the political will necessary for legislatures to overcome the numerous constraints that confront them.

Increased Federal technical and capacity building assistance, while important, may not finally overcome some of the most formidable barriers to legislative involvement, including lack of interest and the highly restrictive nature of the grant system itself. From this perspective, the most promising way for the Federal Government to secure more legislative involvement may in fact be by giving States more flexibility and discretion over grant programs--through block grants and the consolidation of categorical grants--thus providing a greater incentive for legislative involvement.

Nevertheless, we believe that certain administrative changes could provide needed assistance and encouragement from a more immediate and practical standpoint. OMB is already working to institute a promising new data system aimed at providing State legislatures and Governors alike more timely information on Federal grant awards and outlays to the States. An even stronger OMB leadership role would help promote Federal responsiveness to legislative assistance requests. Additionally, we believe that OMB should amend Circular A-95 to allow for legislative involvement, thus neutralizing the apparent executive branch bias in several provisions of the present Circular.

RECOMMENDATION TO THE CONGRESS

We recommend that the Congress amend the Intergovernmental Cooperation Act of 1968 to ensure that grant provisions assigning various administrative responsibilities to State executive officials not be construed as limiting or negating the exercise of powers by State legislatures as determined by State law to appropriate Federal funds, to designate agencies to implement grant programs and to review State plans and applications for Federal assistance. Such a policy would retain existing Federal designations of State administrative focal points, but would remove Federal constraints on legislative involvement. This cross-cutting policy should apply to all existing and new Federal grant programs.

RECOMMENDATIONS TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

We recommend that the Director, OMB, issue a new directive to Federal agencies on providing assistance to State legislatures. This directive should become the focal point of an intensified Federal effort to specifically promote legislative oversight of Federal grant programs. The directive should:

--Restate the eligibility of legislatures for Federal assistance and require Federal agencies to actively identify those programs suitable for legislative participation.

--Encourage Federal agencies to more actively involve legislatures in the evaluation of grant programs where such evaluations are required of the States. The eligibility of legislatures for reimbursement of oversight costs incurred in evaluating Federal programs should be clarified by each Federal agency and communicated to both State agencies and State legislatures.

--Direct Federal Regional Councils to experiment with the designation of legislative liaisons to serve as the focal points for legislative inquiries and to better communicate Federal policy and grant changes to the legislatures.

OMB should actively monitor agency implementation of this directive.

We also recommend that the Director, OMB, revise Circular A-95 to specifically allow for legislative involvement and thereby help dispel doubts as to the permissibility of such involvement. These changes would provide explicit opportunities for legislative review and comment on grant applications and State plans submitted for Federal assistance. Specific changes recommended are:

Part I --amend to require clearinghouses to disseminate, upon request, project notifications of grant applications to legislatures, or their designated representatives, in addition to State agencies.

Part III--amend to allow for legislative review and comment on State agency plans submitted for Federal assistance on the same basis currently afforded Governors.

Part IV --amend to allow for legislative comment on the designation of substate districts for Federal programs on the same basis as the Governor.

CHAPTER 5

AGENCY COMMENTS AND OUR EVALUATION

Copies of a draft of this report were distributed for comment to the Office of Management and Budget (OMB), the National Conference of State Legislatures (NCSL), the National Governors' Association (NGA), and the Advisory Commission on Intergovernmental Relations (ACIR). The comments received from each of these organizations are included as appendixes IV to VII.

Detailed analysis of the comments and the consequent changes made in this report are presented below.

OFFICE OF MANAGEMENT AND BUDGET (OMB)

OMB agreed in principle that State legislature involvement in the Federal grant process is beneficial and serves Federal interests. OMB, while concerned that Federal regulations may restrict or prohibit legislative involvement in the Federal grant process, believes that Federal neutrality can only occur when Federal interests do not dictate otherwise. OMB thought attempts to redress or "neutralize" the perceived imbalance in legislative and executive roles should be approached with extreme caution. We believe that neutrality itself is a Federal interest. We asserted our fundamental position on this question in chapter 4: as long as the Federal Government uses States to implement national objectives, it should respect the States' own procedures whenever possible. Given the importance of neutrality, it is difficult for us to conceive of a situation where the Federal interest would dictate limiting legislative involvement in Federal assistance matters. Even in those programs where the timely and expeditious distribution of Federal funds is of paramount importance, State legislative involvement based on the record to date is not likely to interfere with this Federal objective.

OMB disagreed with our proposal that the Intergovernmental Cooperation Act be amended, noting that the Federal Government may be prevented from working with a single point of responsibility in certain cases when it is determined to be in the Federal interest. It further commented that our proposal could require the Federal Government to decide in certain cases who

represents State government. Instead of a cross-cutting approach, OMB suggests that consideration might be given to amending specific statutes and regulations inhibiting State legislative involvement by substituting the term "State government" for "State agency."

We continue to believe that an amendment to the Intergovernmental Cooperation Act of 1968 would be the most practical and expedient approach. Then, as established by individual statutes, the Federal Government could continue to designate and work with a State focal point for administrative matters when required by the Federal interest as long as such arrangements do not prevent legislative involvement pursuant to State law. One possible approach to implement this proposal would be to request a certification from the State that a grant application is not inconsistent with any applicable appropriation acts or any acts designating an administering agency.

OMB's primary concern is that Federal agencies would be thrust into internal State matters and forced to either decide on their own who represents State government or wait until the State judicial processes resolve the conflict in cases where a Governor and legislature disagree. These concerns should be viewed in the first instance against the existing situation: the Federal Government is currently in the position of deciding who represents State government in these kinds of disputes. Currently, however, the Federal position is decidedly not neutral, as indicated by 65 of 75 Federal program officials who said they would fund the Governor's position even if opposed by the legislature. We agree that under our proposal the issue of who represents State government would not be so readily or automatically determined at the Federal level as it currently is in the case of an intrastate conflict. However, we believe that under our proposed amendment Federal agencies would defer to the States themselves, namely to State judicial interpretations or political resolutions between the competing branches, to resolve these internal State questions. In this manner, our amendment would extricate the Federal Government from its current position of funding the proposal of one branch of State government when the other may disagree.

