ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6147 HOUSE STATE AFFAIRS

551

speech, Roosevelt outlined some of the principles of the New Nationalism:

> The state must be made efficient for the work which concerns only the people of the state; and the nation for which concerns all the people. There must remain no neutral ground to serve as a refuge for lawbreakers, and especially for lawbreakers of great wealth, who can hire the vulpine legal cunning which will teach them how to avoid both jurisdictions...The New Nationalism puts the national need before sectional or personal advantage. It is impatient of the utter confusion that results from local legislatures attempting to treat national issues as local issues.*

The Supreme Court began consistently to uphold federal statutes which arguably entered areas reserved to the states. The Commerce Clause was used to uphold a statute that prevented the interstate shipment of lottery tickets despite a contention that the power to regulate commerce did not include the power to prohibit it. The taxing power was used to sustain legislation that for decades protected the butter industry from competition from artificially colored margarine. Congress entered the fields of food and drug inspection and meat inspection under the Commerce Clause. The Commerce Clause was also used to sustain the Mann Act which made it a federal offense to ship women across state lines for immoral purposes. The common link in these cases is that Congress was acting to restrain the physical movement of something across state lines.

However, the connection with physical movement was replaced with the concept of a "stream of commerce". This doctrine was used to apply antitrust laws to sales of cattle within a single state on the grounds that the sales were part of a continuing stream of activity that was part of interstate commerce.

THE BEGINNINGS OF THE GRANTS ECONOMY

Although the federal government had provided "grants" in earlier periods, through such actions as grants of public land to promote construction of railroads, the grant system as we know it today began with the passage of the Weeks Act of 1911. That legislation, which covered protecting forested watersheds, was soon followed by the Smith-Lever Act establishing the Agricultural Extension Service. By 1925 federal grants totaled about $93 million, covering these functions

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*ACIR, CONDITION OF FEDERALISM, p. 64.

plus public health, highways, vocational education, and maternity care. The grants economy was beginning.

A challenge by the State of Massachusetts to one of the programs indicated that the Supreme Court would not likely accept challenges to grants on both procedural grounds and on the basis that the state's participation in grant programs and adherence to grant conditions was voluntary.

CONSTITUTIONAL AMENDMENTS AFFECTING FEDERAL-STATE RELATIONS

A series of constitutional amendments in the early 1900's had significant implications for evolving relationships between the states and the federal government. The Sixteenth Amendment provided the federal government with access to the income tax, now the most significant single source of federal revenue. The Seventeenth Amendment ended the practice of selection of senators by state government, replacing it with the popular election method. No longer would senators be emissaries from state government; they became political figures with direct ties to the electorate. The Eighteenth Amendment (Prohibition) reflected use of police power at the national level in an area previously under the control of states, which was why a constitutional amendment was considered necessary to permit federal action.

THE TWENTIES

A group of civil rights cases in the period from 1919 through 1927 brought protection of the federal Bill of Rights to citizens dealing with state action through the concept that the Fourteenth Amendment made these protections applicable to the states. While this enlargement of federal control was taking place in civil rights, the Supreme Court began to void federal action dealing with economic regulation. Most notable, in light of previous cases on lottery tickets and meat packing, was a decision invalidating congressional action to regulate child labor. In response, Congress passed new child labor legislation based upon the taxing power. The Supreme Court rejected this legislation also on the theory that an invasion of state powers was involved. However, the Court rejected an Arizona labor relations statute on the grounds that it involved unequal protection of the laws and rejected a Kansas arbitration statute as contravening the due process requirements of the Fourteenth Amendment.

DEPRESSION AND RECOVERY

The Depression had a massive impact on the history of federalism. As the Advisory Commission on Intergovernmental Relations put it:

> By the end of the Depression, the American governmental system was transfigured. Whether or not conscious of its plunge into modernity, the nation had modified its view of economy, realigned itself politically, and amended its attitudes on poverty and unemployment. Yet...the Constitution stood practically if not formally transformed. When the clouds of depression lifted, the remaining constitutional constraints to the growth of the central government had been eroded. The character of American federalism was thenceforth forever changed.*

The Depression saw the enactment of the first federal welfare program, which used the mechanism of funneling funds through state governments. Public works projects were also funded for economic relief but, unlike more recent versions of such programs, the funds were spent directly by the federal government rather than by state and local governments. An entirely new type of federal institution, the Tennessee Valley Authority, was established with a charter to provide power and economic development to a designated geographic area. The president also entered economic regulation in great detail, resulting in a running battle between the administration and Supreme Court. The president's agricultural program was scrapped on the grounds that it invaded the power of the states. Other key parts of the New Deal were held invalid. However, by 1937 the Court had backed down from these decisions and began to uphold federal economic regulation on a broad front. In the cases that resulted, the Court generally upheld the concept that the federal government was empowered to tax and spend generally in the pursuit of the general welfare. Prior decisions prohibiting federal child labor laws were overruled. By the end of World War II, the previous constitutional bounds on federal action potentially infringing on the powers of states had been almost totally rejected both in the courts and by the nation's political leadership.

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* ACIR, CONDITION OF FEDERALISM, p. 76

MORE RECENT DEVELOPMENTS

Over the past 20 years, little attention has been paid to the moribund historical relationship of the state and national governments. Instead, decision-makers, including many state officials, fell into a pattern of decision making which assumed fundamental national responsibility for essentially all domestic functions. That responsibility might be shared with state and local governments. The primary cost responsibility might be carried by state and local governments. But the legitimacy of a federal role was rarely challenged.

Federal grant programs were provided in such areas as fire protection, coastal zone management, rat control, domestic water supplies, sewage treatment plant construction, repair of rural bridges, bilingual education, libraries, arts and culture, police protection, and just about every governmental activity known. Federal legislation protected the rights of the physically handicapped, the aged, drug abusers, and others, and sought to improve the status of minorities.

The extension of federal power and roles suffered only one legal setback. In 1976 in NATIONAL LEAGUE OF CITIES v. USERY (426 U.S. 833), the Court, in a 5-4 decision, held that the federal government could not apply its wage and hour regulations to state and local government employees. The majority opinion noted that "states as states stand on quite different footing than an individual or corporation when challenging the exercise of Congress's power to regulate commerce...Congress may not exercise that power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of intergovernmental functions are to be made." The minority opinion called the decision a judicial redistribution of power and argued that "the extent of federal intervention into the states' affairs in the exercise of delegated powers shall be determined by the states' exercise of political power through their representatives in Congress.."

The Usery decision deals only with one instance of regulating state and local governments directly by legislation, as distinct from federal regulation of private conduct that state or local governments may also seek to regulate. In addition, the holding stands side-by-side with other holdings making the same legislation applicable to certain state and local functions considered to be of a proprietary (businesslike) nature and decisions applying age and sex discrimination statutes to state and local employment policy. More important, it is generally agreed that the policy that Congress cannot apply as a regulation under the Usery decision could be applied through the spending power by conditioning federal grants on compliance with the policy.

THE RELEVANCE OF HISTORY AND CONSTITUTIONAL LAW

In the day-to-day decisions that determine the relationship of Alaska and the federal government, most of the legal and constitutional materials discussed in this chapter do not make much difference. As a practical matter, neither history nor current interpretations of the Constitution prevents the federal government from entering areas that traditionally were handled by state and local governments.

The American history of federalism certainly provides the basis for claims that the founding fathers did not contemplate the degree of federal involvement in regulation and grant programs that has developed since World War II. However, the counterclaim is that the founders did contemplate the Constitution as a living document and that increased federal roles reflect real changes such as easier transportation, greater mobility of people and goods, and the development of a truly national economy that cannot be effectively regulated by a single state.

As politically salient arguments, "states rights" and appeals to the principles of the founding fathers have simply lost whatever effectiveness they may have had in an earlier day. One indication of this is that state officials themselves rarely make historical or legal arguments against federal action, and often support federal actions that would be inconsistent with such sweeping arguments. Another indication is the way in which the Reagan administration has handled the effort to reduce the scope of the federal government and put more power into the hands of state and local officials. This argument is normally put pragmatically, not legally or historically. federal action is criticized as being too costly, too remote from the problem, having too many unintended consequences, destroying individual initiatives, and being overly intrusive into the lives of citizens. While the rhetoric includes occasional mention of historical background or the principles of the founding fathers, the key arguments for state and local power are basically pragmatic.

Chapter 2 thus turns attention to the pragmatic question of the circumstances under which national action may be more appropriate than state and local action and when national action should be avoided.

CHAPTER TWO: GUIDING PRINCIPLES OF FEDERAL-STATE RELATIONS

INTRODUCTION

The preceding chapter suggested that historical and legal approaches to federal-state relations are likely to have little current political saliency. Americans have either forgotten their history or choose to reject historical precedents and the courts no longer stand as major guardians of federalism. If history and law are not to guide policy, then other guides must be found. This chapter is the quest for those guides.

In broad terms, the issue is at what level of government should there be lodged responsibilities for social welfare, economic regulation, provision of services, and financing all of these. This is by no means a new issue. Plato's REPUBLIC and Aristotle's POLITICS both address the appropriate size and scope of governmental units.

In its study of this subject, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH: AN AGENDA FOR AMERICAN FEDERALISM: RESTORING CONFIDENCE AND COMPETENCE (1981), the Advisory Commission on Intergovernmental Relations suggested that a test of national purpose be applied to determine wnen the federal government could legitimately act. The concept of national purpose is, in substance, a replacement for the former legal tests of appropriate spheres of federal action. It can be seen as one of two possible approaches to issues raising questions of state-federal relations.

One approach is to bring to the table no theory at all about appropriate spheres of responsibility, letting each case be decided on its own merits. ACIR calls this approach the "timely contribution" test. That is, if federal action can make a timely contribution to a worthwhile objective, then the action should be taken.

The national purpose test applies the added concept that the federal government should consider overall division of labor among governments and the effect of any proposed specific action on that general division of labor in deciding when federal action is appropriate

Despite its concern that a national purpose test be applied, ACIR concedes that in practice, one is not:

> According to the national purpose criteria, grants-in-aid should be employed to advance major national objectives in the principal fields of federal concern, with other functional fields being left to state and local

> governments alone. In practice, however, most commentators believe that the federal grant system has never -- at any stage of its development -- embodied a clear conception of national purpose or priorities. The specific activities selected for assistance seem to have reflected short-term political judgments, rather than careful assessment of basic needs.

ACIR does not do a convincing job of articulating a national purpose test. The most specific test that it offers is one of "irreconcilable conflict" which would require actual head-on conflict between state action and a nationally articulated goal before federal action was taken. This approach is hard to apply as it is difficult to know a "head-on conflict" when one sees one. Whether or not the federal government should regulate the hunting season on federal lands and whether or not there should be federal legislation on drunk driving are important issues, but notions of national purpose seem to add little insight to the analysis of these issues.

As a practical matter, anyone advocating federal action can couch the advocacy in terms of national purpose. Federal action is needed because there is a problem that needs to be solved which is not being adequately solved by state and local action. This is the premise on which practically all federal domestic legislation is based. The national purpose test does not dispose of the issue but simply changes the vocabulary by which it is addressed. Thus, more specific prescriptions of when federal action might be appropriate must be considered. These include concepts based upon fiscal equalization, externalities and spillovers, economies of scale, service and tax competition, and political accountability. These concepts are discussed in the sections that follow.

FISCAL EQUALIZATION

Different governmental units differ in their fiscal capacity as measured by such indicators as property value per pupil in public schools or per capita income. Different governmental units also differ in the needs for public spending as measured by such indicators as percentage of persons in poverty, percentage of persons in public schools, etc. The cost of providing services also differs from government to government due to differing prevailing wages and prices.

The concept of fiscal equalization is that an appropriate role for higher levels of government is to equalize, in whole or part, fiscal disparities among lower levels of government. The concept is illustrated by the financing of elementary and secondary education in most states.

There is general agreement in society that there should be a system of free public schools and that the actual provision of the service should be at the local level.

Organizing educational responsibility into local school districts and, in some states, with general purpose local governments which rely heavily on property taxes creates considerable disparities in financial capacity among the districts. It is not unusual for some districts to have high concentrations of industrial and commercial property and very few pupils. Other communities are essentially bedroom communities, with large numbers of pupils to educate and little or no industrial and commercial property to tax. As a result, a property tax of 1% of value may suffice to provide public education in one community while a 4% tax might be required in another to provide the same teacher salaries and pupil-teacher ratio.

Most states deal with this problem through equalization programs of school assistance. These equalization programs generally seek to supply state aid so that the same level of local tax effort will produce the same minimum expenditure level in each district.

Equalization can be considered through both how the federal government raises money and how it spends money, recognizing that there is not general agreement on the appropriate measures of equalization for either.

The federal tax system is inherently equalizing with respect to income. That is, citizens in a state with high per capita income will pay a greater proportion of their income in federal income taxes than will persons in a lower income state.

Federal expenditure programs may or may not be equalizing depending on the characteristics of each program. Aid to schools based upon the number of disadvantage pupils would generally be considered as equalizing. Programs, such as revenue sharing, which consider per capita income as an allocation factor, would also be considered as equalizing. However, programs which provide a federal match for state and local spending, such as welfare (AFDC) and Medicaid, may not be equalizing as states with high fiscal capacity will tend to spend more and draw larger amounts of federal money than poorer states.

Equalization is logically a more relevant criterion for aid to local governments than for aid to state governments, as fiscal disparities among local governments are much greater than fiscal disparities among states.

Furthermore, fiscal disparities among states have been decreasing throughout the 20th Century, at least when measured by the traditional test of per capita personal income. The American economy permits free movement of workers, goods, and employers. Persons in low income areas tend to migrate to higher income areas, increasing per capita income where they left and decreasing it where they go. This can be seen in the major migrations from the rural South to the Midwest in the 1940's and 1950's and in current migration to Western states, including Alaska. At the same time, centers of employment can migrate to where low income (and low wage) workers are to be found. The wholesale shift of the garment industry from the New York area to the South and of furniture manufacturing from North to South are examples. This movement decreases income in the states giving up the firms and increases income in the new locations.

Although there are occasional gyrations in the secular trend, the convergence of personal incomes is continuing. In 1967 regional per capita income in the Southeast was 79% of the national average, the lowest of any region. By 1977, however, it had increased to 86% of the national average. The two highest regions in 1967, with 113% of the national average, were the Far West and the Middle Atlantic. By 1977 the Middle Atlantic had dropped to 106% of the average, while the Far West maintained its position. In terms of individual states, Mississippi was the lowest state in 1967 at 62% of the national average, but moved to 70% in 1977. Connecticut, which led in 1967 with 129% dropped in ten years to 114%.*

Fiscal capacity can also be measured through a representative tax system which seeks to reflect the comparative yield of a national average of state tax rates for each of the states. This measure will indicate more capacity than the personal income measure for states with major natural resources (e.g., Alaska and Oklahoma), a strong tourist industry (e.g., Nevada), or a major corporate tax base (e.g., Delaware) and generally lower capacity for states lacking these assets. This measure also shows convergence over time for all regions and most states. The most notable exceptions are low population high resource states, such as Wyoming and Alaska, which improved their fiscal capacity, by this measure, from 1967 to 1979.

Thus fiscal equalization considerations are a diminishing factor in the design and evaluation of federal financial roles.

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*ACIR, TAX CAPACITY OF THE FIFTY STATES: METHODOLOGY AND ESTIMATES (1982), pp. 20-21.

Fiscal equalization is only a theoretical purpose of federal grants. In actual practice, the current system of federal grants is not particularly equalizing. While states such as California, Rhode Island, and New York get a smaller percentage of costs in large programs such as Medicaid and AFDC (welfare) paid by the federal government, their benefit levels are sufficiently higher so that per capita federal assistance in these states is higher than in the states with lower fiscal capacity.

Thus, if fiscal equalization were the only criterion for measuring the federal role, there would be little if any such role. Fiscal capacity disparities among states are relatively small and generally diminishing and there is clear proof that federal aid, in total, is not equalizing.

EXTERNALITIES AND SPILLOVERS

The theory of externalities and spillovers is easily understood. Individual firms provide "private" goods, such as automobiles and magazines where the enjoyment (benefit) is confined to the person making the purchase and where that person bears the total cost of the purchase. Governments provide public goods which inherently can be enjoyed, without specific charge, by many persons. Economically optimal decisions about what public goods and services to provide at what cost are most likely to occur when the voters of the decision-making unit receive all of the benefits and pay all of the costs. In this sense, the national defense function is appropriately at the federal level because all U.S. citizens receive the benefits and all of them pay the costs. Provision of defense services by a state would involve externalities as the citizens of that state would be providing defense capabilities benefiting citizens of surrounding states.

A major example of externalities is pollution control. If all the costs and benefits of pollution control were confined to a single state, then the citizens of that state would presumably, through their elected representatives, reach a decision on the optimal level of pollution control spending. However, if many of the costs of pollution fall into a downstream or downwind state, the citizens could be expected to "underspend" on pollution control as they would not bear the full costs of pollution created in their state.