We also believe that neutralizing Federal statutes by using the term "State government" when referring to the State would be subject to the very same objections raised against our proposed cross-cutting amendment, i.e., the question of who represents the State. Furthermore, eliminating the designation of a specific State actor would be contrary to the legitimate Federal need to recognize a focal point for administrative responsibility. Finally, making neutralizing changes

on a program-by-program basis where appropriate is fraught with procedural delays that would seriously hamper the effort to remove Federal barriers.

With regard to our recommendations to OMB, we are encouraged by the indications of OMB support for several key recommendations, including issuance of a revised directive clarifying legislative eligibility for financial assistance, projected changes in the A-95 process to encourage legislative involvement, and promises for renewed Federal Regional Council efforts to communicate with State legislatures. We had suggested that OMB require Federal agencies to report on compliance with existing or revised directives on legislative involvement. OMB disagreed with that suggestion on the grounds that it would conflict with its overall paperwork reduction efforts. In the interest of paperwork reduction objectives we are now recommending that OMB actively monitor the implementation of its directive.

We expanded our recommendation relating to the revised OMB directive to ensure legislative access to Federal information and technical assistance, unless otherwise prohibited by law. This change was prompted by comments on the report as well as our finding that a number of Federal program officials indicated they would not respond to direct legislative requests for information.

Finally, we would hope that, if a revised OMB directive is issued, Federal agencies would be encouraged to direct their counterpart State agencies to work more closely with legislatures in evaluating grant programs. We recognize that OMB Circular 74-4 allows States to claim costs for legislative oversight in grant applications. However, we believe that a more active Federal posture is needed to take advantage of the independent perspective and the skills offered by many legislative evaluation groups.

We also would hope that it takes appropriate action on those violations of existing OMB policy noted in chapter 2.

NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL)

NCSL enthusiastically endorsed the report. It felt that the report offered substantiation of complaints often registered by State legislatures that Federal programs place them at a disadvantage in fulfilling their oversight role. NCSL

believes that the report recognizes the need for Federal neutrality as well as equity in recognizing State legislatures as a participant in the intergovernmental grant system

NCSL expressed strong support for our recommendations to the Congress and to OMB. It noted that our recommendation would not lead to a Federal definition of a State legislative role, but rather would enable the legislatures to define their own roles consistent with State law. It also observed that our recommendations recognize that specific Federal actions are needed to restore Federal neutrality.

NCSL suggested that we supplement our recommended amendment to the Intergovernmental Cooperation Act with a call for conforming amendments in each Federal grant program's enabling legislation and regulations. We believe that our crosscutting change will be sufficient to achieve individual program conformance with the principle of neutrality articulated in the proposed amendment. While additional changes to each statute and regulation might possibly offer further clarification, we do not feel that the extraordinary effort involved in revising individual program authorizations would be warranted.

NCSL also suggested that we recommend that OMB provide for reimbursement of State and local auditing activities performed under the single audit approach included in Attachment P to OMB Circular A-102. Although we do suggest that legislative involvement in program evaluation under grants receive more active Federal support, the related field of auditing was outside the scope of our study. This was due in part to the fact that the auditing function is not under the legislative branch in some States. We have actively promoted the single audit concept for Federal assistance, however, and worked closely with OMB in the development of Federal policy in the grant auditing area.

Finally, we are prone to agree with NCSL that effectiveness and balance in our Federal assistance system can ultimately only be restored by grant consolidation. In fact, we found the narrow, restricted nature of the grant system itself to be a major factor that discourages legislative interest in Federal funds oversight. A system of broader based grants offering more discretion to the States would most likely provide greater incentives for State legislative involvement. To avoid confusing the discussion, however, we confined the recommendations and conclusions of this report to the issues specifically relating to the State legislatures' role in Federal assistance.

NATIONAL GOVERNORS' ASSOCIATION (NGA)

NGA strongly supported the concept of neutrality articulated in the report but disagreed with several other important points. First, NGA felt that the draft report failed to meet the neutrality standard because it supports Federal encouragement of more active legislative oversight. We continue to adhere to the principle of neutrality, especially with regard to Federal intrusion in specific policy disputes to support one actor in an internal State dispute. In response to NGA's comments we have further clarified our position on the Federal role in supporting legislative involvement. Since legislative oversight enhances important Federal interests, we believe that the Federal Government should help those legislatures actively seeking to achieve stronger Federal funds oversight by providing access to Federal capacity building assistance currently provided primarily to the State executive. However, we further note that the Federal Government can only be supportive, and should not bear the responsibility for stimulating legislative interest or creating the political will necessary for legislatures to overcome the numerous constraints that confront them.

NGA also felt that we failed to prove that the State court rulings prohibiting legislative appropriation of Federal funds in four States were premised on the court's notions of the Federal grant process.

In response to their comments, we added additional material in the report to further explain our position. It is generally true, as NGA states, that these rulings were explicitly based on interpretations of separation of powers distinctions based on State constitutions. We believe, however, that these decisions can be interpreted as reflecting a view of the nature of the Federal grant process. For example, the Supreme Court of Colorado in MacManus v. Love ruled that a bill prohibiting the expenditure of Federal funds without an appropriation was an unlawful "attempt to limit the executive branch in its administration of Federal funds to be received by it directly from agencies of the Federal Government * * *." Noticeably absent from this capsulization of the grant process is the State legislature. In these cases, the efforts of State legislatures to appropriate Federal grant funds are further denied on the basis that Federal grant funds are custodial funds or funds held in trust to be expended according to the terms and conditions of the Federal grant statute.

By further concluding that the legislatures' power of appropriation does not encompass these funds, the courts appear to be suggesting that the States have no further policy discretion of a legislative nature once grant funds are receipted. Even assuming that Federal funds are funds held in trust, it does not necessarily follow that legislative appropriation of the grant funds violates the terms of the trust. As the Pennsylvania Supreme Court observed: "As long as the funds are not diverted from their intended purposes and the terms and conditions prescribed by the Congress are not violated, there is no inconsistency between the provisions of the Federal programs and State legislative administration of the funds."