The theory of externalities sounds attractive when applied to grant programs. For example, suppose that 40% of the benefits of a particular state program accrued to persons out-of-state, but that all the costs were borne in-state. The voters of the state could be expected to "underspend" on this program. The optimal policy would be for the

national government to share the costs of the program, specifically to pay 40% of the costs. Given this incentive, the state decision-makers would presumably act optimally. Thus, the notion of externalities fits well with the actual structure of many federal grant programs which do involve federal percentage matching.

However, the theory becomes tenuous when applied to practical situations. Theoretically, the citizen of Alaska has some interest in education provided to citizens of Mississippi. The Mississippi student may, for example, migrate to Alaska or be part of the pool of persons from which armed forces are drawn. However, who is to say that national taxes, justified on this basis, should be used to pay 1%, 5%, or 30% of Mississippi's educational costs?

The externalities argument is quite strong for certain federal financing, such as financing of an Interstate Highway System and a national system of airports. The argument is ridiculously weak when applied to such activities as local fire and police protection, rat control, solid waste disposal, urban gardening, home insulation, and pothole repair. As economist Lester Thurow puts it, the concept of externalities:

> ... is simply not a convincing explanation of the provision of most domestic public goods. Once a society gets beyond basic public health measures and communicable diseases, medical care does not generate externalities. Death is the most private of all activities, and an individual's health has no nonmarket economic effects on the general population. Neighborhood externalities certainly exist in housing, but internalizing these externalities does not lead to the types of housing programs that have been legislated. The externalities have nothing to do with minimum housing standards for each family. Similarly, I find the arguments that education generates exernalities unconvincing once one gets beyond elementary education (literacy, etc.). Fire protection is like medical care. Some limited amount of fire protection and code enforcement is necessary to prevent conflagrations, but beyond this a donor has no more interest in his neighbor's fire protection than in his neighbor's fire insurance.*

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*ACIR, RESTORING CONFIDENCE, pp. 53-54

Although the economic criteria of equalization and externalities give some indication of appropriate national roles, particularly in regulation, they do not match well with the existing federal grant system. As ACIR concludes:

> Existing grant-in-aid programs have not been a very effective instrument in achieving national equity goals. In general, the grant-in-aid system is not strongly targeted to the least advantaged states or localities, has not substantially altered the distribution of income or economic opportunity, and has not been consistent with theoretical prescriptions based upon externalities criteria.*

ECONOMIES OF SCALE

Governmental activities vary in the extent to which they require large service areas to be performed most effectively. Where an activity is less expensively or more effectively carried out on a national scale, there is a strong argument that the federal government should be performing the function. Conducting a space program and providing for the national defense are examples of such functions. The only government that can provide national copyright and patent protection is clearly a national government.

While notions of economy of scale provide some clear examples of functions that should be performed at the national level, they provide little guide to what functions should be performed at the local level. If there are diseconomies of scale in performance of a particular function, one option is decentralizing the function to state and/or local governments. Another option, however, is decentralizing the function to federal field offices or private providers operating on contract at the appropriate scale.

There is very little hard evidence to show that there are significant diseconomies of scale in government functions. While some major federal functions, such as welfare, social services, and education, are carried out through state and local governments, the federal government itself conducts such programs as the maintenance of

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*ACIR, RESTORING CONFIDENCE, p. 60

decentralized park system (National Parks), the management of a hospital program (Veterans Administration), the making of loans (Farm Credit System), and the patrol of waterways (Coast Guard). As state and local service delivery systems go, some of these are generally considered to be relatively efficient.

An example of a situation in which local control is cherished in the United States is local law enforcement. However, we have no real evidence that there are diseconomies of scale in this function. Some functions are clearly better performed on a large scale than a small one. Examples are the maintenance of records on vehicle registrations, specialized training, fingerprint records, and files on persons wanted by the law. We have no real proof that small city police departments are more effective (however measured) than those of large cities, nor that persons in rural areas who get local police protection from state police forces, as is the case in some states, are less well protected than those served by county agencies. Some European police forces, generally conceded to be effective in comparison to ours, are national forces.

There are reasons, discussed below, why the notion of local police forces is widely accepted, but diseconomies of scale do not account for this view.

SERVICE, POLICY, AND TAX COMPETITION

Individual governments can adopt quite different patterns of regulatory policy, provision of service, total governmental cost, and the division of financial responsibility in the tax structure. This leads to the possibility of competition, which can be viewed both as good and bad.

The concept of competition is recognized at the local government level in both the public finance literature and in the popular mind. In many American metropolitan areas, one can find a number of suburban communities with quite different characteristics. Some are well known for the quality of their public schools and often have high property tax rates. Others, often called working class communities, maintain relatively low (inexpensive) levels of public service and have lower tax rates. People can, by decisions on where to reside, pick and choose among jurisdictions. In this sense, having decision-making at the local level maximizes individual choice of Americans.

This concept can also be applied at the state level. President Reagan used this concept when answering questions about potential uneven distribution of gains and losses under his new federalism proposal, noting that people could always vote with their feet if they did not

like the results in their own state.

While the notion of governments competing to draw residents has some appeal, it also has limitations. For many persons, moving even within a metropolitan area is not an option -- they may not live in a metropolitan area at all or may be locked into current residential choices by high interest rates associated with new mortgages, by friendship with neighbors, proximity to work, or a desire to avoid switching schools of their children. Of course, for competition to have effects it is not necessary that all the customers need to be free to switch suppliers, just enough of them to influence the behavior of the suppliers.

As a practical matter, however, the bulk of the competition among local and state governments is likely to occur over ensuring the location of firms considered to provide attractive employment opportunities. This competition now has practically all states and major cities offering industrial development revenue bonds; many states and cities providing tax abatements and/or loan funds; local government cooperation in providing site improvements for new firms, etc. This competition can tend to reduce the taxation of persons and firms considered mobile (primarily firms and high income taxpayers) relative to all other taxpayers. Whether this result is considered desirable or not depends upon one's tax policy views.

If one accepts the idea of competition among jurisdictions as an appropriate mechanism for popular control of sub-national governments, then the competition criterion would suggest making sure that key governmental functions are both performed and financed by the smallest governmental units possible.

However, this conclusion definitely has its critics. Their fear is that competition will produce socially undesirable results. If, for example, unemployment compensation and workers' compensation are controlled by the states, it can be argued that benefits are held to low levels so that states can maintain a competitive business climate. If states are left on their own to set welfare benefits, it is argued that the more generous states will be hurt by less generous ones, either by the migration of persons to the more generous state or by the migration of firms to the less generous states with lower taxes.

POLITICAL ACCOUNTABILITY

In deciding what levels of government should perform what functions, ACIR suggests a criterion of political accountability. The concept is that functions should be assigned to jurisdictions that are "controllable by, accessible to, and accountable to their residents

(ACCESS AND CONTROL) and that maximize the conditions and opportunities for active and productive citizen participation (CITIZEN PARTICIPATION)."

ACCESS AND CONTROL: Notions of voter access and control of public officials and of accountability are difficult to translate into quantifiable terms. As a legal matter, all citizens of local, state, and national government in the United States have the trappings of access, control, and accountability. Governments are controlled by officials who are elected by any adult who wants to vote. Elected representatives at all levels are accessible to just about any constituent. Decisions are normally arrived at in open forums. Procedures are available for petitioning bodies of elected officials, and public hearings are common at all levels of government.

It is difficult to say how one would judge comparative access and control between state and federal governments or between local governments and the states. In a mathematical sense, the individual citizen has more power to influence decisions when smaller numbers of citizens are involved in making those decisions. Thus, a voter who is one of a hundred residents of a town would be expected to have more influence in town affairs than he or she would in a state of two million people or a nation of 220 million. Furthermore, the individual enjoys a greater likelihood of knowing the elected officials and the appointed personnel of the government. Other things being equal, the criteria of access and control would thus seem to favor conducting governmental functions at the lowest possible governmental level.

CITIZEN PARTICIPATION: So long as there are not systematic differences in barriers to citizen participation, the discussion above would seem to apply to citizen participation, suggesting that more meaningful participation is likely to take place at lower levels of government. This is certainly mathematically the case. If a decision is made by federal legislation, some 535 elected representatives will be involved. If the same decision is made at the state level roughly 10,000 decision makers will be involved. If made at the local level, literally hundreds of thousands will make the decision.

The assumption that citizen participation opportunities are inversely a function of the number of citizens covered by a government is clearly invalid if lower levels of government systematically deny certain categories of citizens access to their political processes. At times when state legislatures were unrepresentative of state populations because of failure to reapportion on a timely basis, this could easily be the case. It can also be the case if certain groups, such as blacks in the South or Native Americans, are systematically denied access at

the state or local level.

However, times have definitely changed in the representation of minorities. State legislatures have much smaller districts than those of U.S. representatives or senators. As a result, any ethnic group that is concentrated in a particular area will have state legislative representation before it will have representation in the U.S. Congress. For example, the percentage of black members of Congress is well below the percentage of black state legislators.

At the local level, the impact is even more pronounced. For example, blacks now control county and city government in many areas in the South and city governments in many Northern cities.

At any point in time, groups will probably tend to prefer that power be concentrated at the level of government at which they feel they are most effective in getting their policies implemented. This would suggest a pragmatic approach to federalism in which groups that have a lower proportion of members in some areas (e.g., blacks in Alaska) would tend to prefer policies of a government covering more persons with their background (e.g., the national government). Groups with a higher proportion of membership in an area (e.g., Alaskans who fish or hunt) would, on the same logic, prefer that decisions of interest to them be made on a state rather than a national basis.

While this analysis of political self-interest seems reasonable enough and has some basis in observed political conduct, the situation is distorted somewhat in consideration of devolving power from the federal government to the states. Practically every significant group in America is represented in the nation's capital, usually with headquarters there. The persons in leadership positions in these groups have a vested interest in decisions being made in Washington, D.C. rather than in state capitals. To the extent that government power is devolved, power will devolve in private groups as well, as organizations will be more dependent on their state leadership and less dependent on their national leadership. For this reason alone, the organized leadership of political interest groups are likely to represent one of the groups of opponents to devolving federal power.

INFORMATION AND COMPLIANCE COSTS

INFORMATION COSTS: Decentralization of authority for decision-making puts more people into the act of making decisions. This was discussed above as a valuable result in connection with citizen participation. However, significant costs are imposed in the process. Some of these costs are simply overheads. It clearly costs more to have a Congress, legislatures in 50 states, and numerous county commissions and city councils than it would simply to have a Congress and some sort of local government body in each community.

However, these information costs multiply through the administrative machinery of state and local government. State legislatures must be informed on such matters as possible locations for highways and means of financing them. However, state transportation agencies then make specific decisions on such matters as specifications for construction materials, selection of contractors, and the like. Having to make policy decisions on these matters in 50 states is clearly more expensive than making the decisions once for the nation would be. The costs of this decentralized activity are clearly substantial.

COMPLIANCE COSTS: Once decisions have been made on a decentralized basis, then individuals and firms must find out what those decisions have been and find ways to comply with them. As any driver in the Lower 48 states during the 1970's knows, even such things as deciding when one can turn right on red become confusing in the absence of national standards. The situation can be equally difficult for a trucker seeking to move semi-hazardous cargo across the United States by truck.

In some cases, the differences in regulations that develop on a state-by-state basis are difficult to defend. One example is trucking with vehicles that have two trailers attached to one tractor (double-bottoms) and weight limits for trucks. The construction of roads, most of which are federally-aided roads built to uniform national standards, and weather conditions among the states would suggest that there is no significant physical difference in road conditions and maintenance criteria among the states. Yet, weight and length restrictions differ considerably. As a result, truckers are driven into patterns of travel that are clearly non-optimal in an economic sense. It may be that the most restrictive states have taken the correct view, and that other states are incurring excessive maintenance costs by permitting heavy trucking. It may be that the gains from more efficient transportation outweigh the safety and maintenance implications of heavy trucking. What cannot be the case is that both groups of states could be

correct at the same time. The resulting inconsistencies cause significant compliance costs.

Significant information and compliance costs are the other side of the argument that concentrating power at state and local levels lets policy be tailored to the particular needs and policy preferences of the local population.

RELATIVE COMPETENCE OF LEVELS OF GOVERNMENT

Many discussions of state and federal roles have concentrated attention in alleged systematic failings of one level of government or the other. Much of the court intervention in state and local policy has been based upon apparent systematic discrimination by many states, particularly Southern ones, against black citizens. Many of the national grant programs are premised on notions that state and local governments provide inadequate attention to the needs of the poor. Many of the administrative restrictions in grant program presume the necessity to guide state and local government in such matters as avoiding conflicts of interest, procurement procedures, personnel practices, etc.

The criticisms of federal involvement in domestic programs also deal with competence questions. The federal government is viewed as being bureaucratic, overly involved in paperwork, incapable of understanding local situations, etc. This section examines the question of whether state and local government are inherently more or less competent than the federal government.

Because there is disagreement about appropriate policies in such areas as transportation, land use, social services, and recreation, one cannot judge the competence of governments by the policies they adopt, at least in many important instances. Thus, the question of relative competence is discussed in terms of what those discussing it consider proxies for competence, such as the number of staff members available to a legislative body. These are inherently poor measures, but are the only ones available.

REPRESENTATIVENESS: There can be no question that state governments, before the decision of the Supreme Court in the reapportionment cases, were unrepresentative of the citizens in each state, simply because voters had unequal voting power. In some areas, usually rural ones, a much smaller number of voters had a single representative in the legislature than in rapidly growing urban and suburban areas. However, the holding in BAKER v. CARR that such systems were unconstitutional has meant that state legislatures are reapportioned at least every ten years and that both houses of the

legislature are reapportioned in proportion to population.

Interestingly enough, this leaves the federal government with a system that is less representative of population than state governments. As each state gets two senators, persons in smaller states have more representation than persons in larger states. Thus, a believer in "one person -- one vote" would be more comfortable with the representativeness of state legislatures and local governing bodies than with the national legislative machinery.

CORRUPTION: Because one suspects that only a small percentage of corruption at any level of government is uncovered and prosecuted, it is not possible to make quantitative comparisons of corruption at various levels of government. Thus, one is left with impressions which may not reflect reality, but which are themselves a reality because they affect the political environment in which federalism issues are considered.

During the expansion of the federal role in domestic policy ranging from the 1930s to early in the 1970s there was a widespread impression that the federal government was much less corrupt than state and local governments. Machine politics were seen as dominating the politics of many cities, and state legislators were seen as being in the pockets of various special interest groups. Petty corruption in such matters as local purchasing and inspection functions was believed to be widespread. Meanwhile, the federal government was viewed as offering a superior civil service system and a general history of avoidance of corruption.

These views have been shaken considerably by recent events. The Watergate scandal shook public confidence in the integrity of officials at the very top of the Executive Branch. A crusading press, rightly or wrongly, has not treated the federal Executive Branch image kindly. In 1982 alone, a Secretary of Labor was under investigation for alleged ties to racketeering, an Attorney General was under fire for allegedly taking tax breaks that he did not deserve, and the White House was criticized for policies on the acceptance of gifts.

The situation is not much better in Congress. Recent years have seen the forced resignation of a Senator and indictment of several House members in the Abscam investigations. Memories are fresh of the resignation of the Chairman of the House Ways and Means Committee in a scandal involving alcohol and sexual escapades. Campaign contribution information shows massive contributions to key members, even when they do not face serious election fights. After setting stricter standards, Congress recently relaxed its standards on receiving outside income for lecturing to outside groups, typically groups with a strong interest in legislation being considered by the person being paid.

However, the state and local government picture does not provide major contrasts. Federal indictments are being made in the area of highway contracting in many states and there is considerable reason to believe that similar situations may exist in other states. Corruption is often a major issue in gubernatorial contests at the state level. While the federal government can be criticized for policies regarding acceptance of outside income by members of the legislative body, many states have much lower standards. In fact, with legislative service being part-time, many legislators have business dealings (e.g., legal services) with persons and firms that have a direct interest in influencing their conduct as legislators.

At the level of the individual government worker, there periodically appear exposures of conduct problems. At all levels of government, many of these concentrate in the procurement function, with the federal GSA and its state and local counterparts being the object of suspicion. Persons who can benefit or harm individual firms substantially through the use of discretion -- tax auditors, tax assessors, building inspectors, safety inspectors, etc. -- are always subject to temptation. While few public complaints appear about federal officials' corrupt conduct in fields such as mine inspection and occupational health and safety, considerable suspicion is directed to building and other compliance inspectors at the local level.

In summary, we have no way to measure corruption at the various levels of government. We do know, from the tip of the iceberg that reaches the stage of publicity, that the problems seem to exist at all levels of government. This is not surprising, as officials often start their careers at the local government level and work their way through state government to federal service. Certainly, there is no basis for asserting that the federal government is consistently or inherently less subject to corruption problems than state or local government.

STAFFING: Another argument which was often used in the years of expanding grant programs to justify growing federal involvement in decisions previously made by state and local governments was that the federal government was better staffed than state and local governments.

As applied to the legislative body, the argument consisted of contrasting state legislatures with Congress. State legislators were much more likely than members of Congress to have additional occupations, as most state legislative service was, and is, not considered full time. State legislators often did not even have offices assigned to them and legislative staff was quite limited, particularly when contrasted with the staff support available to members of Congress.

This situation has changed considerably. Legislators are still not, in most states, full time bodies. However, legislative pay and expenses have been increased and more time is spent on legislative business as sessions have become more frequent and longer, and intra-session special committees and commissions more common. Legislative staffing has increased in practically every state by substantial margins, as have the legislative counterparts of the Congressional Research Service.

Perhaps as important as legislatures moving to meet an implicit staffing standard, is the increasing questioning of the standard itself. The bureaucracy supporting Congress now costs over a billion dollars a year, but it is not clear that this level of staffing has improved legislative decision-making.

Within the Executive Branch, state governments have sharply increased the top level staff of the governors. Typically, in 1982, governors are supported by a budget staff, some sort of planning staff, and enough personal staff members to handle functions such as press, legislation, etc. and usually additional staff specialized in such areas as health, transportation, and education.

At the level of the government worker, state and local workers in a "spoils" system were often contrasted with federal workers in a "merit" system. A typical stereotype of a state or local worker was as a "hack" whose career was launched through political connections. This stereotype never was totally accurate, as some of the strongest civil service systems in the country were in state government.

However, by 1982, the contrasts between federal and state and local governments were reduced. Merit-type systems cover hiring and promotion in major government services such as teaching and police and fire protection. Practically all states have also gone to non-patronage systems for all functions, even including traditionally patronage positions such as those involving highway maintenance and support services in state institutions.

Perhaps more important is that the rigid civil service standard itself is less respected than it once was. Some critics point out that such a system makes it more difficult to provide opportunities to minorities. For higher level positions, the criticism is that the system prevents political leaders from making the bureaucracy responsive. This criticism has been strong enough to cause the federal government to move away from a strict system for higher level employees. Thus, it is not clear what the current standard should be for comparing the personnel systems of state and federal governments, but the federal system no longer is regarded as clearly exemplary.

RED TAPE AND PAPERWORK: Rightly or wrongly, the federal government has acquired the reputation of having become highly bureaucratized, with all the symptoms that implies -- excessive preoccupation with paperwork, slow procedures, complicated forms, etc. There is substantial evidence for this view. For any given action that is comparable between federal and state government (e.g., building a road, providing a grant to local government), the paperwork associated with federal action is normally substantially greater than that associated with state action.

One of the main reasons for this is that the federal government systematically covers more cross-cutting issues in much of what it does. Thus, a federal policy designed to deal with highways will also cover such subjects as affirmative action, highway beautification, protection of the environment, payment of prevailing wages, avoiding barriers to the handicapped, historical preservation, promotion of small business, etc. State and local programs, other than those where terms are dictated by the federal government, have these complex cross-cutting features much less often than federal ones.

PUBLIC OPINION ABOUT COMPARATIVE COMPETENCE: Current public opinion does not accord much credit to the federal government's competence compared to that of state governments. A Gallup poll taken in September 1981 asked a representative sample of Americans the question: "Which do you think is more likely to administer social programs efficiently -- the federal government in Washington or the government of this state?" Seventy-two percent of the respondents indicated that the state government would do better; only 19% indicated the federal government, with 9% suggesting their performance would be about the same. In response to the question "Which do you think is more understanding of the real needs of the people of this community -- the federal government in Washington or the government of this state?", 74% picked state government. Another question asked was "Which theory of government do you favor -- concentration of power in the federal government or concentration of power in the state government?" When this question was asked in 1936, 56% preferred the federal government, but in 1981 only 36% preferred the federal government, while 64% preferred concentration of power in state government.

SUMMARY: COMPETENCE: Because there are no accepted tests of what constitutes good public policy, and no reliable comparative measures of how well policy is carried out, the question of the relative competence of state and federal government will not ever be settled. However, such evidence as we have leads to the conclusion that there is no clear competence advantage for either level of government. Put another way, the centralization of power in Washington will not necessarily improve administration, but the devolution of power to the states won't necessarily do so either. This suggests that criteria of relative

competence are not relevant to key decisions about federalism in the modern context.

TOWARD A THEORY OF FEDERALISM

INTRODUCTION: As a nation, we now have enough experience with the "timely contribution" theory of federal action to know that we are dissatisfied with the results. Decisions that federal action would make timely contributions to such subjects as local law enforcement, rat control, library finance, and other subjects have now been rejected by budget decisions in the administration and Congress. Other "timely contributions" such as the small area economic development programs are also being dropped rapidly.

More important, the pattern of ad hoc federal decisions on individual domestic grant and regulatory programs has obscured the relative responsibilities of state and federal governments, has caused the creation of new local government bodies such as planning commissions, manpower consortia, and professional standard review boards that have littered the administrative landscape with little apparent gain to the effectiveness of our governmental system and substantial loss in political accountability. Also, federal intervention has substantially affected the way in which states deal with their local governments and the functions performed by various local governments. Finally, the policies have been expensive -- perhaps too expensive to sustain along with such federal responsibilities as income security, Social Security, defense, and an irreducible minimum of clearly national functions, such as care of veterans, national parks, and the airways system.

The public vote in Alaska to examine the statehood relationship through the Statehood Commission is but one manifestation of strong and widespread feelings that something major is wrong with the current system. The fact that the President can propose sweeping changes in the federal system and receive criticism primarily on the grounds that the proposals were designed to divert attention from the country's economic system, rather than that the proposals were wrong, suggests widespread desire for change. The fact that the nation's governors and legislators have endorsed in principle a sorting out of federal and state and local functions also suggests that the times may be ripe for change.

For the collection of ad hoc policies that currently characterize state-federal relations to be replaced by a system that makes some degree of overall sense requires some agreement on the basic concepts that will determine what revisions are to take place. Thus, there is a need for a theory of federalism that can command widespread acceptance

and guide major policy decisions.

NATIONAL FUNCTIONS: The Constitution provides a reasonable starting point for the elaboration of national functions. The list of functions in Article 1, Section 8 includes:

(1) regulating commerce with foreign nations,
(2) establishing naturalization rules,
(3) providing uniform bankruptcy laws,
(4) fixing standards for weights and measures,
(5) providing the money supply and prohibiting counterfeiting,
(6) establishing post offices,
(7) maintaining a patent and copyright system,
(8) maintaining jurisdiction over offenses committed on the high seas, and
(9) providing for armed forces.

In addition to this incomplete list of functions, the federal government clearly needs powers and functions that are necessary to exercise the powers listed above. These include the power to tax, the power to establish a court system and law enforcement personnel to enforce federal laws, the power to own property and regulate its use, the power to pay personnel including retirees and veterans, etc.

To this list of widely accepted constitutional functions must be added the protection of the civil rights of Americans. There is considerable controversy over the definition of these rights, for example, whether enforcement of them requires bussing and whether they extend to a right to have an abortion. However, the concept that these questions should be addressed at the federal level in the context of a nationally uniform concept of citizen rights is widely accepted. Also widely accepted is the concept that as a nation we do not favor entrusting enforcement of these rights to individual states and cities.

Other functions also seem to be lodged in the federal government by general consensus. One of these is the general research and information collection function. The benefits from space research, health research, economic data collection, etc. are national in scope and the costs are appropriately financed on a national basis.

There are also certain "systems" which are designed to serve all citizens and are appropriately financed nationally, although there may be state or local roles in the implementation of some nationally defined systems. Whether some or all of the services in such systems are provided privately or publicly, the decision making on the systems can

be national in scope, if there is to be government decision making at all. Examples of such systems, besides the postal system, include the air transportation system, multi-state systems of water supply and navigation, a system of roads connecting population centers, a system of parks of national value and interest, a weather prediction system, a mapping system, a system of insurance for financial institutions, a system of check clearance and credit regulation, and a nationally uniform pension system (Social Security and Medicare).

REGULATION OF COMMERCE: The commercial motivations of the founding fathers were substantial. Having a strong national government was seen as protecting commerce by making uniform national rules on the avoidance of contract by bankruptcy, preventing internal tariffs and other limits on trade, providing a national standard of value for currency and goods (weights and measures), and providing a postal and post road system.

Many of these motivations would seem relevant, and consistent with the intent of the Framers, today. They would seem most relevant to the notion of inter-state movement of goods and services where national action may be the only way to protect citizens of one state from individuals or firms resident in another state. Federal regulation that can easily be justified on this basis includes regulation of inter-state land sales, regulation of drugs and cosmetics, regulation of food (e g., meat inspection standards), and regulation of transportation of products in support of state laws prohibiting use or sale or restricting use (e.g., narcotics, alcohol, gambling devices, prostitutes). This regulatory approach can also easily be seen as covering securities regulation and the currency power as extending to the creation of currency through bank loans and other financial transactions.

The scope of federal activity affecting commerce is, of course, much more substantial than that described above. Some examples are federal regulation of wages, hours, and working conditions and federal regulation of collective bargaining. The federal government seeks to prevent anti-trust violations and enforce trade practices. It also regulates particular industries, such as mining and railroads, and influences business conduct heavily through the tax laws. The question is how much of this type of federal activity is appropriate and how much should be left for state and local government. Here, and elsewhere in the report, whether the activity should be regulated is not being considered. Instead, we are assuming that regulation of the current type will continue to be provided and asking the appropriate level of government to provide it.

The strongest argument for regulation by the federal government in such areas as labor relations, occupational health and safety, unemployment compensation, compensation for industrial injuries, mine safety, pollution control, and product safety is that, without federal regulation, competition among the states would undermine regulatory effectiveness. States wishing to attract industry and/or states whose politics were dominated by persons favoring industry positions, or totally opposed to regulation of these subject matters, would presumably maintain quite low (inexpensive) standards. This would encourage some movement of firms from high cost to low cost states, provide an advantage for firms in the low cost states, and put considerable pressure on the states with higher standards to drop them.

At the same time, many of the activities that could be reached by federal standards are de minimus in the impact of standards on persons living in other states. For example, the impacts of a 2,000 employee plant producing brakes are much different from those of the corner ice cream store. Using the test of externalities discussed above, the costs and benefits of the ice cream store regulation all fall on the citizens of the state with the store.

This combination of circumstances would seem to indicate concurrent state and federal jurisdiction. Federal law would provide minimum standards for firms or plants with significant impacts on interstate commerce. Federal power could be delegated to states that met federal minimum standards. States would be free to set their own standards for smaller firms where there would be no externalities (e.g., wages and hours of local business) and would have to meet federal standards where there were externalities (e.g., most air pollution). State regulation could be accepted as taking the place of federal regulation when minimum federal requirements were met. In such a case, there would be a federal payment to the regulating state that would be roughly equal to what the federal cost would be if the federal government administered the regulations being taken by the states.

This regulatory model is quite close to current policy in many areas. In unemployment compensation, the federal government establishes the basic principles of the program and collects a payroll tax that is returned to the states for the administrative costs of the program and the state employment security offices. The states have considerable flexibility in setting benefit levels and tax rates. Comparable arrangements exist for pollution control, workers' compensation, and a variety of other economic regulatory programs.

INCOME SECURITY: Currently, the most controversial portion of the federalism debate concerns state and federal roles in income security programs. However, there is some consensus on these programs. It is generally agreed that the federal government should continue to maintain a nationally uniform retirement system (Social Security) and an accompanying medical program (Medicare) as well as to assume its responsibilities for former employees (Veterans and civil service annuitants). The federal government also provides a minimum income for the aged, blind, and disabled under the Supplemental Security Income program, although this payment is still supplemented by some states.

Beyond this point consensus disappears. State governors and legislators have long argued that the federal government should have primary responsibility for programs of substantial money or goods transfer to poor persons. The Reagan administration's New Federalism proposal would shift the basic welfare (AFDC) program to the states in return for federal assumption of all or part of the income-tested medical program (Medicaid).

The issue of which level of government should handle income security can be viewed on both a static and a dynamic basis. On a static basis, viewing the subject at single points in time, there are significant disparities among states in potential needs for income security programs. Table 1 shows comparative poverty rates in 1975, the last year for which state-by-state data are available. The data are based upon a nationally uniform definition of poverty. If they were adjusted for the higher cost of living in some states, such states, including Alaska, would show higher percentages of persons in proverty.

TABLE 1: COMPARISONS OF POVERTY RATES
Percent in Poverty, 1975

	Persons	Children (5-17)
Alaska	6.7%	6.4%
UNITED STATES	11.4	14.5
Connecticut	6.7	8.4
West Virginia	15.1	18.9
Mississippi	26.1	32.6

The sharp disparities in poverty population shown in Table 1 are not totally reflected in participation in social welfare programs. States, such as Mississippi and West Virginia, with high poverty populations also have low fiscal capacity and tend to have low welfare payment levels and stricter eligibility standards than more affluent states. Thus, the national average for public aid recipients (AFDC and

SSI) as a percentage of population was 6.5% in 1980. In Alaska, the percentage was 4.6%; in Mississippi, the highest state, 11.4%; and in Nevada, only 2.3%. On a national average basis, the percentage of persons receiving food stamp assistance in 1980 was 9.7% while it was 8% in Alaska and 20.6% in Mississippi.

Currently, the amount of income security assistance a United States citizen receives is highly variable with the state of residence. All citizens are eligible for Food Stamps on a nationally equal basis. The availability of housing assistance varies with the willingness of local housing authorities to participate in federal programs. The coverage of free medical care under the Medicaid program varies, both in terms of services that can be provided and eligibility for the program, from state to state, with the more affluent states tending to provide loser eligibility criteria and more services. Welfare eligibility also varies with some states permitting assistance to "intact families" (two parents in the home) and some not. Payment levels vary considerably as well, with 1980 average monthly payments of $280 nationally, $359 in Alaska (which has a substantially higher cost of living than the national average), $399 in California, and $88 in Mississippi.*

On a dynamic basis, there are significant changes over time in income security needs in various parts of the United States. This is most obvious in the case of unemployment. Employment and unemployment tend to gyrate substantially in the industrial Midwest. Employment in other areas, such as the rural South, experienced decline for many years. New technology and tastes are likely to shift the burdens of unemployment from state to state in ways that cannot now be predicted.

State leaders believe that the disparities among states in poverty and welfare dependency rates, the potential future variability of those rates, accompanying disparities in state fiscal capacity, and the fact that unemployment and dependency relation to national economic trends over which they do not control all suggest that responsibility for "safety net" programs should be federal. This would suggest full federal financial responsibility for Social Security (now federal), Medicare (now federal), Food Stamps (now federal with state sharing of administrative costs), subsidized housing (now federal), Supplemental Security Income (federal with state supplements), AFDC (shared state and federal), and Medicaid (shared state and federal).

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*All data in the paragraph above are from STATISTICAL ABSTRACT OF THE UNITED STATES, 1981, various tables.

The Reagan administration is clearly interested in returning responsibility for relief and related income-tested programs to the states. Actual proposals have fallen short of this target mainly because the costs of full state assumption would be extremely high and politically unacceptable. A discussion of the proposal now under consideration will be found in a later chapter of this report.

One principle is that the government that is responsible for causing poverty is responsible for any safety net programs to deal with it. This suggests federal responsibility for poverty and unemployment associated with federal actions, such as tariff reduction, and an uncertainty about responsibility when poverty and unemployment are associated with national economic fluctuations. The states clearly do not control these fluctuations, but the national government's control is, at best, incomplete. As a practical matter, much of the poverty in the United States is not caused by short-term economic fluctuations but by longer term economic changes and various demographic circumstances that have persisted for generations. In the case of some native populations, life-styles centuries old are now defined as poverty through contrast with modern life-styles elsewhere in the United States. In other cases, as in Appalachia, large populations were drawn to areas by economic opportunities which were later sharply reduced by changes in technology and tastes for goods and services. Unless one takes a very activist view of the role of governments, this poverty is not necessarily caused by any level of government.

Another approach to the subject is to consider responsibility for poverty in terms of which government has the tools to deal with poverty. This criterion produces highly ambiguous results. State and local governments control education, one clear route out of a life of poverty. However, the federal government is the primary source of funds for manpower training programs, a presumed route out of poverty for adults. State and local governments control preventive health programs, but with substantial federal financial participation. State governments control employment services, but under a federal program with federal standards, and would be the logical administering agencies for any working requirements (workfare) associated with income transfer programs.

Another approach to the subject is to consider the best level of government to administer the income-tested programs. State and local governments now administer the AFDC program, the costs of which are shared with the federal government. The federal government could administer this program just as it now administers Social Security and the income tax. Alternatively, the federal government could pay for the program and have state and local governments handle the administration, which is now what happens with Food Stamps. However, the result of such an arrangement is constant disputes between the federal government and

state and local governments. The federal position is that state and local governments do not have adequate interest in tight administration of the program because they do not bear any of the program costs associated with loose enforcement of eligibility criteria.