Further, their outcomes could have been different had a Federal policy on State legislatures been articulated, as we recommend in this report. Indeed, in Shapp v. Sloan, the Pennsylvannia Supreme Court specifically noted ACIR's recommendations--that legislatures assume greater control over Federal funds in the absence of any Congressional repudiation thereof--as indicative that legislatures did have a role in the Federal grant process.

Finally, NGA states that our draft report did not reflect an adequate understanding of the checks and balances within States and the various constitutional processes established within States to resolve these conflicts. In this regard, it felt that our discussion of State executive branch use of Federal grant funds to circumvent legislative intent did not adequately distinguish between informal expressions of legislative policy which may have no legal standing and formal acts of the entire legislature, e.g., passage of State laws. Several of the examples were expanded to clarify these distinctions.

In the section of the report dealing with this question, we are not suggesting that State executive officials have acted illegally or improperly against State laws enacted by the legislature, nor do we feel that the Governor should necessarily be bound by informal expressions of legislative intent. Our point is that with Federal funds, State executives can act more autonomously than with State funds to begin or expand programs without legislative knowledge primarily because

--Federal programs assign legislative responsibilities to the State executive branch without recognition of the powers of State legislatures, and

--legislatures in some States have not yet overcome the various Federal and non-Federal constraints to implement oversight procedures on the use of Federal grant funds.

Because the executive in some States does have more autonomy with Federal funds, cases have arisen where programs are undertaken with Federal funds that are contrary to established policies articulated by the legislature. In the Pennsylvania case cited in the report, for example, the legislature specifically rejected a State agency request for State funds to hire parole officers after full hearings in both Houses. When the State executive subsequently used Federal LEAA funds to hire these officers, it was not in violation of State law, but the executive certainly knew of the opposition by the legislature to this action. Similarly, in the Ohio case discussed, the legislature appropriated the entire budget including Federal and State funds for the Bureau of Employment Services in a lump sum as one line item. During the appropriations process, the legislature cut the Bureau's total budget to cancel a planned $1.5 million expansion of a federally funded employment program. In spite of this clear expression of legislative intent, the agency director told us he would nevertheless implement the proposed expansion of this program with Federal funds by cutting the budget elsewhere. From a formal, legal standpoint, the agency felt it had full discretion over its budget as long as the total spending limit enacted by appropriation was not breeched.

NGA also stated that our report seemed to "shrug off" the internal State judicial process as an inadequate vehicle to resolve internal separation of powers disputes and that we propose that the Federal Government become the "disinterested" arbiter of these disputes. This was certainly not our intent. Our legislative recommendation is designed to extricate the Federal Government from its current position of non-neutrality in cases of legislative-executive disputes over grant programs. We believe that our recommendation would require Federal agencies to observe State political and judicial resolutions of conflicts between the branches of State government, notwithstanding Federal grant provisions which appear to assign legislative powers to the State executive branch.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS (ACIR)

ACIR supported the report's conclusions and recommendations. It agreed that the Federal Government should encourage

greater legislative involvement because of the Federal interests that are, in fact, promoted by such involvement. ACIR found the report to be informative and comprehensive and noted that our material on Federal agency interpretations constituted "a welcome addition" to the literature on Federal grants management.

ACIR also made several technical and editorial suggestions for changes which we have incorporated in the final report. We have added empirical data in appendixes II and III further explaining legislative oversight behavior. We have also clarified the report to emphasize that Federal designations of State administrative focal points are desirable and necessary, but that such designations should not be permitted to interfere with the legislatures' exercise of powers in grant programs.

PROGRAMS REVIEWED BY GAO AND FEDERAL REQUIREMENTS FOR STATE AGENCY DESIGNATIONS

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: (note a)				
	Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State
Assistance to States for Intrastate Meat and Poultry Inspection (10.475)			X		
Food Stamps (10.551)		X			
State Administrative Expenses for Child Nutrition (10.560)		X			
State Administrative Matching Grants for Food Stamp Program (10.561)		X			
Nutrition Education and Training Program (10.564)		X			
Youth Conservation Corps--Grants to States (10.661)	X				
Young Adult Conservation Corps--Grants to States (10.663)	X				
Cooperative Forestry Assistance (10.664)			X		
Payments to Agricultural Experiment Stations Under Hatch Act (10.878)			X		
Higher Education-Land-Grant Colleges and Universities (10.882) (note b)					

APPENDIX I

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: (note a) Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State
Coastal Zone Management Program Development (11.418)	X				
Coastal Zone Management Program Administration (11.419)	X				
Coastal Energy Impact Program--Formula Grants (11.421)	X				
Civil Defense--State and Local Management (12.315)	X				
Military Construction, Army National Guard (12.400) (note b)					
Comprehensive Public Health Services--Formula Grants (13.210)	X				
Alcohol Formula Grants (13.257)	X				
Special Alcoholism Projects to Implement the Uniform Act (13.290)	X				
State Health Planning and Development Agencies (13.293)	X				
Health Planning--Health Systems Agencies (13.294)	X				

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: (note a)				
	Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State
Adult Education--Grants to States (13.400)				X	
Educationally Deprived Children--Local Educational Agencies (13.428)		X			
Educationally Deprived Children--Migrants (13.429)				X	
Educationally Deprived Children--State Administration (13.430)		X			
Educationally Deprived Children in State Administered Institutions (13.431)		X			
Library Services--Grants for Public Libraries (13.464) (note b)					
University Community Service--Grants to States (13.491)	X				
Vocational Education--Basic Grants to States (13.493)			X		
Vocational Education--Consumer and Homemaking (13.494)			X		
Vocational Education--Program Improvement and Supportive Service (13.495)			X		

APPENDIX I

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: (note a) Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State
Vocational Education--Special Needs (13.499)			X		
Educationally Deprived Children--Special Incentive Grants (13.512)		X			
Grants to States for State Student Incentives (13.548)	X				
Educational Innovation and Support (13.571)		X			
Rehabilitation Services and Facilities--Basic Support (13.624)				X	
Developmental Disabilities--Basic Support (13.630)	X				
Special Programs for the Aging--State Agency Activities and Area Planning and Social Services Programs (13.633)	X				
Special Programs for the Aging--Nutrition Program for the Elderly (13.635)	X				
Social Services for Low Income and Public Assistance Recipients (13.642)	X				

APPENDIX I

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: (note a) Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State
Public Assistance Training Grants--Title XX (13.644)	X				
Child Welfare Services--State Grants (13.645)	X				
Work Incentives Program--Child Care--Employment Related Supportive Services (13.646)		X			
Child Support Enforcement (13.679)				X	
Medical Assistance Program (Medicaid - Title XIX) (13.714)				X	
State Medicaid Fraud Control Unit (13.775)	X				
Assistance Payments--Maintenance Assistance (State Aid) (13.808)				X	
Assistance Payments--State and Local Training (13.810)	X				
Hypertension Program (13.882)				X	
Comprehensive Planning Assistance ("701") (14.203) (note b)					
Regulation of Surface Coal Mining and Surface Effects of Underground Coal Mining (15.250)	X				

APPENDIX I

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State (note a)
Outdoor Recreation--Acquisition, Development and Planning (15.400)				X	
Fish Restoration (15.605)					X
Wildlife Restoration (15.611)					X
Law Enforcement Assistance--Comprehensive Planning Grants (16.500)	X				
Law Enforcement Assistance--Improving and Strengthening Law Enforcement and Criminal Justice (16.502)	X				
Criminal Justice--Statistics Development (16.509)	X				
Law Enforcement Assistance--Juvenile and Delinquency Prevention--Allocation to States (16.516)	X				
Antitrust State Enforcement (16.700)	X				
Employment Service (17.207)			X		
Unemployment Insurance--Grants to States (17.225)			X		
Highway Research, Planning and Construction (20.205)	X				

APPENDIX I

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: (note a) Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State
Highway Beautification--Control of Outdoor Advertising, and Control of Junkyards (20.214)		X			
Local Rail Service Assistance (20.308)	X				
State and Commumnity Highway Safety (20.600)	X				
State Economic Opportunity Offices (49.013)	X				
Grants to States for Construction of State Home Facilities (64.005)	X				
Veterans State Domiciliary Care (64.014)	X				
Veterans State Nursing Home Care (64. 015)	X				
Water Pollution Control--State and Interstate Program Grants (66.419)	X				
Water Pollution Control--State and Areawide Water Quality Management Planning Agency (Section 208 Grants) (66.426)	X				

APPENDIX I

Program title and Catalog of Federal Domestic Assistance Number	State Agency Designated By: (note a) Governor	Federal Government	State Law (Legislature)	State Law or Governor	State Secretary of State
State Public Water System Supervision Program Grants (66.432)	X				
Construction Management Assistance Grants (66.438)	X				
State Volunteer Services Coordinator Program (72.011)	X				
State Energy Conservation Program (81.041)	X				
Supplemental State Energy Conservation Program (81.043)	X				

a/Information derived from interviews with Federal agency officials.

b/State agency designation not federally required

APPENDIX I

APPENDIX II

IMPEDIMENTS TO LEGISLATIVE OVERSIGHT OF FEDERAL FUNDS

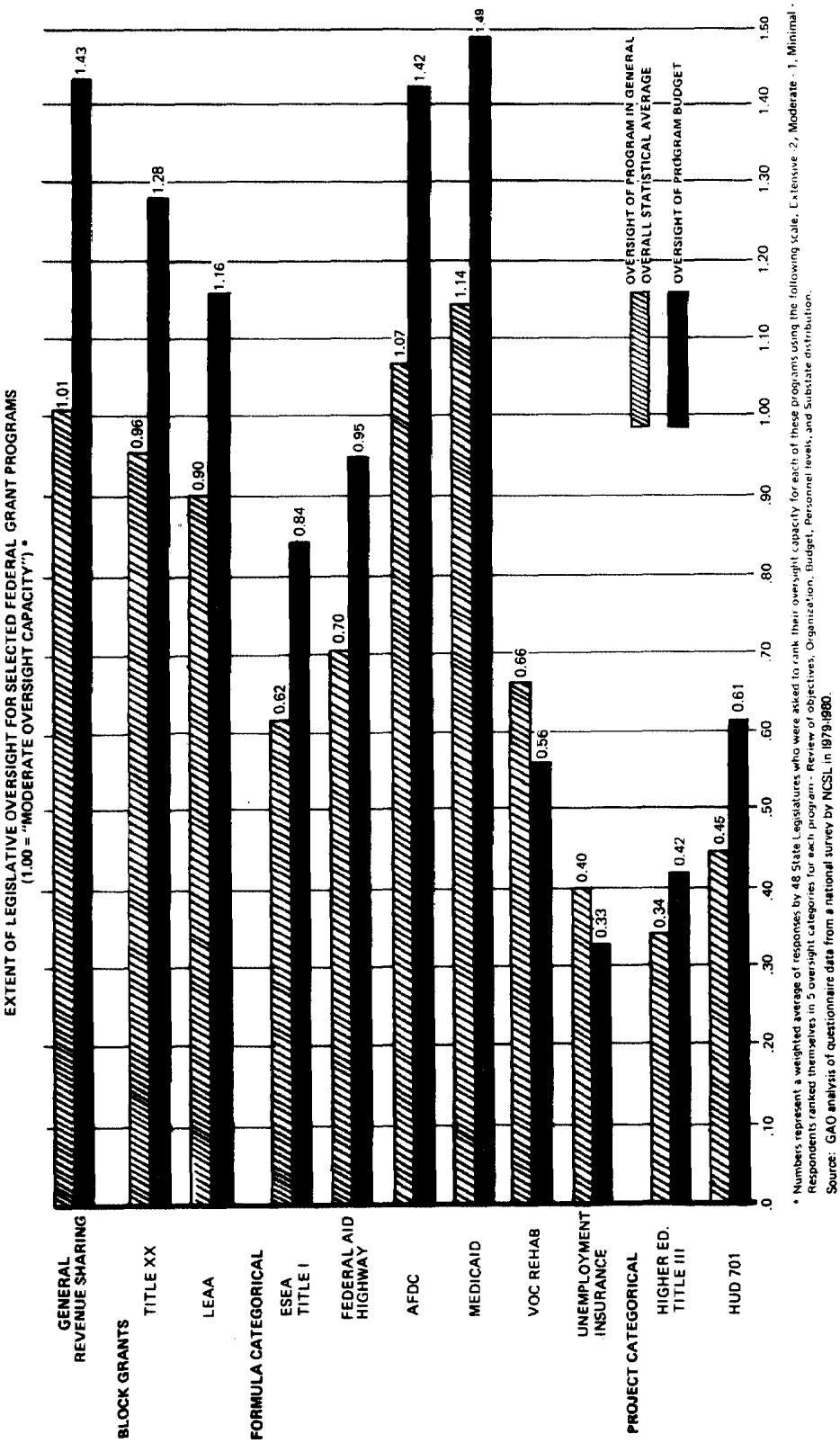
Impediments	Percent of State legislatures ranking impediments as "very or moderately severe" (percent)
Complexity of Federal regulations	76
Lack of State discretion on the use of Federal grants	74
Federal statutory language specifying dominant State executive branch roles	65
Legislative staff capacity or time	64
Short legislative sessions	51
Level of interim activity	54
Federal-State agency collaboration in the timing of awards	53
Inadequate information sharing by State agencies	44
Federally required State program organizational structure	43
Completeness of Federal application and award information	41
Timeliness of Federal application and award information	40
Inadequate information sharing by the Governors	39
Federal-State agency networks that informally predetermine awards	33