If the American public approached this subject anew, it might be that they would have hit upon an arrangement in which the federal government made payments to the states for dealing with low income persons. These payments would be based upon a measure of need (e.g., number of persons in poverty) so that the national government would provide more assistance to those states where the income security needs were greatest. However, the program might also incorporate some measure of fiscal capacity, reflecting a concept of shared state and federal responsibility. The federal government would meet only the needs that could not be met with reasonable effort on the part of the states. The selection of programs for assisting the poor would, in this scheme, be left with the states. Although some of the arrangements currently under discussion might lead in this direction, all levels of government have become so locked into existing programs that this is not now a politically realistic alternative.

CATEGORICAL ASSISTANCE PROGRAMS: The current network of federal domestic assistance programs grew in an environment where concerns about the overall relationships of national and state and local governments were basically ignored. In an environment in which such concerns were paramount, it is unlikely that the present large numbers of categorical grants would have developed.

ADMINISTRATIVE FEATURES OF THE RELATIONSHIP: If one were designing a federal system from scratch, it is likely that the current loss of political accountability would be avoided. For reasons discussed in detail in later chapters, the categorical grant system tends to place power in the hands of non-elected lower level state and federal officials. To avoid this situation, one would need much clearer definitions of national and state and local roles. In some of the regulatory areas discussed above, this would probably consist of some national minimum standard with states exercising options beyond the minimum and having considerable flexibility in administrative arrangements. In some areas, this would mean simply having no federal involvement at all. In still others, it might mean categorical grant programs administered on a formula basis with state participation contingent on statutorily defined performance minimums.

SUMMARY

This chapter has reviewed various methods by which one might find some guiding principles for dealing with the relationship of the national government to the states. This quest can be viewed as mostly a failure. Constitutional and historical approaches lead to results that are not controlling precedents today and are inconsistent with the issue-by-issue positions of many state and local officials, not to mention Members of Congress. Criteria, such as those suggested by ACIR, are not easily applied to real world situations, and most suggest lines of argument rather than presenting definitive prescriptions for action. Considering alternative theories, as is done in the latter part of the chapter, also produces ambiguous results when applied to such fields as pollution control and regulation of the workplace. The fundamental problem is that some subjects of governmental action include elements that are so local as to make total federal control absurd and elements so national as to make no federal action unthinkable.

Thus, the federal system is likely to continue to be characterized by ambiguities in the divison of responsibility among governments. It is not practical to eliminate these ambiguities. It may be practical to limit them and to adopt policies which diminish their negative effects.

FEDERALISM IN OTHER NATIONS*

CONDUCTING INTERGOVERNMENTAL RELATIONS: In the United States, there are essentially no organized mechanisms for state-federal consultation, although considerable consultation takes place on an ad hoc basis. In other federal systems some of the consultative mechanisms are more formal. For example, in Australia there is an annual Premiers' Conference which brings leaders of the national government together with the state leaders. This is simpler in Australia than the United States because Australia's parliamentary system means that executive and legislative leadership are the same, so that each state can be represented with a single voice. The Conference does not have any legal authority but has become an institutionalized forum in which national leaders present their proposed programs affecting states. There is also a Loan Council in which the six states each have a vote and the national government has two votes and the capability to break ties. The Council

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*The subjects covered in this section are covered in more detail in ACIR reports on federal systems in West Germany, Australia, and Canada, and a summary report, STUDIES IN COMPARATIVE FEDERALISM: AUSTRALIA, CANADA, THE UNITED STATES AND WEST GERMANY (1981), dealing with comparisons of the United States and those three countries.

has jurisdiction over non-defense long term borrowing of all the governments involved, thereby permitting coordination of this aspect of government impact on credit markets. Australia also has a grants commission, with three part-time lay members, that has no formal powers but is highly effective in influencing legislative actions on grants. Canada, like the United States, lacks formal consultative mechanisms such as the Australian Premiers' Conference. However, Canadian intergovernmental relations is characterized by large numbers of conferences, 782 of them in a recent year, involving primarily career officials of national and provincial governments.

The West German Constitution, basically that dictated to the Germans by the occupying powers at the end of World War II, was designed to reduce the power of the central government and place considerable power in the states. One of the ways by which this is done is through a bicameral legislature with one house representing the states. Representatives in this house can be recalled by the states that send them. The concurrence of this house is needed on many important national matters handled by legislation.

In the late 1960's, Germany began a state-federal fiscal planning process designed to permit state and federal officials to coordinate their budgeting processes. This has resulted in the creation of two state-federal planning bodies, but these bodies do not have substantial power.

RESPONSIBILITIES FOR TAXATION: The responsibilities for taxation in Australia are similar to those in the United States, with the federal and state governments having power to tax the same sources. However, in practice the governments use separate tax sources. The payroll tax is levied at a nationally uniform rate but all proceeds go to state governments. The national government relies on sales taxation and customs. State governments administer sin taxes (e.g., liquor, gambling) and, by tradition, local governments use the property tax.

Canadian federal and provincial governments have overlapping taxing authority. Income taxes, which account for 38% of governmental revenues, are generally collected by the national government for both levels of government, but the provinces set the rate for that portion of the tax that is turned over to them. In Canada the provinces own the natural resources, so that revenues from resources are a significant item for some of the provinces.

Most German government revenue is obtained from shared taxes. The shared taxes are the personal and corporate income tax, the value added tax, and the business tax. Thus, the financial position of the state

governments is secured in large part through shared taxes rather than grants from the federal government.

INTERGOVERNMENTAL TRANSFERS: Australia provides equalization grants to its financially weaker states, and only to them. The distribution is based upon the concept that those states should receive enough federal assistance so that they can provide the same services as "standard states" where most of the population resides with the same level of taxes as those states. Australia also has specific purpose (categorical) grants but has been reducing reliance on these since 1977.

The Canadian national government makes equalization payments to many, but not all, of the provinces using the equalization logic described above for Australia. The federal government also provided 50-50 cost sharing of provincial programs for hospital insurance, medicare, and higher education for many years. In 1977 Canada changed this system from open-ended matching of provincial costs to a program that is independent of provincial costs, but does require provinces to meet nationally defined minimum standards for these programs. The total grant amount is defined as a base year amount plus an escalator related to economic growth. Part of the grant is cash and part is raised by the provinces which were yielded the right to take a portion of the income tax. This shift to unconditional grants with minimum standards reduced the detailed federal day-to-day involvement in these programs.

As noted above, a large portion of German revenues are shared among the various levels of government. In addition, Germany provides equalization payments from the federal government. There is also a unique system which results in shifts of resources from the richer states to the poorer ones. Germany also maintains some relatively small programs of categorical grants, but the level of federal dictation of state and local conduct under these grants is not nearly as high as in the United States.

CONCLUSIONS FROM THE COMPARISONS: ACIR reached three basic conclusions from its study of federalism in the three countries discussed above:

(1) Fiscal federalism as organized in the United States is less formally structured, more fragmented, and consequently less neat and orderly than in any of the other three countries.

(2) The United States grant system is more complicated and extensive than is the case abroad.
(3) The United States pays less attention to the goal of fiscal equalization than do Australia, Canada and West Germany.*

Intergovernmental relations in the United States is clearly "messier" than in the three countries studied. Part of this results from the fact that at each level of government in the U.S., three branches of government are involved. In the three countries, with parliamentary systems, the executive and legislative leadership are the same and the courts play a lesser role in federalism issues than in the United States. There are also many more actors in the United States because the United States has more states and local government is a more significant factor here than in the three countries.

However, the constitutional apportionment of responsibilities in Germany, the various consultative bodies in Australia and, to a lesser degree, the conferences in Canada all tend to give intergovernmental relations in the three countries more structure than in the United States.

The American grant system is considerably more complicated than those in the three countries. More grants are involved, more money per capita is involved in categorical grants, and the administrative mechanisms are more cumbersome.

While the American general revenue sharing program is oriented toward fiscal equalization and some grant programs take fiscal capacity into account, ACIR concludes that "The United States ... pursues equalization to a lesser extent and measures fiscal capacity in a less rigorous manner than do the federal systems of Australia, Canada, and West Germany." As ACIR sums it up:

> Fiscal equalization, however, is the exception rather than the rule in the United States. Even in equalizing programs, measures of fiscal ability are combined with factors designed to represent program need so that no program in this country distributes aid with the exclusive purpose of lessening fiscal disparities. It thus follows that, unlike the other countries studied, the U.S. has no targeted program of equalization aid under which the richer states do not receive any financial assistance.

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*COMPARATIVE FEDERALISM, p. 93.

PART TWO: CURRENT STATE-FEDERAL RELATIONS

CHAPTER THREE: FEDERAL LAW AND REGULATION

INTRODUCTION

The federal government interacts with state and local government in three basic ways. First, the federal government operates as national lawmaker. It affects state and local government through interpretations of the Constitution by the Supreme Court and by the passage of laws affecting them by Congress. Second, the federal government is grantmaker, affecting state and local government actions by providing money and guidelines on how to use it, and sometimes cross-cutting requirements forcing these governments to do or refrain from doing something in order to continue to be eligible for grants. Finally, the federal government as an entity has important impacts. It is a large employer, particularly in Alaska, a large land owner, particularly in Alaska, maintains many facilities, and may impact significantly on state and local government through its relationships with Native Americans and foreign governments.

An understanding of how the federal government now operates in these three modes is essential to consideration of potential changes. Thus, this part of the report describes and analyzes current federal operations, providing a chapter on each of the aspects of federal operation discussed above.

Historically, federal-state activities have been basically cooperative. That is, when the federal government desired to induce certain conduct by state and local officials it would typically offer them a gran. in return for that conduct. Federal restrictions were closely tied to the grant. What the private sector knows as regulation, instructions from the federal government with no accompanying federal grant, was largely confined to the private sector.

However, federal regulation is an extremely important aspect of state-federal relations. In some cases, the federal government regulates the private sector, but in ways that preempt or interfere with state regulation. In other cases the federal government regulates state and local government directly and outside of the context of any grant program. Finally, the regulation is handled by many different actors including the courts and federal regulatory agencies.

PROTECTING THE RIGHTS OF CITIZENS

There has been a long history of federal preemption of the decisions of state and local government in civil rights. The areas in which the most regulatory activity has taken place have been in protecting the rights of the criminal defendant and minorities. While

there are still substantial controversies in both fields, there now seems to be widespread acceptance of federal involvement in them.

The acceptability of this form of intervention probably relates to a number of historical factors. The first of these was that a civil war was fought specifically over the question of whether the federal government could intervene to protect civil rights, specifically by ending slavery. This question having been decided, the Fourteenth Amendment was passed which specifically applied civil rights tests -- such as not abridging the privileges and immunity of citizens, depriving a person of life, liberty, or property with due process or denying equal protection of the laws -- to state governments. By interpretations through the years, that amendment is seen as giving protection from state action for all the rights of U.S. citizens stated in the Bill of Rights.

The federal courts have shown little hesitancy in accepting jurisdiction of civil rights cases even when what they were doing was requiring actions by state and local officials. Federal court decisions in the name of civil rights mandate spending for improving prison conditions, patient-staff ratios in mental health institutions, and various other expenditures in each.

The most widely known situations where judicial activism in civil rights makes major changes in the conduct of state and local functions is the implementation of school desegregation. Judicial decisions have required not only busing within the same school district, but have overridden the geographic scope of school districts for the purpose of finding pupils outside of a district to promote racial balance within it.

Federal constitutional law has also had major impacts on the pattern of law enforcement. Federal rules, derived by the courts from interpretation of constitutional requirements cover investigatory procedures, arrest procedures, questioning and incarceration, procedures at trial, and sentencing.

Constitutional interpretations by the Supreme Court have also created some of the most emotional issues in American politics. Two current examples are abortion and school prayer.

The protection of constitutional rights has been extended by statute through a variety of enactments. For example, age discrimination was prohibited by the Age Discrimination Act of 1975. Anti-discrimination requirements are applied directly to state and local governments through federal law and are also applied through the provisions of specific grant programs. For example, general revenue

sharing -- which goes to all general purpose local governments -- has an anti-discrimination requirement and the block grants authorized by the Omnibus Budget and Reconciliation Act of 1981 contain a prohibition against discrimination on the basis of race, color, national origin, sex, age, and physical handicap.

The continuing evolution of judicial protections of civil rights is moving fast enough so that it is possible that regulatory impacts on state and local government will increase even at a time when discrimination is becoming less and less of a problem. A good example of this is the litigation that has developed out of Section 1983, an 1875 amendment to the Civil Rights Act of 1871. The section provides that a person who "under color of" state law causes the deprivation of civil rights shall have personal liability to that person for damages.

Both the protection of state governments from suit provided by the 11th Amendment to the Constitution and defenses available through acting in good faith meant that the section was not a significant source of litigation affecting state and local government until 1961. In that year, the Supreme Court allowed the application of the statute to individual Chicago police officers involved in an illegal search. In a 1978 case, the Supreme Court decided that the governments involved in such actions, as well as the individual persons, were subject to suit, with some restrictions. The key restrictions were lifted two years later when the Court eliminated good faith as a defense. This created a substantial liability potential for municipalities. For example, one leading case involved a Chief of Police who was dismissed without a formal written reason or hearing. Such a dismissal was found to create a civil rights violation by a Supreme Court case decided AFTER the officer was fired. In a subsequent opinion, the Court extended the capability to sue municipalities to violations of federal laws, not just the Constitution. Litigation of this type permits recovery of attorney's fees in certain circumstances. The combination of these factors has resulted in litigation with over $4 billion at issue.*

The potential impact of continued judicial activism in the civil rights area on state and local government is indeed substantial. Civil rights issues have reached the Supreme Court in the context of decisions such as controlling the location of adult movie theatres, rezoning for low and moderate income housing, and whether zoning can prevent occupancy of housing units by non-related persons or extended family members such as grandparents. Civil rights decisions also, of course,

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*Cynthia Colella, "The Mandate, the Mayor, and the Menace of Liability" in INTERGOVERNMENTAL PERSPECTIVE, Fall 1981.

affect state and local governments in dealing with their employees, with decisions involving such questions as whether cities can require a larger pension contribution from women than men on the grounds that women live longer.

REGULATION RELATING TO NATIONAL DEFENSE

Another area of federal regulation is that related to the national defense, about which there is also little argument. Clearly, if the nation's defense will depend in part upon the National Guard, state guardsmen will have to train in ways set by the federal government and be subject to federal regulation. Clearly, the federal government will need authority to conscript persons, take property, etc. in time of military emergency.

The consensus on clearly military regulation does not necessarily extend to other regulation done in the name of national security. Responses to various energy crises have included federal rules governing allocation of supply, changes in speed limits on state and local roads, changes in local traffic regulations (e.g., right turn on red), and mandates from the federal government to state utility commissions. These economic regulations are probably best understood as coming from factors other than national defense.

COMMERCIAL REGULATION

INTERSTATE TRANSPORTATION: The federal government has long regulated companies engaged in the inter-state transportation of goods and persons. Over a century ago, the courts established that strictly intra-state transportation could be regulated incident to this power. For example federal regulations can prohibit unreasonable railroad charges for short hauls, where there are no competing carriers, to cross-subsidize longer hauls.

The federal government maintains exclusive jurisdiction over the airways system and regulates the aspects of state and local airports that are related to flight safety. Federal laws preempt state laws on such matters as the alcoholic beverage regulations applied to planes in flight.

The federal government has the power to regulate water-borne inland navigation. The Corps of Engineers does this for commerce that could affect the navigability of the waterways. Rates for waterborne commerce are not regulated by the federal government or the states. Ports and terminals for inland water-borne commerce are normally provided by the private sector and state and local port authorities, which are not regulated by the federal government. The regulation of ocean shipping

safety and rates is federal.

The federal government is the primary instrument for the regulation of railroad rates and terms of service through the Interstate Commerce Commission. The federal government has also undertaken some responsibilities in the area of railroad safety, duplicating regulations in some states without preempting them. There are some overlapping state and federal responsibilities in such matters as the management of grade crossings.

The federal government has also been active in the regulation of interstate trucking, including moving companies and bus companies. However, states maintain jurisdiction over the licensing of the vehicles, which can include safety requirements that overlap the federal requirements. States can make their own regulations on what kinds of vehicles can use the highways, and do set separate standards on such subjects as permissible truck weight and hazardous cargos. There is also some state regulation of intra-state trucking and bus operations.

States set licensing requirements for motor vehicles and can set standards affecting car design, as California has done in the case of emission standards. However, the federal government can also set vehicle design standards and has done so both as part of pollution control and energy conservation efforts, and has also set standards relating to such factors as bumper strength under the Motor Vehicle Information and Cost Savings Act. The states have authority to set speed limits, determine whether or not to have inspection programs, etc., but much of this authority has effectively been shifted to the federal level because of provisions which the states must accept in order to continue to receive federal highway funds.

COMMUNICATIONS: The federal government has totally preempted the field of broadcasting by television and radio using the airways. The broadcast spectrum is allocated by the Federal Communications Commission which regulates everything from ham operators to major TV stations.