APPENDIX II

Impediments	Percent of State legislatures ranking impediments as "very or moderately severe" (percent)
Availability of Federal application and award information	31
Legal problems with the delegation of legislative authority to committees in the interim	27
Accuracy of Federal applications and award data	26
Legal problem with the definition of "public" funds	12
Legal problems involved in violation of contractual obligations entered into by the State agency	11

Source: GAO analysis of questionnaire data from a national survey by NCSL in 1979-1980.

APPENDIX III



* Numbers represent a weighted average of responses by 48 State Legislatures who were asked to rank their oversight capacity for each of these programs using the following scale, Extensive - 2, Moderate - 1, Minimal - 0. Respondents ranked themselves in 5 oversight categories for each program - Review of objectives, Organization, Budget, Personnel levels, and Substate distribution.

Source: GAO analysis of questionnaire data from a national survey by NCSL in 1979-1980.

APPENDIX IV

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 11 1980

Mr. William J. Anderson, Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your July 3, 1980, request for the Office of Management and Budget's comments on the draft General Accounting Office (GAO) report, "The Federal Government Should Encourage Greater State Legislative Involvement in the Federal Grant Process." Our overall reactions to the report appear below, followed by specific comments on the GAO recommendations.

Overall Reactions

We agree in principle that state legislature involvement in the federal grant process is beneficial and that federal interests such as improved recipient accountability and enhanced administrative efficiency can be served. We take issue, however, with a number of GAO's recommendations for achieving involvement. We are concerned that these recommendations could result in the federal government's being inadvertently thrust into internal state government matters that should more appropriately be resolved through debate or discussion within each state.*

Over the years a pattern has seemed to develop with the federal government dealing primarily with the state executive in the administration of federal grant programs. It is doubtful there ever was any willful intention by the federal government to exclude state legislatures from the federal grant process. Rather, the administrative simplicity of dealing with the state executive coupled with the uncertainty of who in the state legislature was the appropriate point of responsibility probably led to the apparent bias toward the executive. Once established, this pattern was reflected in federal regulations and, more importantly, in the actions of federal agency officials in interpreting those regulations.

It has not been until recent years that this relationship has been actively questioned and that attention has focused on the role of state legislatures in the federal grant process, largely as the result of the growing impact of federal funds on state budgets and the emergence of more sophisticated state legislatures.

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*In a case involving the Pennsylvania state legislature's right to reappropriate federal funds, the U.S. Supreme Court dismissed the appeal for want of a substantial federal question (Thornburgh v. Casey, 440 U.S. 942, 1979).

APPENDIX IV

Any attempts to redress or "neutralize" the perceived imbalance in the legislative and executive roles in the federal grant process should be approached with extreme caution for a number of reasons including the diversity of state constitutional provisions, statutes, and practices and the perception that the federal government may be prescribing or defining specific roles within the intragovernmental sphere. Indeed, an even balance may not be possible given the separation of various powers within a state government.

We do not think the Intergovernmental Cooperation Act should be amended to deal with this question. Problems of construction and interpretation are sure to develop. The proposed language of the amendment recommended by GAO may prevent the federal government from imposing necessary and proper procedures in the administration of federal grant programs. For example, in some cases federal interest may require designation of a specific point of responsibility. The language might also result in the federal government's being placed in the position of deciding in any given situation who actually represents the state government.

Instead of this global approach, we think that individual federal statutes and regulations expressly restricting or prohibiting legitimate state legislature involvement in the federal grant process should be identified and clarified where appropriate. Consideration might be given to using the term "state government" in lieu of "state agency" when referring to state administration of federal assistance. The determination as to how and where this responsibility is to be lodged within the state government would then be subject to the normal state controls.

It is our opinion that, absent some federal limitation, the state legislatures may involve themselves in the federal grant process. There is growing evidence that state legislatures are increasingly taking steps on their own to strengthen and/or realign their roles in the federal grant process. Many state legislatures now perform post audits and program evaluations. More and more legislatures are becoming involved in federal fund appropriation, application review, and award tracking. Some have gone so far as to require fiscal notes or economic impact statements.

Views on Specific Recommendations for OMB Implementation

1. Issue New OMB Directive on Federal Assistance to State Legislatures

In the wake of the GAO draft report, OMB will assess the desirability of reissuing its December 22, 1969, policy guidance which orginally attempted to clarify the eligibility of state legislatures for federal assistance. In 1978, the National Conference of State Legislatures requested OMB to reissue the directive. At that time OMB declined, seeing no need to reissue a policy that had not changed. The preference was to deal with specific instances where policy was not being correctly applied instead of issuing broad exhortations.

A restatement of the 1969 directive that state legislatures and their instrumentalities are eligible to apply for federal assistance would not, of course, automatically confer eligibility status on state legislatures. Eligibility is determined in most cases by provision of program statutes, not by OMB policy.

Information on federal programs and applicant eligibility requirements appears in the Catalog of Federal Domestic Assistance and the Federal Register. The Catalog contains an applicant eligibility index indicating who is able to apply for the various programs, including state and local governments. We see no compelling reason at this time for separately indicating programs that are particularly suitable for a subset such as state legislatures.

Reactions to other proposed GAO additions to a new OMB directive follow:

- Encourage legislative evaluation of grant programs. We would welcome legislative participation in evaluating the administration of grant programs, where appropriate. OMB Circular 74-4, "Cost Principles for Grants to State and Local Governments," establishes the principles for determining costs under federal assistance programs. Under the principles, the salaries and other expenses of state legislators are unallowable, since such costs would continue regardless of whether the state had federally assisted programs. However, the expenses of organizations under state legislature direction are allowable when they provide oversight of grant programs such as audit, appraisal, review, etc. This has been well established over the years.

- Direct Federal Regional Councils to designate legislature liaisons. Most Federal Regional Councils have attempted to build liaisons with state legislatures. In those instances where these liaisons have been less than successful, it appears there has been some difficulty in establishing and maintaining an appropriate point of contact. OMB agrees that FRCs should renew their efforts to foster an open channel of communications with the state legislatures.

- Direct agencies to report compliance. As part of its overall paperwork reduction effort, the Administration is attempting to minimize and/or simplify agency reporting. We see no justification for asking federal agencies to report on steps taken to comply with the existing (or a revised) OMB directive clarifying policy on federal assistance to state legislatures.

2. Modify A-95 Allowing for Legislature Involvement

OMB is in the process of making major modifications to Circular A-95. As part of this effort, we will explore ways to encourage the involvement of state legislatures in A-95 review of grant applications, state plans, and sub-state district designations. There will be ample opportunity for interested parties to consider the proposed changes. It is anticipated that a draft revision to the circular will be available for comment some time in the fall of 1980.

In an attempt to improve feedback on A-95 and other award actions, OMB is establishing the Federal Assistance Award Data System (FAADS) which will provide regular reports to states. OMB is requesting that each state government interested in receiving FAADS data designate a single coordination point to assist in evaluating the data and refining the system. We have asked each governor to take the lead, in consultation with the state legislature, in providing this designation to OMB.

APPENDIX IV

Concluding Observations

While we are concerned that there are instances where federal regulations may restrict or prohibit state legislature involvement in the federal grant process, we feel it would be inappropriate at this time for an OMB directive to become the focal point of an intensified federal effort to promote state legislature involvement in the process. As part of the FY 1982 budget cycle, we are currently reviewing the appropriate roles of government, including which level of government is best suited to carry out particular functions. This effort will provide state and local groups, including state legislators, with an opportunity to express their views.

We hope these comments will be helpful in finalizing the report.

Sincerely,

Wayne Granquist

Wayne G. Granquist
Associate Director for
Management and Regulatory Policy

National Conference of State Legislatures

Office of State Federal Relations

444 North Capitol Street, N.W. 2nd Floor Washington, D.C. 20001 202/624-5400

President
Richard S. Hodes
Speaker Pro Tempore, Florida House of Representatives

Executive Director
Earl S. Mackey

August 12, 1980

Mr. William J. Anderson
Director, General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

The National Conference of State Legislatures applauds the draft report "The Federal Government Should Encourage Greater State Legislative Involvement in the Federal Grant Process." We are pleased that the U.S. General Accounting Office (GAO) chose to undertake a study of such major intergovernmental impact and of such growing concern to state legislatures throughout the country.

The report substantiates what state legislators have told us for years -- that federal statutes and program policies place state legislatures at a disadvantage in attempting to play a responsible role both in overseeing the operation of state agencies and in ensuring the most efficient use of funds flowing through state treasuries. Federal grant policies which arbitrarily divide responsibilities between the state executive and legislative branches have generated separation of powers disputes in the states, muddying state constitutional distinctions. We are particularly pleased that your study refutes commonly held misconceptions about inefficiency and delay caused by state legislative involvement in the federal grant system.

NCSL's concern has been heightened by the growing complexity and pervasiveness of the federal aid system coupled with a concomitant increase in state legislative fiscal and oversight capacity. Our recently completed study of the issue produced two national seminars, several reports, panel discussions at each of the last four NCSL Annual Meetings and A Legislator's Guide to Oversight of Federal Funds, which we are pleased to submit with this response. It has been made clear to us time and again that state legislators share the concern of their congressional counterparts that programs established with government funds be accountable to the taxpayers through their elected officials. A meaningful state legislative role in the federal aid system

can lead to better and more accountable administration, to increased coordination and a more effective check against duplication of services, and to better and more efficient provision of the services intended by Congress. Indeed, the federal interest served by increased legislative involvement are cited and well documented in your report.

With the passage of the Intergovernmental Cooperation Act of 1968, the federal government recognized the crucial role of elected officals at all levels of government in the federal aid system. We feel that the report's proposed recognition of state legislators as equal participants in this system is consistent with the goals of the Act and is appropriate on the basis of equity and balance in the intergovernmental aid system.

Allow us to take this opportunity to cite on example of the disregard for state practices and procedures which has led to our concern and involvement in the issue. In April 1980, shortly before voting final passage, the U.S. Senate added a floor amendment to Title III of the Windfall Profits Tax bill requiring that states provide 50% of program administration funds for the Home Energy Assistance Program. The provision could be waived by the cabinet secretary. In developing regulations, the Secretary of HHS made the provision of the matching funds a condition for the approval of a state's plan. Federal program staff then requested that agency counsel in each regional office review each state's statutes for means by which the executive branch could provide these matching funds without legislative approval. Their eagerness to get the program in operation though many state legislatures had already adjourned caused them to ignore state appropriations practices and, indeed, mechanisms which have been established by the individual states to respond to such situations during a legislative interim.

NCSL strongly supports both your proposed amendment to the Intergovernmental Cooperation Act and your recommendations to OMB. A neutralizing amendment to the legally-controlling omnibus grant statute would go a long way toward achieving balance and non-intrusiveness in the federal aid system. We recognize, however, that ultimate resolution of the imbalance will require specific conforming amendments in federal grant-in-aid enabling statutes, as well as implementing regulations. NCSL asks that GAO consider adding this stipulation to its recommendations. We agree with GAO that the principle of federal neutrality must be established in an omnibus statute.