Cable TV, which does not use the airways, is subject to licensing and regulation by state and local government although legislation is pending in Congress to limit state and local roles in regulating cable operations.

The federal government also regulates telephone communications that are interstate, while local phone service is regulated by the states.

PUBLIC UTILITIES: Regulation of gas and electric utilities, like telephone service, is split between the states and the federal government. In terms of rates, the federal government regulates

interstate rates, while states regulate rates for gas and electricity (and water, which is not regulated by the federal government) sold within a state. As a practical matter, the federal control extends to wholesale contracts provided to municipalities and cooperatives that resell power.

Federal control over the navigable waterways gives the federal government authority to veto proposed powerplants using impoundments (hydro) or significant withdrawals of cooling water (which all do). Federal control over atomic energy gives the federal government the power to license nuclear plants. Conventionally powered plants do not require licensing, but federal pollution control requirements must be met.

Under the Natural Gas Pipeline Act of 1968, the federal government is also involved in the regulation of pipeline safety.

Periodically, proposals are made at the federal level to preempt a variety of state and local laws relevant to public utilities. Power plant siting proposals involve a national finding that a particular site should be set aside in the national interest and would preempt state police powers relative to site development. The proposed coal slurry pipeline legislation would override state law regarding the taking of private property and other local zoning and land use restrictions.

PRODUCT SAFETY AND LIABILITY: The Consumer Product Safety Commission is empowered to enforce safety standards for products such as lawnmowers, bicycles, and power saws. This legislation does not preempt stricter state standards, although as a practical matter states do not normally regulate product safety. Under the Flammable Fabrics Act the federal government regulates the flammability of fabrics such as children's sleepware. Federal law also regulates the contents and labeling of bedding materials.

The liability of manufacturers to users for product defects is covered by state law. However, there has been serious consideration of federal laws to set uniform product liability laws.

The Food and Drug Administration regulates food additives, cosmetic ingredients, medical appliances, and drugs. The agency also regulates radiological products. States can legislate in these areas, but generally do not do so. Federal regulations also cover the production and distribution of meat and poultry. These laws and regulations do not preempt state and local regulation, but as a practical matter have generally discouraged state regulatory programs.

LABOR RELATIONS: The federal government regulates labor relations in all firms of significant size and there are periodic attempts to apply the national labor relations law to the relations between state and local governments and their employees. Federal regulations set a minimum wage for firms affecting interstate commerce and have provisions relating to maximum hours, migratory labor, child labor, when overtime must be paid, etc. The federal government also regulates private employer pension plans.

The Workers' Compensation system provides compensation for injuries in the workplace. It overrides state tort laws whch previously set the liability of employees injured on the job. Special laws are applicable to longshoremen and coal mine workers. The Occupational Safety and Health program regulates working conditions to ensure safety of workers.

FINANCIAL INSTITUTIONS: The prime federal influence on the banking system and related financial institutions is not, strictly speaking, the exercise of regulation through the passage of federal laws requiring specific conduct. The Federal Reserve Board handles clearing transactions and the flow of credit on a short term basis in the banking system. Pursuant to this function, the Board regulates banks that are a member of the system. The Federal Deposit Insurance Corporation and Federal Savings and Loan Insurance System provide insurance for depositors. Membership in these systems, which is not required by federal law, brings certain regulatory consequences. Other credit mechanisms exist for consumer cooperatives and credit unions.

The federal government also preempts state legislation dealing with money and credit. The most recent example is legislation dealing with state usury laws, which effectively repealed such laws unless reinstated by actions of the state legislatures subsequent to the passage of the federal legislation. There has been preemption by court decision of state laws relative to the assumption of home mortgages. The securities exchanges and sales of financial instruments are regulated by the Securities and Exchange Commission. Some states have "little SECs" that pursue comparable regulation for securities not sold across state lines. While states charter corporations and set rules for their functioning, considerable recent litigation has developed challenging state laws designed to prevent unfriendly corporate takeovers.

ENVIRONMENTAL PROTECTION: Acting under their police power, state governments and local governments given the power to do so by the states, can adopt widespread rules governing the use of land and water, air, and noise pollution. The federal government has entered this field with various cooperative state-federal programs relating to air pollution, solid waste disposal, noise pollution, water pollution and safe drinking water. As a legal matter, federal regulations do not

preempt state ones, but as a practical matter the state control of pollution is generally handled through the cooperative state-federal program in which the federal government exercises considerable control through the grant mechanism. The laws in the pollution field generally require state plans that meet certain federal minimum standards. The consequences of having an unacceptable state plan include the possibility of the federal government doing its own enforcement and the loss of federal environmental protection funds to state goverment.

State law generally governs the use of land for solid waste disposal and states can license operators of landfills. However, federal preemption of some of this authority has been discussed, and regulations enforced through grant programs influence how this authority is used at the state level. Much the same situation exists in the handling of hazardous waste.

The federal government regulates water supply through the ure Drinking Water Act.

Federal legislation preempts state legislation respecting endangered species. Federal legislation also involves the Corps of Engineers in water diversions affecting navigable waterways, including the diversion of water from nearby wetlands and construction such as docks.

ANTITRUST AND TRADE PRACTICES: Federal law governs the anti-trust field and certain aspects of unfair trade practice law. State regulations are permissible in this field, but antitrust law can be applied to state actions, as it has been in professional licensing situations which discourage professional advertising.

LANDLORD-TENANT LAW: The federal government does not currently directly regulate the relationship of landlords and tenants except in federally assisted housing. However, proposals are under serious consideration in Congress that would use the grant mechanism to preclude local rent control laws.

SAFETY IN THE WORKPLACE: The Occupational Safety and Health Act is one of many areas where federal legislation is designed to permit state participation in the regulatory function while not precluding the effect of state laws regulating the same subject matter.

MINING: The federal government has long had mine safety requirements for deep mining, and more recently has regulated surface mining. These regulations do not preclude state regulations on the same subject.

AGRICULTURE: Most of the federal regulation of agriculture takes place through grant agreements with state and local governments and agreements between farmers and the federal government on acreage restrictions in relation to ability to use various farm subsidy arrangements. Federal regulation of the function also occurs through the foreign policy and trade powers. The Department of Agriculture is responsible for preventing the entry of diseased plants and animals into the country, has certain powers relative to the movement of farm goods in interstate commerce, enforces laws relative to humane slaughter and the research use of animals, and even is responsible for the prevention of cock fights. Meat and poultry inspection laws are enforced through cooperative state and federal programs in states that have chosen to participate, and are federal administrative responsibilities in the other states. The Department also enforces the U.S. Warehouse Act designed to protect farmers against warehousemen and maintains inspections of products containing eggs. Federal seed inspectors inspect seeds sold in interstate commerce. Also commission brokers and others handling perishable farm products are subject to a federal licensing procedure. The federal government also regulates the wholesale price of milk.

FISH AND WILDLIFE: The federal government regulates migratory bird taking and the Marine Mammal Protection Act as well as the Endangered Species Act, all of which preempt state legislation dealing with the same subject matter. Fishing in territorial waters of the United States is controlled through treaty agreements negotiated by the federal government and federal rules for fishing outside the three mile limit.

CRIMINAL LAW: Some federal regulation simply takes the form of declaring various activities to be criminal. For example, it is a federal offense to rob a bank, to transport women across state lines for immoral purposes, to smuggle cigarettes, to transport narcotics, etc. In general, the federal criminal offenses are consistent with state law in the sense that crimes under federal law are also crimes under state law. In general, duplication in this area is more of a problem for the criminals than for law enforcement officials, as the commission of many crimes makes one liable for state and federal prosecution and subjects one to the attention of law enforcement personnel from both levels of government.

FEDERAL REGULATION OF STATE AND LOCAL ACTIVITY

The bulk of federal regulation, as described above, is concerned with the regulation of conduct of individuals and firms, not governments. It is well established that when state and local governments undertake enterprises usually undertaken by firms (e.g., electric and gas utilities, Virginia's railroad, North Dakota's cement

plant, South Dakota's bank) these governments are subject to the same federal regulation applicable to private firms.

The extent to which the federal government can regulate governmental functions is more controversial, as is the exact definition of governmental functions. In NATIONAL LEAGUE OF CITIES v. USERY (426 U.S. 833 (1976)) the Supreme Court ruled in a divided vote that the federal government could not apply the national wage and hour legislation to state and local governments. This decision and the principle above regarding businesslike functions have caused controversy between Department of Labor and state and local officials over the subjects excluded from the protection afforded by the Usery case. The Department contends that such functions as the maintenance of state stores for the sale of alcoholic beverages, off-track betting, local mass transit, electric power generation and distribution, and certain other functions are "non-traditional" and are not government functions protected under the Usery decision.

These definitional conflicts arise in other areas as well. For example, New York State runs the Long Island Railroad. A conflict of laws exists between New York's Taylor Act which forbids public employees from striking and the Federal Railway Labor Act which guarantees to railroad employees the right to strike.

Another regulatory conflict arises out of the federal regulation of the structure of private pension plans. This federal regulation is carried out through the tax code which defines employer contributions to pension plans as non-taxable to the employee and deductible to the employer when various conditions are met, such as not discriminating against lower paid workers. The Internal Revenue Service has contended that these provisions are applicable to state and local pension plans. Many state and local officials have argued that they are not and have refused to qualify their plans through IRS, which has taken no major enforcement action to date.

The magnitude of direct federal regulation of state and local government is quite small in comparison with the regulation implemented through grant programs discussed in the next chapter.

SUMMARY: FEDERAL LAW AND REGULATION

The primary mechanism by which the federal government regulates state and local government is through grant programs. The limited attempts at direct federal regulation are of doubtful constitutionality under the Usery decision, so disputes over federal regulation of state and local government will probably continue to center on regulation through grants. The exception is federal civil rights enforcement where

broadened definitions of what rights are protected have triggered federal court involvement in state and local law enforcement, corrections, mental health, education, personnel administration, and other areas.

The current level of federal regulatory activity relative to the private sector is substantial by any standard. In some cases, the federal regulation touches subject matters not regulated at the state level. In other cases, no grant programs are involved nor is there formal coordination, but state and federal programs operate side-by-side as is the case in public utility and wage and hours regulation. In many cases, attempts have been made to develop cooperative regulatory programs through the grant mechanism. Pollution control, occupational health and safety, and meat and poultry inspection are examples. In still other cases, federal regulation is designed to preempt state and local regulation.

While some of the regulation described in this chapter fits with the general principles, such as externalities and economies of scale, outlined in Chapter 2, much does not. Current controversy over a proposed Federal Trade Commission order dealing with the conduct of funeral directors provides an example of a situation in which state governments already regulate the industry, as do proposed standards for used car sales. Certainly, federal regulation of cock fighting does not represent a situation dealing with externalities or in which a uniform national policy is essential.

Federal regulation of the private sector comes about because a group of people get concerned about a situation and muster enough power to get a law passed. The test of whether such laws can be passed is whether a majority can be obtained for passage. Throughout much of our history, neither members of Congress nor state and local officials were much concerned about the abstraction of the federal system as they faced specific issues such as aversion to cock fighting. The predictable result, as shown in this chapter, is that the scope of federal regulation of private activity does not reflect any consistent philosophy or principles on appropriate roles for the federal government and state and local governments.

CHAPTER FOUR: FEDERAL GRANT PROGRAMS

INTRODUCTION

Grants represent the cornerstone of the current system (or non-system) of federal-state relations. It is through grants that the federal government controls state-local administration of programs such as Food Stamps, Aid to Families with Dependent Children, Medicaid, Urban Mass Transit, Highways, and many others. It is through conditions attached to grants that the federal government can set the speed limit on every local road in the United States.

Procedures associated with grants have been, for most state officials, the single most important source of concern about federal policy affecting states. For example, in 1976 the National Governors' Association issued a publication FEDERAL ROADBLOCKS TO EFFICIENT STATE GOVERNMENT, which is an inventory of federal policies which hampered the effectiveness of state administration. The publication contains 44 pages of examples, almost all of which are from grant administration, rather than regulation.

Alaska's situation, however, does not mirror those of other states. Alaska is one of the states where federal land ownership is a massive factor in the state's development. Federal policies in dealing with Native Americans affect Alaska in major ways, as well. As a non-contiguous state, Alaska is much more affected by the Jones Act (requiring shipping among states to be in U.S. bottoms) than most other states. High reliance on oil revenues makes the state sensitive to energy policy and taxation. High reliance on fishing makes international treaties more important in Alaska than other states. Thus, federal grant problems may not dominate consideration of state-federal relations for Alaska as they do for many other states.

However, an understanding of grant program problems and potential solutions is critical to the work of the Statehood Commission for two reasons. The first is that while grant problems may be comparatively less significant in Alaska, they are still significant, as Alaskans suffer the same problems as people in other states, and have non-grant problems on top of them. Second, to be feasible politically, action to reform the federal system will have to build on a broad base of support throughout the United States. For Alaska's concerns to be acted upon in the context of a major revision of the federal system, that revision will have to include enough grant reform to satisfy those for whom grant reform is the primary motivation for considering changes in the state-federal relationship.

Grant spending by the federal government in the fiscal year ending in September of 1982 will be about $91.2 billion, down somewhat from $94.8 billion the previous year. Grant spending will account for about 13% of total federal spending in the current year and for a little less than a fourth of state and local spending. There are literally hundreds of federal government grant programs for state and local government.

THE LEGAL STANDING OF FEDERAL GRANT REQUIREMENTS

In 1923, the Supreme Court decided a landmark case that still controls the law of federal grants (MASSACHUSETTS v. MELLON, 262 U.S. 447, 1923). The Court viewed a potential grant as an offer of assistance by the federal government that could be accepted or rejected through voluntary decisions of individual states. It followed that the grants did not require the states to do anything or yield anything. The state could defeat any alleged ulterior purpose by "the simple expedient of not yielding", not accepting the grant and the conditions that went with it.

From this logic it followed that when a state entered into an agreement with the federal government to accept a grant it was validly bound by whatever conditions were attached to the grant. This condition could be one that the federal government could not impose directly through regulation. For example, it is widely conceded that if the Court follows past precedents, the federal regulation of state and local working hours rejected in the Usery case as regulation could be imposed as a grant condition.

In a companion case to the Mellon decision, the Court held that an individual did not have standing to challenge the use of general tax funds for a particular grant. Subsequent cases have held grant conditions valid that would require a state to amend its constitution to accept the grant, to shift public health responsibilities from county elected officials to a planning board, and to undo a part of a major reorganization of state government. Thus, there is little legal limitation on what grant conditions may include.*

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*For more detailed discussions of this topic, see David B. Walker, "Federal Judges and Federal Grants: A Dimension of Today's Dysfunctional Federalism (processed, 1979) and Thomas J. Madden, "The Law of Federal Grants" (processed, 1979).

DISSATISFACTION WITH GRANT ADMINISTRATION

State officials, and their local counterparts, have experienced numerous frustrations in trying to serve citizens effectively throughd grant programs. Some of the major problems today were identified by the governors in 1976 in their report on federal "roadblocks" to efficient state government. The six major problems identified in that publication were:

(1) Lack of coordination among federal departments or agencies limits the effectiveness of programs in solving problems and increases the administrative burden on the states;

(2) The federal executive branch exceeds its proper authority in some areas, encroaching on matters which are within the proper jurisdiction of the states;

(3) Federal regulations are prescriptive in methodology rather than oriented toward results;

(4) Excessive reporting and paperwork requirements must be met by states participating in federal programs;

(5) Funding and program implementation are delayed by lengthy approval procedures, absence of program guidelines, and other administrative practices which cause serious dislocation and inequities at the state level; and

(6) Lack of federal coordination and consistency in implementing indirect cost determination procedures creates continuing administrative confusion for states.

Comments such as these continue to be made by officials of both state and local government.*

These problems are also cited in reports from a variety of federal agencies that have examined the grants system. For example, Congressional Budget Office has considered federal mandates in FEDERAL

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*See, for example, "Federal Grants Management Reform," Hearings before the Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs, U.S. Senate (1979) and Office of Management and Budget, MANAGING FEDERAL ASSISTANCE IN THE 1980'S: PUBLIC COMMENTS ON THE DRAFT WORKING PAPERS ISSUED AUGUST, 1979 (OMB, 1980).

CONSTRAINTS ON STATE AND LOCAL ACTIONS (1979); the Commission on Federal Paperwork provided IMPACT OF FEDERAL PAPERWORK ON STATE AND LOCAL GOVERNMENTS: AN ASSESSMENT BY THE ACADEMY FOR CONTEMPORARY PROBLEMS; and the General Accounting Office has produced a number of reports on the grants system including FUNDAMENTAL CHANGES ARE NEEDED IN FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS (1975). ACIR has published extensively on reforming the grants system including a comprehensive report, IMPROVING FEDERAL GRANTS MANAGEMENT (1977).