Your proposed recommendations to OMB will also promote federal neutrality. State legislative involvement in grant program evaluation is an important means to establish program accountability, and we are pleased with your recommendation. Indeed, since federal regulations currently allow reimbursement for this kind of state activity, we concur that such policies should be clarified. We feel, however, that GAO should specifically recommend legislative reimbursement where applicable. Because of current OMB efforts to implement single state compliance audits for federal grant regulations, we also ask that you recommend that OMB specifically provide

reimbursement of state executive and legislative auditing activities under Attachment P to Federal Management Circular A-102.

Regarding your recommendation for legislative liaisons in Federal Regional Councils (FRC), we recommend that state legislatures or their designees be included in FRCs on a par with representatives of the executive branch of state government. Your suggested revisions to the A-95 process are crucial. Allowing state legislative participation in reviewing state plans and grant applications may prevent problems before they actually occur. We understand that OMB is considering general revisions to A-95. In addition to the GAO recommendations, we welcome any revisions which call for comprehensive enforcement and adequate funding. We have developed more detailed responses to your entire study, including your recommendations, and enclose them as an attachment.

What we are seeking and what your report addresses, is a federal neutrality which restores the ability of the states' constitutional checks and balances to function in the most effective -- and necessary -- way to improve a federal aid system which has often escaped these safeguards. To achieve this neutrality, specific actions must be taken both by Congress and by the administering agencies to correct past imbalances and misconceptions about the state legislative role. We are pleased with the thoroughness of GAO's understanding of this situation. There is no request here for additional funds or new federal programs. What is sought is remedial action to restore a neutrality which can prove beneficial at both the federal and state levels, and which ultimately could save funds.

In general, however, we believe that long-term improvement and restoration of balance and effectiveness in the federal assistance system will only result from broad-based grant reform efforts, the cornerstone of which is grant consolidation and simplification. NCSL has long supported reforms to cut through the maze of rules and regulations needed to operate nearly 500 separate categorical programs. Our support of S. 878, an omnibus grant reform bill, has been forthright and consistent. As it includes grant consolidation, improvement of audit procedures and the simplification of crosscutting requirements, this proposal could immensely improve the current situation. We also applaud OMB's continuing efforts to achieve many of these reforms administratively. Specifically, we are pleased with federal grant information improvement efforts which have resulted in the Federal Assistance Award Data System (FAADS).

NCSL has begun discussions with the National Governors' Association to develop an agenda for reform of the federal aid system. The agenda will likely include: provisions for full federal assumption of responsibility in certain areas in exchange for turning over full responsibility in other

areas to states and localities; grant consolidation in certain program areas and termination of narrow grants and those not clearly related to national objectives; fiscal notes on all legislation and regulation which show the actual costs to states and localities; and development of a more flexible system for the administration of intergovernmental grants. The coming months will find us even more active in this broad governmental issue.

We are pleased that GAO's recommendations would not lead to a federal definition of any specific role for the legislature. Rather, we feel that their adoption will enable the state legislatures themselves to define their own roles and responsibilities, in conjunction with their executive branches and consistent with their own constitutions. We look foward to the timely issuance of your final report so that we can begin anew to work with the federal government and with our own executive branches to increase the effectiveness and accountability of the public services and programs we offer to the citizens of our country.

Thank you for allowing us the opportunity to respond to your study. It marks an important turning point in state-federal relations.

Sincerely,

Richard S. Hodes

Richard S. Hodes
President of the NCSL
Speaker Pro Tempore, Florida House
of Representatives

Earl Mackey

Earl. S. Mackey
Executive Director

RSH/ESM/gj

Attachments

National Governors' Association

George Busbee
Governor of Georgia
Chairman

Stephen B. Farber
Executive Director

August 13, 1980

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Thank you for sending us the draft report entitled "The Federal Government Should Encourage Greater State Legislative Involvement in the Federal Grant Process." This advance consultation is a regular GAO practice and is to be commended.

Our central concern, as amplified below under point 4, is that the federal government should not attempt to involve itself in matters concerning the executive and legislative branches of state government which only they can properly resolve. We also have specific comments on the report and have provided them to the GAO staff orally, as you suggested. The points we made are as follows:

1. The report fails to meet the neutrality standard it sets for itself.

   On page i, the report establishes as its goal "achieving federal neutrality with regard to the internal separation of powers within state government." This is a policy which we wholeheartedly support. However, there are numerous references to an active encouragement of legislative involvement, including the title of the report itself. A more appropriate title would be "Federal Agencies Should Review Their Procedures to Ensure Neutrality on State Legislative Involvement in the Federal Grant Process." In the text, one example of a departure from the neutrality standard occurs in the second to the last recommendation on page vi, which would "direct federal agencies to report steps they have taken...to encourage legislative involvement." A change analagous to the one suggested for the title should be made here and elsewhere in the report where similar departures occur.

2. The report fails to make the case clearly that intrusive federal policies exist.

   Chapter 2 should be reorganized to collect in one place the barriers to the involvement of state legislatures in the

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APPENDIX VI

federal grant process. Currently, some of these examples are discussed on pp. 13, 15, 16, 17, 18, 19, 20, 21, and 22. Interspersed among the examples of federally-erected barriers are references to state episodes and a confusing discussion of matching requirements (page 14). These should be removed so that a clearer case for federal neutrality can be developed.

3. The report fails to prove its assertion that "state courts have prohibited legislative appropriation of federal funds in four states in rulings apparently premised on the idea that since no role for legislatures is defined by the federal government, none is intended."

The authors cite action by four state courts prohibiting certain legislative initiatives as evidence that federal policies and statutes "exclude legislatures from the grant process." However, the report mentions no specific federal statutes on which the state court opinions were grounded and can only conclude that the court cases were "implicitly" based on interpretations of federal grant law that restricted the role of legislatures. It is my understanding that the four court decisions were based on state constitutions and that federal requirements had little if any influence over the justices' findings. This section should either be rewritten to include relevant quotations from the court opinions regarding the courts' interpretation of federal law--and the weight this was given by the justices in the opinion--or dropped altogether.