The concerns of state officials have been reflected in the attitudes of Presidents Carter and Reagan. Both of these former governors have concurred in the need for grant reform. In 1977, President Carter wrote to the heads of federal departments and agencies: "Both my own experience in State and local government and the advice and comments I have received from State and local officials over the past seven months have convinced me of the need to simplify and streamline the administration of the Federal aid system."*

PROBLEMS WITH REGULATION IN GRANT PROGRAMS

QUALITY STANDARDS AND GOLDPLATING: State and local officials feel that federal regulations often force them to conduct activities in a more expensive fashion than they would conduct those same activities if using their own funds. In a derogatory sense, this is often called "goldplating." State and local officials know that it is generally more expensive to do something within a federal program than to do the same thing with state or local funding. This knowledge is based upon the experience of those officials in doing the same things (e.g., building airports and highways, providing social services) with federal funds in some cases and without in others.**

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*This memorandum and other documents dealing with Carter administration activities in this field will be found in FEDERAL AID SIMPLIFICATION: WHITE HOUSE STATUS REPORT (1978).) President Reagan has made sweeping proposals for changes in federal grant programs, which are discussed in Chapter 8 of this report.

**A good example is the direct comparison of comparable road projects, some with federal assistance and some without. See Los Angeles County Road Department, RED TAPE (1973) and RED TAPE II (1973) for graphic examples.)

Besides the cross-cutting requirements discussed below, there are some systematic reasons for higher cost in federal programs including:

(1) Federal programs add another level of reporting, as a federal agency will insist on reports of how its funds are being used;

(2) Federal programs involve delays, during which costs mount as people are underutilized;

(3) Federal programs require the establishment of new public consultation devices (e.g., mandatory advisory committees, special publication of notices and public hearings) which are overlayed on existing state and local consultative devices;

(4) Federal programs have very extensive appeal procedures;

(5) Federal programs have special administrative requirements governing purchasing, personnel, accounting, etc.;

(6) Federal programs generally involve extra paperwork for elaborate plans, quarterly reports, exception reports, etc.;

(7) Federal programs have audit requirements that overlay existing state and local auditing procedures, and, most important,

(8) Besides the procedural standards listed above, federal programs generally have higher "quality standards" than state and local governments have when using their own funds.

"Quality standards" are not simple issues because both sides of controversies about them are correct. At the federal level, line agency officials want to make sure that state and local officials do things right -- meeting the highest standards for everything from road construction to health services. Congress, by delegation to these line agency personnel, lets them insist on the standards in federal programs. However, Congress does limit the funding, which is why quality standards can safely be delegated from a congressional pespective. As a result, federal programs generally have a "do it right or not at all" characteristic.

A classic example is the Section 8 housing program, where new Section 8 construction, like new public housing construction before it, costs more than comparable housing provided in the private market because of quality standards (and paperwork). This reduces the number of persons assisted with any given federal appropriation, but does mean that those assisted get high quality buildings.

While federal officials can mandate a good job in dealing with part of the problem and ignore the rest, state and local officials generally do not have the luxury of dealing with problems this way. ALL roads must be maintained and all significant population concentrations must have roads, but limited resources mean that roads will not be perfectly built or maintained. ALL persons requiring institutional mental health care will get some kind of service, but limited resources mean that not all will receive care equal to that in private psychiatric hospitals. ALL school age children who want to attend public schools will be provided education. Thus, in most of their activities, state officials do not have the option of meeting the best (and most costly) standards for some part of the population and leaving the rest totally unserved. Federal officials do have this option in many programs.

The conflict between a federal approach of "do it right or not at all" and a state and local approach of "do the best you can with the resources you have available" emerges in a variety of programs.

A typical situation involves the staffing of day care centers, which has been an issue for many years. Obviously, other things being equal, the lower the ratio of children to staff the better the care. At least that is the conventional wisdom in this field. The federal government supports day care through Title XX (social service) and WIN (employment for welfare recipients) programs. Final new day care regulations released in early 1980 reduced the allowable child-to-staff ratio from six to five in facilities that serve infants as well as other children.*

Clearly, the regulations were designed to increase the quality of care by increasing the cost of care. In the absence of funding increases, which did not occur, the effect is also to reduce the number

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*The specific examples used in the remainder of this chapter are from a survey of states made by the National Governors' Association. Results are summarized in ELIMINATING ROADBLOCKS TO EFFICIENT STATE GOVERNMENT: THE GOVERNORS' GREEN BOOK (1981).

of persons who can be provided any care at all. Furthermore, because many day care facilities combine children funded with federal money with children whose parents pay, some of the higher costs will fall on the parents.

Another example of the quality standard situation is associated with federal support of highway rehabilitation. State highways generally are in bad condition. Much maintenance has been deferred and a considerable number of older roads do not meet current standards on permissible sharpness of curves and width of bridges. State highway officials have "logics" by which they determine which problems to solve first on what roads based upon such factors as accident records, the severity of the problem, the amount of traffic, etc. Federal officials are insisting that when federal funds are used for maintenance (e.g., resurfacing) that other work be undertaken so that the whole road meets quality standards. This requires state officials to deviate from their priority lists to "do it right or not at all".

CROSS-CUTTING REQUIREMENTS: Federal assistance is greatly complicated for federal administrators and grantees because the federal assistance programs have been chosen as the vehicle for implementing a wide variety of federal concerns unrelated to the purpose of the grant. These requirements apply both to the uses of the federal funds involved and to any state matching funds. They all increase cost, increase paperwork, and cause delays.

The Office of Management and Budget has recently identified some nearly 60 separate requirements of this type. They include:

- Nine different anti-discrimination requirements covering race, sex, age, architectural barriers to the handicapped, creed, national origin, alcoholism, and drug abuse,
- 15 different environmental protection provisions covering clean air, clean water, drinking water, endangered species, floodplains, wetlands, fish and wildlife, historic preservation, coastal zones, etc.,
- Three different provisions regarding "protection and advancement of the economy", such as the Cargo Preference Act,
- Three different health and safety provisions, including the Animal Welfare Act and protection of human research subjects,
- Two minority participation provisions, one for women and one for Indians,
- Three different labor standards provisions including the Davis-Bacon Act, an anti-kickback provision, and the Contract Work Hours and Safety Act,

- Two standards regarding public employee personnel policy,
- 10 standards on general administrative and procedural requirements,
- Nine "recipient-related administrative and fiscal requirements", and
- Two freedom of information requirements.*

Even assuming that these requirements were administered consistently by a single agency for each, which is not currently the case, these requirements involve adding costs to federal programs that would not develop in the case of state or local spending for the same purpose. Administrative costs are involved in certifications, studies of impact, etc. Real costs are imposed by requiring contractors to pay more for labor than they otherwise would (Davis-Bacon) and modifying plans based upon requirements.

PAPERWORK: In a report to the Commission on Federal Paperwork, the Academy for Contemporary Problems concluded from its examination of federal aid paperwork:

> If, as we suspect, the costs of this kind of paperwork are closer to five percent of total program costs, the annual cost is a little over $5 billion. Further, these estimates represent the minimum cost of Federal paperwork in federally-assisted programs operated by State and local governments. They include only the costs to the primary governments and do not include costs that can be passed on to other governments, to private businesses, or to citizens. The General Services Administration has estimated that such administrative costs may accumulate to as much as 35 percent of program costs. If the costs absorbed by individuals are included, the Federal paperwork burden may approach 50 percent of some program budgets.**

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*Office of Management and Budget, MANAGING FEDERAL ASSISTANCE IN THE 1980'S (1980), pp. 20-26.
**THE IMPACT OF FEDERAL PAPERWORK, p. 7.

Much of the paperwork in federal grant programs is driven by the nature of narrow categorical grants. For example, rather than providing assistance for health and mental health, the federal government separates these programs. Rather than providing a program for health, the federal government further divides these programs into individual health problems, etc. Recent moves to block grants have improved this situation somewhat but by no means solved the problems of large numbers of smaller categorical grant programs.

The narrow categorical programs inherently generate considerable paperwork just to make sure that funding affects the category defined in the program. This involves intricate tracking well beyond the federal funding itself. First, the uses of the federal funds must be monitored and checked. Second, the uses of the state matching funds must be monitored and checked. Third, state funds not involved with the program must be monitored to avoid "supplantation" (substitution of federal dollars for what the state would do in any case), and to ensure "maintenance of effort" (avoiding reduction of state contributions in the same field).

Leaving aside the special problems of categorical programs, the federal agencies routinely require of state and local agencies detailed paperwork far in excess of the paperwork which the White House, Office of Management and Budget, and Congress require of the federal agencies themselves in federally administered domestic programs. Examples are:

ELABORATE PLANS AND APPLICATIONS: Applications for federal programs routinely run to hundreds of pages. New applications are required each year even though much information does not change. State agencies are required to describe their environment, provide maps, show population by sub-areas, etc., evaluate program inter-relationships, provide information on plans for designated subgroups, show evidence of considering alternative strategies, response to federal initiatives, etc.

CERTIFICATIONS: State and local governments are not permitted to certify their procurement systems, accounting, auditing, personnel systems, etc. on a one time basis or for many different programs at once. They must do it at least annually for each of the federal programs involved.

In addition, they must certify to all kinds of things they are not doing, such as not violating the nearly 60 cross cutting requirements.

DENIAL REPORTS: In many programs, states must report on what they do not do as well as what they do. Thus, they provide reports on persons they do serve and on persons to whom they deny service.

FISCAL INFORMATION: State and local governments are routinely required to provide fiscal information in federal formats, which often do not match state and local accounting systems, and for time periods which are incompatible with those used in their own systems.

PROGRAM REPORTS: These are the most understandable reports, although required in more detail than is used. These deal with what was accomplished with the federal money.

STEP-BY-STEP APPROVAL PAPERWORK: Some of the federal programs, particularly in construction programs for waste water tratment and highways, are based upon a presumption that state and local officials are incompetent, trying to rip off the federal government, or both. Thus, these progams involve detailed review of plans and drawings, contractor selection, specifications, progress payments, contract modifications, etc. by federal officials.

State and local officials generally find this quantity of paperwork onerous, particularly when they compare it to the paperwork the federal agencies do themselves or to the paperwork required of them in state-administered progams.

LOW PRIORITY PROGRAMS AND REGULATION: State and local officials often complain that they are driven to low priority use of funds by narrow federal categorical grants.

Sometimes this is a result of creating categorical grants within a narrow categorical grant program. For example, in a survey of regulations in grant programs by the National Governors' Association,* one state reported that it could not use funds for feeding programs for the elderly for transportation to where the food was offered. The result, in areas not served by mass transit, was to redefine recipients as those who needed the feeding and who also owned cars, which one suspects is the least needy portion of the potential client population.

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*ELIMINATING ROADBLOCKS IN EFFICIENT STATE GOVERNMENT: THE GOVERNORS' GREEN BOOK, 1981

Often low priority uses of funds is a problem with a program, not within it. Narrow categorical programs deal with a need defined nationally that may not exist to the same degree in every state. Usually the problems of mismatch are not obvious and are hard to prove, as was the case in Southern states where officials found federal resources more than adequate for drug abuse but less than adequate for alcohol abuse. Sometimes, however, the mismatches are obvious as in the case of grade crossing protection funds allocated to Hawaii which lacks grade crossings and "weatherization" funds for that same state. Those funds were available to install insulation, caulking, etc. in a state where these are not pressing needs.

COST-INCREASING REGULATIONS: In the case of most federal programs, regulations that increase costs reduce the quantity of service that can be produced with any given quantity of federal dollars and state or local matching funds. However, in the open-ended programs of Medicaid and AFDC, such regulations increased total costs and thus the costs that had to be paid by state governments.

In 1980 some of the Medicaid regulation in effect required a state, to have any program at all, to adopt a complete schedule of basic services. If the state opted for additional services, it had to provide them to everyone, not just persons with the greatest need for them. States could not penalize Medicaid abusers by taking benefits away from them, could not steer patients away from high cost providers, and had to follow federal reimbursement standards even if they could make arrangements to buy the services for less. The Reagan administration has eliminated a number of these requirements, but a subsequent administration could reimpose them.

INCONSISTENT REGULATIONS: The premise of federal regulation involves substituting federal decisions for state and local ones. This presumes that federal officials know the right answer, that the right answer is the same for each state, and that state officials will not discover the right answers without federal guidelines. Considerable doubt arises about these premises when federal agencies issue inconsistent guidelines.

The most serious cases of inconsistent federal regulations occur in the federal cross-cutting requirements where a grant program in one field (e.g., transportation) is used to achieve other objectives such as historical preservation or equal employment opportunty. Problems arise through both legislation and regulation because the substantive and procedural requirements in one program's statute or regulations will differ from and/or partially duplicate those in the general statute dealing with the cross-cutting requirement. This problem frequently

arises in affirmative action requirements, where reporting problems and conflicting guidance have become a particular problem for universities. Another example is historical preservation values affected by highway programs, which are covered by two separate statutes. Examples of inconsistency appear in the paragraphs below.

How to handle purchases which involve the contractor's purchase of a commodity to perform work (e.g., asphalt for a highway contractor) is always a dilemna for private and public purchasing officials. If one does not permit the contractor to pass along a price escalation, some believe that contractors increase their bids by more than the amount of the likely escalation because of risk and uncertainty. Those officials prefer to absorb the price increase. Others believe that contractors may underestimate cost increases in their bid and do not permit escalation once the contract is signed. Current standard contract forms for the Department of Transportation reflect an attitude that federal officials have more insight on this issue than do state officials. Thus, both the Federal Aviation Administration and the Federal Highway Administration provide guidance on this subject. One prohibits escalation and the other requires it.

Dam safety requirements administered by the Corps of Engineers require that the safety of a dam be evaluated in terms of the risk involved in the event of failure, with the ability of an emergency spillway to pass a certain size storm for a given level of risk as the criterion. The problem is that federal agencies have inconsistent standards for the risk evaluation of dams, including having no agreement on the size of storms that should be used in such evaluations.

Different federal agencies have different standards for allowable costs, making it impossible to have a single automated accounting system that meets federal standards and state needs. For example, in highway projects the Federal Emergency Management Agency does not permit reimbursement of undistributed direct costs and workers' compensation. On the other hand, the Federal Highway Administration does.

Universities, particularly those using certain hazardous chemicals in research and practicing radiology in university hospitals, find dealing legally with pregnant women in "at risk" jobs impossible. Policies of the Nuclear Regulatory Commission and National Institutes of Health seek to exclude pregnant women from such jobs. On the other hand, civil rights requirements prevent discrimination based on pregnancy. States cannot achieve one objective without violating the other.

Federal agencies are also inconsistent on costs in the same project. For example, "weatherization" projects are often handled by workers paid through a Department of Labor program while materials are

purchased through a Department of Energy program. If a project is done by error (e.g., a project where the recipient's income was insufficiently low), Labor holds the sponsor liable, but Energy does not unless the error rate is above 3%.

CONTROL OF PROCESS, NOT RESULT: In general, state and local officials feel that federal agencies should be concerned with the results of programs -- persons provided assistance, jobs obtained, highways built, etc. -- in relation to funds spent. State and local officials resent excess federal dictation of processess that are used to achieve the results, particularly when the effect is to overlay a federal requirement on a state system that can and does achieve the same result. Examples are mandated forms of organizations such as advisory committees and boards, dedicated data processing, procurement rules, and personnel allocations.

SUMMARY: FEDERAL-STATE REGULATIONS IN GRANT PROGRAMS

There is general agreement by state and local officials and outside observers, such as the Advisory Commission on Intergovernmental Relations, that the federal system is badly congested and in considerable need of reform. This widely held view has given rise to reform efforts of various types that are described in Part Three of this report. The 1980's may be a time in which the political environment is right for a substantial reform of the way in which the federal government relates to state and local government, with grant reform being one cornerstone of the new relationship.

CHAPTER FIVE: OTHER FEDERAL IMPACTS ON ALASKA

INTRODUCTION

This chapter concludes the overview of current state-federal relations. Chapter 3 discussed federal law and regulation generally; Chapter 4 considered federal grant programs; and this chapter covers federal lands, federal employees and some issues, such as control of fish and game, that are of particular interest to Alaskans.

The purpose of this chapter is limited relative to the overall charter of the Statehood Commission. The commission is working separately on subjects, such as the implementation of the Statehood Act and the Native Claims Settlement Act of 1971, which are outside of the scope of this report.

FEDERAL EMPLOYEES AND INSTALLATIONS

There are a number of ways to consider the presence and impact of the federal government. One way is to consider the regulatory presence, the impact of federal laws, as was done in Chapter 4. Another approach is to consider federal money, taxes and spending. Still another approach is to consider federal personnel.

Interestingly enough, while the federal government has increased its financial and regulatory roles in the past several decades, there has been very little expansion of federal employment. Total federal civilian employment, including the Post Office, in 1981 was 2.9 million persons, about the same as in 1970. In the federal budget presented in early 1982, the president reported a reduction in employment from FY 1981 to FY 1982 and recommended further reductions of federal civilian personnel in FY 1983 and FY 1984. As a result of static federal employment and national population growth, federal employment as a share of population has been dropping.