4. The report fails to prove its assertion that "state agencies... have used federal grant provisions defining explicit executive roles to ward off oversight efforts by their state legislatures."

Throughout the discussion on conflicts between the executive and legislative branches, the report fails to distinguish between formal action by the legislature (i.e. enactment of statutes) and informal acts. The example cited on page 24 that a Governor chose a different agency to administer a federal program from the one that the legislature "was on record" favoring as the designated agency glosses over whether the legislature passed a law requiring assignment of program responsibilities or whether one member of the legislature voiced his opinion in recorded debate. Just as the President is not bound to committee report language and statements made during congressional debate, a Governor clearly need not respond to "advice" from the legislature on these matters. However, he must comply to statutory directives. This distinction needs to be made throughout the report. Moreover, examples presented in numerous instances in the report concerning legislative staff perception of the limitations on the legislatures' role seem to be a highly inappropriate insertion in a discussion concerning the constitutional separation of powers in state government.

> Another way of stating the point here is that the report shows a lack of understanding of the checks and balances in states and the constitutionally-based methods for resolving questions like the role of the legislative branch in the federal grant process. The authors of state and federal constitutions recognized that the greatest strength and the strongest tension in the system they created was related to the conflict created between the executive and the legislative branches. To deal with this conflict--which they saw as inevitable and continuous--the constitutions provided for judicial branch arbitration. The report seems to shrug off this process as inadequate, reserving for the federal government the role of a disinterested resolver of questions of legislative involvement in executive functions. To students of constitutional law, this idea is fundamentally flawed.

In conclusion, the report addresses an important set of issues and makes a number of useful points. However, because it fails to attain the standard of neutrality it sets for itself in the first page, because it fails to prove two of the most important theses advanced, and because one of the key sections is organized in such a way as to mask the basic evidence presented, we believe that the body of the report should be substantially revised before final publication. We would appreciate your views on our comments, and we are prepared to work constructively with you on the final report.

Sincerely,

Steve Farber

Stephen B. Farber

APPENDIX VII

ADVISORY
COMMISSION ON INTERGOVERNMENTAL RELATIONS
WASHINGTON, D.C. 20575

July 30, 1980

Mr. William J. Anderson
Director, General Government Division
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Anderson:

This is in response to your July 3, 1980, request for comments on the draft GAO report, "The Federal Government Should Encourage Greater State Legislative Involvement in the Federal Grant Process."

The Advisory Commission on Intergovernmental Relations is a national, permanent commission established by Congress in 1959 to monitor intergovernmental relations and make recommendations for change. Its membership includes federal, state, and local elected and appointed officials and representatives of the general public. By statute, four governors and three state legislators serve on the Commission.

Clearly one important concern to the Commission over the past 21 years has been the relationships among and between federal, state and local governments caused or influenced by the federal grant-in-aid system. The state legislature's role in the system has been a major component of Commission consideration throughout the years.

In August 1975, the Commission took a very strong position on the issue of state legislatures and federal funds saying that state legislatures should "take much more active roles in state decisionmaking relating to the receipt and expenditure of federal grants to states." Specifically, the Commission recommended that legislatures take action to provide for:

-- inclusion of anticipated federal grants in appropriation or authorization bills;

-- prohibition of receipt or expenditure of federal grants above the amount appropriated without the approval of the legislature or its delegate; and

-- establishment of sub-program allocations, where state discretion is afforded in formula-based categorical and block grants, in order to specify priorities.

Understandably, then, the Commission welcomed the General Accounting Office's study of state legislative involvement in the federal grant process and is equally pleased at the overall recommendation of the GAO: that the federal government should encourage greater state legislative involvement in this key area.

ACIR also supports the recommendation regarding the eligibility of state legislative entities for federal assistance. (ACIR does qualify the funds to those research funds "found to be of outstanding scientific merit and of significant potential social benefit with an interstate impact.") It has taken no specific position regarding state legislatures and program evaluations or liaisons with federal regional councils. Its recommendations regarding state legislatures and OMB Circular A-95 do call for a stronger role by "governors and/or legislatures."

Like GAO, ACIR believes that the federal government should be neutral regarding the balance of power between state executive and legislative branches in decisions relating to the receipt and expenditure of federal funds. Like GAO, ACIR would not support any federal actions that prescribe how state legislatures should appropriate federal dollars. And, like GAO, we believe important federal interests are, in fact, promoted by state legislative involvement.

We find this draft report to be both informative and comprehensive. A particularly noteworthy contribution was made by GAO's extensive interviewing of federal officials administering the 75 largest federal grant programs. The material culled from those interviews, particularly the section of "Federal Agencies Interpretations Can Prohibit Legislative Assertion of Authority in Conflict With the Governor," is an especially welcome addition to the literature dealing with state management of federal funds.

One concern we do have about this report relates to its overall balance. While we obviously agree with the intent of the conclusions, we feel that the presentation of the background material is somewhat skewed in favor of the legislature. For example, federal

agencies' traditional reliance on the governor or a state agency director as the single point of reference can be supported and should be put into perspective. Federal agencies cannot realistically be expected to deal with a variety of people, some of whom are part-time legislators, for day-to-day administrative decisions. Administrative necessity dictates some single point of reference.

Improved balance also could be achieved if the rationale for the GAO recommendations -- and their implications -- were more fully explored in the report. The recommendation on state legislatures' eligibility to receive federal grants is particularly vulnerable to the argument that the background material does not adequately support the recommendations. Here too, the report should deal more fully with the basic question of why legislatures should receive federal funds and should consider some of the ramifications that might result if they did.

Finally, we feel that there is a need to develop the findings in greater detail, drawing on the empirical data collected to a much greater extent than is now the case.

We do want to commend the GAO for what we feel is a substantial contribution to an important and timely area of intergovernmental concern. Legislative involvement in decisionmaking relating to federal funds should threaten neither the state executive branch nor Washington. Rather, an informed, conscientious state legislative branch, which chooses to take an active role in decisions relating to receipt and expenditure of federal funds, should strengthen the workings of the grant system as well as enhancing and improving the decisions made in the state capitols.

We thank you for the opportunity you have afforded us to comment on this draft report.

Sincerely,

Wayne F. Anderson
Executive Director

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