While direct federal operations are a relatively insignificant economic factor in most states, they are economically very significant in Alaska. Estimated federal spending in Alaska on federal operations in FY 1981 was $1.9 billion, much more than the $495 million estimated to have been spent on grants. There were 41,200 federal civilian employees in Alaska in 1979, 22% of the Alaska non-agricultural work force. The

federal government in FY 1980 spent an estimated $765 million in wages and salaries, a significant contribution to total Alaska personal income of about $5 billion.*

To a significant degree, attention has been focused upon federal employment as a measure of the federal presence. Both Presidents Carter and Reagan have attempted to avoid increases in federal civilian employment as a matter of policy and, as indicated by the statistics above, have been successful in this policy. In the current political climate, it is reasonable to anticipate a continued attempt to reduce or at least not to increase federal non-military employment. As most of the federal employment in Alaska is military, this policy would not necessarily have an adverse impact on Alaska.

However, ceilings on federal employment have not proved to be effective ceilings on the federal impact on state and local government or citizens. For the administration of many domestic programs, the delivery system for federal programs is state and local government. The many state and local employees who are paid with federal funds are not included in reported totals of federal employment. In other cases, particularly in defense programs, the federal government has a choice between performing certain functions itself and contracting with firms to provide engineering, computer facility management and the like. It has been estimated that there are something like five million persons in the non-federal economy who are paid with federal funds.

Along with federal employees are federal installations, ranging from post offices and office buildings to military bases. One principle of federalism that has remained intact from the initial days of the United States is that state governments and their instrumentalities, specifically local governments, cannot tax federal property or operations and the counterpart doctrine that the federal government does not tax the states. The fact that federal property is exempt from taxation does, however, create a potential problem for state and local governments. These governments provide services to the installations (e.g., police and fire protection for a federal office building) without receiving the property tax revenues and various other revenues associated with comparable activity in the private sector. State and local governments also provide services to federal workers and their families without being able to tax the workplace of federal employees.

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*Information on federal spending in Alaska is from Institute of Social and Economic Research, University of Alaska, FEDERAL REVENUES AND SPENDING IN ALASKA (1981 with a 1982 update).

This situation has created pressures to develop some method by which the federal government can pay some of the costs imposed on state and local governments by its employees and installations, without subjecting federal property to taxes. Excluding public lands, the result has been an ad hoc collection of payment devices including some payments in lieu of taxes and, most important, the impact aid program for schools. In certain cases, federal assistance has also been proposed for private economic activity encouraged by the federal government. The Coastal Energy Impact Assistance program is an example.

These programs have long been the subject of political controversy. Proponents contend that they are necessary to offset the costs which federal activities impose on state and local govenment. Opponents contend that, in many cases, the economic benefits and even favorable impacts on government revenues of federal installations are greater than the costs of additional public services, so that there is no burden to be offset. Numerous studies, particularly of the impact aid program, tend to show that circumstances vary from one federal activity to another, making it difficult to tailor a nationally uniform program. In a budget sense, these programs are treated as federal grants, not as part of the federal costs of doing business. They are included within national totals of federal grants to state and local governments and have suffered with other grants the- impacts of federal funding reductions for grants.

Controversy over the extent of the federal obligation to reimburse state and local governments for lost property taxes and/or services provided to federal installations and employees has led to inconsistencies in federal policy from agency to agency and program to program. As ACIR puts it:

> The one generalization that can best be made regarding the array of federally owned property is that there is no guiding principle regarding the extent to which the federal government as a property owner should contribute to the financial support of state and local governments....
>
> In short, the federal payment and tax system is a patchwork of uncoordinated programs. The federal establishment could use similar amounts of real property in each of ten different localities and, depending on a host of different institutional factors, pay different amounts of tax revenues or in lieu payments -- or no payment -- to each of the ten jurisdictions.*

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*ACIR, PAYMENTS IN LIEU OF TAXES ON FEDERAL REAL PROPERTY (1981), p. 3.

From the perspective of the state of Alaska, it is particularly important that the federal government's obligations as a holder of property and employer of persons be separated from federal grant policies and programs. Many of the proposals, for example, for the reform of the federal system involve sharp cutbacks in the federal role in elementary and secondary education. If impact aid is viewed as one of many grants by which the federal government enters the educational field, it is subject to elimination as part of a sweeping "sorting out" of federal and state and local functions. To the extent that impact aid and in lieu payments are part of the costs of doing business, as indicated by such shifts as putting the costs in the budgets of the agencies whose property gives rise to the payments, funding for these programs will not be affected by reforms aimed at the regulatory and grant-making role of the federal government.

PUBLIC LANDS

BACKGROUND: The public lands of the federal government represent another special case of federal-state relations that is of particular importance to the citizens of Alaska. Under the Statehood Act, Alaska is scheduled to receive about 103 million acres of federal land, 29% of the total acreage in the state. Before the bulk of these transfers, the federal government owned, in 1979, 89.5% of Alaska land, including over 52 million acres administered by the National Park Service. This land ownership is a key aspect of the relationship between the federal government and a number of Western states.

The original thirteen states existed before the federal government and there was no such thing as federal land until the federal government was created. When it was created, the states of Virginia and Maryland agreed to give the federal government a 10 mile square area which has become the District of Columbia. The other federal land in these states is land purchased by the federal government for office buildings, military installations, and national parks.

The westward expansion of the United States occurred through purchases of territory from other governments. The federal government established rules for the governance and settlement of these areas in legislation such as the Northwest Ordinance. In the Midwest, certain sections were set aside for public use by what were to become state and local governments and the remainder was deeded to the persons who settled it. Because settlement patterns were relatively dense and all the land was considered to be of value, practically all land went into private ownership and there were no significant residual interests in land retained by the federal government.

In the West, the pattern was different. Land grants were made to settlers and some large land grants were made to railroads. However, large portions of the lands in the West and Alaska were simply not useful for the settlement patterns of division of land to individual farm families that would own and manage farms on the land. As a result, much of the land remained in federal hands. Starting with the admission of Ohio in 1802, the federal government has required states, as a condition of admission to the Union, to accept a "clause irrevocable" by which the state renounces any claim of title to federal lands within the state.

The application of this policy to the central portion of the United States made very little difference, leaving the federal government with title to lands that have been used for such purposes as national forests and parks. These landholdings are generally not the subject of significant controversy. The same cannot be said for the Far West, Alaska, or Hawaii. In these states, federal landholdings constitute large portions of the land area. Changes in technology, mineral exploration, and expanding population have increased the value of federal holdings and made land use controversial in the extreme.

CEDING FEDERAL LANDS TO STATE GOVERNMENTS: The tensions between Westerners and the federal government over land policy have a long history.* The issues have included grazing rights, water rights, timber cutting policy, mineral exploration restrictions, and various environmental controls. One obvious way for dealing with these problems is to remove the federal government from its major role as landowner, one theme of the "Sagebrush Rebellion."

The Rebellion can be viewed as a political movement with its core concern over federal land management. Its rhetoric is a collection of complaints over that management. Because the "rebels" have no single organization through which to decide policies, it does not have a definition of proposed remedies. However, it is clear that many concerned with this issue view ceding federal lands to the states as the appropriate solution. This view has been given some support by President Reagan who, in Anchorage in 1979, called the federal government, "land greedy, holding on to land that it was never intended to hold on to." In subsequent speeches, he indicated that he was one "who cheers and

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*For a good summary from a historical perspective, see Richard D. Lamm and Michael McCarthy, THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE-1982 (Richard Lamm is Governor of Colorado).

supports the Sagebrush Rebellion" and during the campaign pledged that "My administration will work to insure that the states have an equitable share of public lands."*

The Statehood Commission's preliminary report reviews the prospects for forcing the federal government to relinquish federal lands by court action and concludes that such prospects are dim indeed. The report also considers the prospect of obtaining the same result by legislation, and concludes: "The western and Alaska public lands, as Alaskans know only too well, are looked upon by populations in other parts of the country as common goods owned by and to be used by all U.S. citizens."** The report reviews the mathematics of congressional representation, which makes it obvious that major land conveyance to the Western states and Alaska will not take place without a plan that is acceptable to a substantial number of persons East of the Mississippi River.

The problem, of course, is that the energy-poor East sees public land transfers as potentially shifting nationally owned energy-rich properties to states and individuals already becoming rich from control of energy resources.*** In addition, there are substantial and vocal groups throughout the nation that wish to maintain large areas in their pristine state and that concentrate on federally owned land for this purpose.

Furthermore, the objective of turnover of federal lands to the states is not accepted by all Western leaders. Governor Lamm, for example, argues:

> Whoever the rebels are, whatever it is they want, their strategy is bankrupt. To the people of the West, the idea of land cession as leverage to extort improved federal public-lands management is risky enough. But the idea of land cession as an end in itself -- which is how most Sagebrush reactionaries see it -- is dangerous beyond imagination. The cession of the public domain to the western states would destroy the land and the states with it.****

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*Lamm, as cited above, pp. 317-318

**MORE PERFECT UNION, p. 22)

***See, for example, Northeast-Midwest Research Institute, THE UNITED AMERICAN EMIRATES: STATE REVENUES FROM NON-RENEWABLE ENERGY RESOURCES (1981).

****Lamm, as cited above, p .307.

Lamm argues that the states would not retain lands transferred to them. Instead, they would sell them and they would be resold to major corporate interests. He quotes former Idaho governor and Interior Secretary Cecil Andrus as indicating that cession would place the West in the hands of "the Exxons, the Mobils, and the Gulfs."

MANAGEMENT OF THE PUBLIC LANDS: If the states, by reason of Eastern opposition to cession or lack of Western interest in cession, do not acquire the public lands, the problem of perceived excessive federal power must be handled in the context of land management. There are really two basic issues in land management, substance and process.

In procedural terms, many of the complaints regarding land management relate simply to how the federal government makes decisions, rather than the substance of those decisions. As Governor Lamm states the complaint:

> The point is that, good laws or bad, the West has been voiceless in making them. That some have been good does not alter the hard fact that the West has become legally emasculated, that it is treated with arrogance and indifference, and that it still is living with the old, archaic federal-eastern assumption that the federal government is better equipped to rule the West than the West is to rule itself.*

The process by which public land decisions are made in Congress is inherently open, in the sense of being based upon open hearings and recorded votes. Decisions in Congress may be faulted in substantive result, and Westerners may resent not having a majority, but it is hard to fault the process. This is not necessarily true, however, in the administrative processes related to public lands. There questions of attitude, as expressed in concepts like Interior's current approach to being a "good neighbor," can affect substance as well as process. In addition, consultative mechanisms can be developed to reduce the friction between state and federal decision-makers. However, as noted in the chapter which follows, it is difficult for Alaskans, or anyone else, to guarantee meaningful federal consultation regardless of what the formal rules for consultation might be.

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*Lamm, as cited above, p. 241

One consultative device for use of public lands that appears to have satisfied some state concerns is the Department of the Interior's Coal Policy Team concept. These teams are used to deal with decisions relative to leasing federal lands for coal exploration and mining in each of the regions (basically coal basin areas) where leasing is significant. Each team has a representative of the governor of each affected state and a Bureau of Land Management (BLM) representative from the same states. The team is chaired by a BLM employee from outside the region. All of these members vote. Thus, in a basin encompassing parts of two states, there would be five voting members, three federal and two state.

The teams structure the technical work (e.g., environmental impact assessment) of their own agencies and other federal, state, and local agencies. Their open meetings often involve participation by local officials and officials of the many federal agencies besides BLM with an interest in leasing activity on federal land.

The coal team approach was adopted administratively by the Department of the Interior. The approach was not mandated by statute or federal executive order. This means that any subsequent Interior Secretary would be free to drop or modify the concept.

In terms of the substance of land management, Alaskans seem to have their greatest complaint over the general category of restrictions on land use. The complaints vary from restrictions on hunting, overcommitment of land to wilderness status, restrictions on mineral development, etc. As discussed in the final chapter of this report, some of these concerns can, without cession, be dealt with in the context of devolution of federal power while others cannot easily be handled in this context.

The themes of this report on the devolution of federal power obviously have some applications to public lands. The ownership of vast quantities of land does contribute to the pervasiveness of federal influence, makes it more difficult for citizens of the states to manage their own affairs, and does contribute to the costs and size of the federal government. Those concerned over a return to the principles of the founding fathers can also recognize that none of the founders expected the federal government to exercise massive powers as a landlord. The provisions of the Constitution relative to federal property were clearly designed to deal with such subjects as the ownership of forts and arsenals.

Attempting to suggest possible lines of approach to the lands question that could be merged with other approaches to federalism involves speculation, as no attempt was made in the preparation of this

report to interview political leaders on their views of the relationship between lands questions and questions of the federal role in grants and regulation. While it is speculation, it may be useful for the Statehood Commission to consider possible connections.

At the outset it should be noted that there is a general national consensus on valid reasons for the federal government to own and control the uses of land. The federal government needs land for military installations and for a national park system, the keystone of which is ownership of places of unique natural beauty that could reasonably be expected to draw visitors from throughout the United States. However, persons from east of the Mississippi have become interested in recent years in making sure that the benefits of the national park system are not confined to the West and have encouraged national park development in such places as Tocks Island (New Jersey) and the Cuyahoga Valley (Ohio) so that more national park spending would occur closer to population centers. The National Park Service budget has been sufficiently tight in recent years that the current administration has called a moratorium on park acquisition in order to concentrate resources on parklands already owned by the federal government.

Obviously, having land already in federal ownership makes it considerably easier to put such land into the status of parks. Even easier is to put additional land into the status of wilderness, as citizens of Alaska should know better than anyone. It would seem highly unlikely that any lands that are currently a part of the National Park System would be given to individual states except as a part of land swaps. Wilderness areas might be another question, but would probably never be ceded without substantial land use restrictions and not until enough time has passed to provide reliable information on the extent to which such areas are used (or not used as the case may be).

For the remainder of land, there can be several approaches to the transfer issue, including approaching the issues through both economic and political aspects.

In terms of the economics of the situation, it would appear unlikely that the federal government would transfer valuable mineral rights to the Western states. If the concerns over public lands relate more to control questions and less to a desire to gain from mineral exploitation, exclusion of mineral rights is not necessarily a problem for those seeking to shift control of land out of federal hands.

If mineral rights are out of the picture, it becomes reasonable to look at the current costs and benefits of the federal government holding large quantities of land in the West. Holding this land to current standards of operation is not costless. The Department of Agriculture

and Bureau of Land Management spend considerable sums for public land management. Some of these costs (the federal budget is not designed to show how much) are costs associated with earning income such as management of the national forests, administration of systems for permits of various kinds, and surveys. Other costs are essentially deadweight costs, affecting the interests of the states in taking over these lands, but also potentially affecting the willingness of the federal government to give them up. Some sort of study of the costs and benefits of the federal government continuing to hold land would seem appropriate, with land differentiated by type and current use. The Reagan administration has indicated a commitment to analyze federal property on just this basis, although emphasis is on smaller landholdings.

There is one other possibility for dealing with the public lands issue in the context of a general sorting out of state and local and federal roles and financing. The proposals for a grand "sorting out" of functions among various levels of government that are most appealing to state officials involve a combination of termination of federal assistance to, and involvement in, functions such as local education and local transportation and federal assumption of all costs of one or more income tested programs such as Medicaid or AFDC. These proposals are presented and discussed by federal and state officials on the theory that steps will be taken to avoid such a swap having implications for individual states that are substantially different than for states as a group. In other words, the desire is to avoid windfall gains and major losses in any state.

Avoiding such gains and losses is difficult even in the context of an overall agreed swap. Giving income tested programs to the federal government tends to favor most (e.g., more per capita relief) those states which have traditionally had high payment levels in AFDC and high benefits in Medicaid and whose low income persons represent a relatively high proportion of total population. These states are generally those located in the industrial Northeast.

On the other hand, Western states tend to receive larger than average per capita amounts in programs of federal assistance that would be terminated in proposed sorting out arrangements, particularly in highway funding and elementary and secondary education. To make the Western states fare as well as Eastern ones, proposals for sorting out need some sort of extra payments for the Western states. In the administration proposal, for example, a trust fund would be established that would make payments to the states that lost the most from the swap of federal and state/local functions. However, to achieve the objectives of reducing the federal grant budget and eventually getting the federal government out of these programs, the trust fund must eventually

disappear, as the administration proposes. The eventual drying up of the trust fund reduces the attractiveness of the proposals to those states that lose by the swap.

One way to reduce the federal budget cost of swap proposals and at the same time to provide an asset (which current federal leadership may wish to sell in any case) of lasting value would be to provide some public land transfers as part of a New Federalism package for those states that have substantial public lands and would otherwise lose in the swap proposals.

For example, one proposed swap of functions would have the federal government assume full costs of income security functions, including Medicaid, welfare (AFDC), and food stamps. The federal government would stop funding elementary and secondary education, vocational and higher education, highways, transit, and certain other grant programs. A calculation of the financial effects of a proposal comparable to this shows that nationwide the program would be a "wash." That is, states in the aggregate would save exactly enough from the federal takeover of programs to fund the programs that the federal government would stop funding.*

However, some individual states would lose substantially by such a swap. Alaska would have the largest loss of any state, over $260 per capita. Other states with large losses ($50 to $100 per capita) would be:

Arizona	North Dakota	New Mexico
Michigan	California	South Dakota
Montana	Mississippi	Wyoming

Most of these states are Western and all contain substantial public land holdings. To make the New Federalism proposals feasible, a way must be found to provide some offset for these states. In the administration's proposal, a new trust fund is the mechanism chosen, but a combination of a trust fund and public land cession is a potential alternative to just a trust fund.

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*The particular calculation used as an example is from ACIR, CHANGING THE FEDERAL AID SYSTEM: AN ANALYSIS OF ALTERNATIVE RESOURCE/RESPONSIBILITY TURNBACKS AND PROGRAM TRADE-OFFS (1982), p. 59. The numbers should be considered illustrative of this family of proposals. Exact numbers will vary with the year used for analysis, the exact programs to be turned back, and any supplements considered. However, all proposals in the family described above will tend to produce major losses in the states listed in the text.

FISH AND WILDLIFE

The management of fish and wildlife is of particular importance to Alaskans because of the much greater economic importance of fishing and hunting to Alaskans compared to citizens of most other states. Interaction with the federal government on fish and wildlife issues has not been a totally satisfactory experience for Alaskans as indicated by comments made at the convention of the International Association of Fish and Wildlife Agencies in 1979 by Alaska Fish and Game Commissioner Ronald O. Skoog. :

> Historically, each state has had the primary responsibility for managing the fish and wildlife resources within its borders, and I think has done the job well. There is no need to change this role! Yet the trend of increasing involvement and interference by the federal government in state management programs is disruptive, not cost effective, and not in the best interest of the public nor the resources. Frankly, it is also quite unnecessary. I believe the state is in the best position for managing fish and resident wildlife most effectively...
>
> People tend to resent regulations and they particularly resent them when they are developed or promulgated at a distance, such as in Washington, D.C., by people not knowledgeable about the state or its problems and in many cases not particularly sympathetic toward that state....This resentment is particularly true in Alaska...

TREATIES REGARDING FISH AND WILDLIFE: Part of the source of federal power regarding fish and wildlife grows out of the power of the national government to handle relations with foreign governments. In the early 1900's, the taking of migratory waterfowl was occurring so rapidly that it appeared likely that stocks would be depleted. Under the constitutional doctrines of the time (see Chapter 1), the control of shooting of ducks was clearly a state matter and federal legislation regulating the subject would have been unconstitutional. However, the subject was dealt with by a treaty which was implemented in the United States by an act of Congress. The Supreme Court upheld the constitutionality of the statute on the grounds that the foreign policy power, to be effective, had to include the power to implement what was agreed to in a treaty.

Since that time, the question has not been whether the federal government could regulate fish and wildlife management by treaty but

under what circumstances this would be done. Treaties of interest to Alaskans include those relating to migratory birds, endangered species, polar bears, and North Pacific fisheries. State officials have had major inputs into decisions about some of these, but not others.*

Discussion of a possible caribou treaty with Canada gives some indication of the issues that can be involved. The Tanana Chiefs Conference and others seek a treaty covering habitat management and taking. The state of Alaska has taken a position that the treaty would not be beneficial citing, among other things, that "The treaty ... would result in federal pre-emption of yet another traditional prerogative of the state -- management of its own game resources."**

MARINE MAMMALS: The Marine Mammal Protection Act of 1972 in essence federalized the management of marine mammals including polar bears, sea lions, walruses, and several species of seals. The legislation contained provisions permitting the federal government to return this power to states but only with certain restrictions. One barrier is that the federal legislation, before recent amendment, only authorized taking by Alaska natives. Such a provision under state management was viewed as running afoul of the equal protection provisions of the Alaska Constitution. Other barriers may appear in the interpretation of the recent amendment and committee report language. The Alaska Department of Fish and Game makes a strong case that the federal pre-emption eliminated a successful state program and replaced it with non-management by the federal government.

OFFSHORE FISHERIES: There is now dual control of offshore fisheries between the federal government and the state of Alaska, with Alaska having responsibility to the three-mile limit and federal regulation controlling outside the three-mile limit. Under the Fisheries Conservation and Management Act, the federal government is supposed to

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*The treaties and the state role in them are detailed in a letter from Commissioner Skoog to the Executive Director of the Statehood Commission dated December 9, 1981.

**"State Announces Stand on Caribou Treaty," Department of Fish and Game press release, November 3, 1980.

manage in cooperation with the state, but a number of difficulties have developed in implementation. One of the many coordination problems concerns timing in such matters as catch limitations and opening and closing seasons. The state manages on a short turn-around basis, but the federal government has trouble doing this because of its procedural requirements (e.g., Federal Register publication of proposed regulations) and thus encounters difficulty in following state mangagement policies even when trying to do so.

REFUGE POLICY: There is also conflict in the management policies applicable to national wildlife refuges. The basic conflict is that states tend to see the federal government as responsible for the refuge, but not the wildlife, per se. Some federal policymakers see their management responsibilities as extending to the wildlife while on federal land, and in more extreme cases to the wildlife even when not on federal land.

HUNTING ON FEDERAL LANDS: The Department of Interior generally follows a policy of discouraging non-subsistence hunting and fishing in national parks, and regulates these activities in natural preserves. The Department of Fish and Game and many Alaskans see the combination of these regulations and designation of massive land areas as parks and wilderness areas as reducing available hunting opportunities and increasing the difficulties of game management with no particular public benefit.

THE OPPOSING VIEW: Much of the federal intervention in wildlife management issues in Alaska can be understood as an Eastern public using the federal government as a way to enforce their views of appropriate wildlife management on Alaska and other states. An example of this point of view is a comment made by John W. Grandy, Executive Vice President of Defenders of Wildlife:

> Defenders does not oppose cooperative, productive relationships between state and federal Governments. We do oppose politically motivated destructive, single-purpose "management" schemes, such as aerial wolf killing. And if saving wolves threatens traditional relationships, so be it. Traditional federal-state cooperative agreements are useful only if they serve the expanding public interest in perpetuating viable, natural wildlife communities on public land. In short, if we can't get states to uphold

> responsibility on public land and do it right, we'll have to demand that the federal government uphold its ultimate responsibility.*

THE OVERALL LEGAL ENVIRONMENT:** It is well settled under the property clause of the Constitution that the federal government may exercise over its lands both the normal power of a landowner and such sovereign powers as declaring certain activities to be unlawful and enforcing such laws. However, the federal government has not normally sought to apply separate fish and game laws to its lands. For example, the Taylor Grazing Act of 1934 contained an express indication that it was not designed to interfere with state hunting and fishing laws. Similar law applies to activities at federal water projects and military installations. The governing law for management of national forests states: "Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several states with respect to wildlife and fish on the national forests."

The "Sikes Act" of 1974 affirmatively directs the Secretaries of Interior and Agriculture to develop plans with the states on wildlife conservation and development on federal lands. Further, the legislation stated that nothing implied by the term "conservation and rehabilitation programs" should "be construed as diminishing the authority or jurisdiction of the states with respect to the management of resident species of fish, wildlife, or game, except as otherwise provided by law." The Federal Land Policy and Management Act of 1976 also has a provision indicating that nothing in the Act shall be construed as changing the authority of the states for fish and wildlife management.

Thus, the various federal interventions in fish and wildlife policy are associated with special situations -- treaties, native claims settlements, endangered species, and marine mammals, but do not represent a general attempt to control fish and wildlife. The Department of the Interior and the state of Alaska have recently reaffirmed the state role by formal agreement***. This agreement presumes that the state and federal governments maintain complementary policies on subsistence hunting.

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*In PROCEEDINGS OF THE SIXTY-NINTH CONVENTION -- INTERNATIONAL ASSOCIATION OF FISH AND GAME AGENCIES (1979).

**Materials provided by Paul A Lenzini of Chapman, Duff and Paul (which is counsel to the International Association of Fish and Wildlife agencies) provided considerable information useful in the preparation of this section.

***"State, Interior agree on wildlife management." ANCHORAGE TIMES, March 19, 1982.

FEDERAL ENTERPRISES: WATER, POWER, AND THE RAILROAD

One example of a potential devolution of federal power to the state of Alaska would be for the federal government to sell the properties associated with the Alaska Railroad or the Alaska Power Authority, or both, or to drop consideration of new federal river basin developments in favor of state responsibility for the same activity. All three of these issues are somewhat unique to Alaska, although there are some parallel situations in other parts of the United States.

THE ALASKA RAILROAD: Unlike many European nations, the United States government is not the fundamental provider of railroad services in this country. Federal land grants were used to stimulate railroad expansion in the West, but direct federal ownership was never involved. Currently, the federal government is in the rail business in three major activities: the Alaska Railroad, Conrail, and Amtrak. Conrail was the federal response to Penn Central's bankruptcy, where federal action was considered necessary to prevent the economic disruption of the Northeast. The clear intent of the legislation, the current position of the administration, and the position of Conrail's management is that Conrail should operate without federal subsidy and, as soon as possible, should not be owned by the federal government. Amtrak provides the nation's longer haul passenger service and is heavily subsidized. Again, the authorizing legislation, policies of the administration and of Amtrak's leadership all point toward movement away from subsidies and independent operation.

Finally there is the Alaska Railroad which was built by the federal government when Alaska was a territory. Legislation, which has the support of the administration, is now pending in Congress to give or sell the Alaska Railroad to the state of Alaska. There appears to be no significant argument over transferring the railroad to Alaska. While there is no argument over principle, there is an argument over price which could postpone the transfer.

ELECTRIC POWER: The federal government entered the business of generating electric power as a side effect of decisions to build large multi-purpose dams and reservoirs throughout the West. The trade-offs

inherent in operating such dams have made it impractical to turn them over to the private sector.* To market power from these federal projects, the federal government maintains power marketing agencies such as the Alaska Power Administration and the Bonneville Power Administration. In addition, the Tennessee Valley Authority provides generation in the Tennessee Valley, covering parts of Tennessee, Alabama, Kentucky, and Mississippi. However, TVA power operations are not now subsidized by the federal government.

These power marketing activities have been the subject of considerable controversy in the Lower 48 states. These controversies have often taken the form of public versus private power disputes based upon philosophical differences regarding the role of the private sector and government in the production of electric power. Generally, power produced from federal hydroelectric projects is cheaper than power produced in conventional steam plants. Certain users, particularly municipally owned electric systems and rural electric cooperatives, receive preference in the distribution of the limited supplies of federal power. When power supplies are not equal to demand, difficult choices have to be made, such as whether to integrate hydro with privately owned steam plants. In the Lower 48, proposals for the elimination of the power marketing administrations would encounter a general lack of state interest and probable opposition from the federal government's "preference" customers. States generally do not have power generating capabilities. The major exception, New York, created one such facility primarily to deal with the financial crisis of the public utility serving New York City.

The Alaska Power Administration administers two projects in Alaska -- Eklutna serving part of Anchorage's needs, and the Snettisham project serving Juneau. The state's Alaska Power Authority is involved in five power projects, a transmission line connecting Anchorage and Fairbanks, and has other projects under design including the Susitna hydro project. Officials of the Authority have indicated that some savings could be expected if the Power Administration and Power Authority activities were combined.

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*Optimal use of a dam for recreation requires that the pond level be kept constant to avoid unsightly mudflats and various ecological disturbance. Optimal use of a dam for power is for peaking purposes which involve maximum flow for only a few hours a day and fluctuating pond levels. Optimal use for power involves using all water to generate power; optimal use for flood control may dictate sharp lowering of pond level to accommodate expected high volume flows. Private sector operators would not be expected to make these trade-offs in the public interest.

If the economical provision of power were the sole issue, there would seem to be every reason for such a combination. As the state of Alaska, rather than the federal government, is likely to be most heavily involved in new hydro projects, the Power Authority would seem to be the most logical surviving entity, removing the federal government from the power business in Alaska. From the federal perspective, such a federal withdrawal has the advantages of reducing federal employment and responsibility. From the standpoint of those who have long advocated an even greater role for the federal government in power transmission and generation, however, such a move might appear undesirable. The extent of local support would presumably depend upon such matters as what price, if any, the federal government would expect and the price impacts of the proposal on particular groups of customers.

A closely related question is the future federal role in water projects in Alaska. On a national scale, the Corps of Engineers and Bureau of Reclamation continue to plan and construct multi-purpose dams and reservoirs which are normally eagerly sought by states in order to benefit from improved navigation, cheaper power, flood control, and improved recreational opportunities. However, primarily for budget reasons, the Carter and Reagan administrations have sought to slow federal construction activities. Funds for surveys and project design have been cut back, some projects under construction have been slowed, and the federal government is increasingly looking for state and/or local financial contributions in such projects.

The demand by state officials for projects such as dredging, harbor deepening, flood control, and multi-purpose water projects is far in excess of the likely supply of federal funds for such projects. As a result, devolution of this particular federal activity in Alaska should not be difficult if state decisionmakers are willing to forego the federal subsidy inherent in the projects. A state willingness to construct projects and lack of pressure by the state's congressional delegation can virtually guarantee concentration of federal funds elsewhere.

SUMMARY: FEDERAL ENTERPRISES: The federal enterprises covered in this section are quite different from many of the subjects considered elsewhere in this report. In these enterprises, the federal government actually does something -- builds a dam, sells electricity, or runs a railroad -- as distinct from the normal circumstance where, through a law, regulation, or grant condition, the federal government tells somebody else to do something. In these cases, at least in the Lower 48, the federal presence is not often considered obtrusive on state powers;

in fact, states compete for the subsidies associated with using federal tax funds to pay some of the costs involved.

While attempts to reduce the federal role in Alaska in protection of marine mammals or civil rights will run head-on against interest groups that believe that the federal goverment should tell Alaskans what to do, the federal enterprises do not present the same obstacles to devolution. As with the Alaska Railroad, the argument is more likely to be over price than over principle.

EXERCISE OF FEDERAL POWERS FOR NATIONAL DEFENSE AND COMMERCE

In the course of its work, the Statehood Commission has received information on situations in which federal action is discriminatory in its effects on Alaska. Two such situations are the requirement that shipments from U.S. port to U.S. port utilize American ships and the prohibition on export of Alaskan oil. Another example, which may be viewed as positive or negative depending on one's role in the forest product industry, is placing restrictions on log exports.

For the purposes of considering devolution of federal powers -- the subject of this report -- the merits of these policies are not at issue.* The appropriate questions are whether it is appropriate to have the power to make such policies lodged in the federal government rather than state governments.

The rationale for a requirement for shipping in U.S. bottoms stems from the economic reality that U.S. shipping is more expensive than foreign shipping. It is widely believed that U.S. shipping would disappear completely in the absence of subsidies. That outcome is considered undesirable for national defense reasons, as there are many military scenarios in which the United States would want to conscript substantial capabilities in a merchant marine, just as the British did in the Falklands War. Thus, for defense reasons as well as concern for jobs for Americans on vessels and in shipyards, there are subsidies for the merchant marine. Some of these subsidies are direct, paid from funds appropriated to the Maritime Administration. Like many farm subsidies, some maritime subsidies are indirect, such as those paid by Alaska's consumers and producers.

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*The author's conclusion regarding federal roles is not influenced by opinions on the merits of the policies. While I think all three policies are inappropriate, it is for reasons not related to the question of relative state and federal roles.

There are many reasons to argue for a change in the Jones Act policy and its discriminatory impacts on Alaska. However, it would seem hard to argue that the wrong level of government is making decisions about how large a merchant marine to maintain and what financing method to use to maintain it. It was for the purpose of making decisions such as these that the original thirteen states created a national government with the power to regulate commerce and provide for the national defense.

Export prohibitions are a major issue for many parts of the country. Farmers decry political constraints on farm exports that dry up natural markets and cause the U.S. to be considered an unreliable supplier. Computer manufacturers decry limitations on high technology exports. Drug companies object to being prohibited from marketing drugs in a country where they are legal simply because distribution is not approved in the United States. Firms with technology suitable for the Soviet gas pipeline object to sanctions associated with exports from third country subsidiaries to the Soviet Union. For the purposes of this report, however, the question is should the national government or the states have whatever power is to be given to any government to limit exports. The only sensible answer, which is consistent with the decision of the Founding Fathers in 1789, is that only a national government could effectively exercise such powers and carry out the negotiations required with foreign powers.

FAILURE TO RECOGNIZE THE UNIQUENESS OF ALASKA

In the course of this study, a number of staff members from the Alaska congressional delegation were interviewed about situations in which too much power is being exercised in Washington that could be exercised in Alaska. These individuals are in a good position to know things that irritate Alaskans with the federal government. As might be expected, there are some specific Alaskan examples of the types of problems with federal regulation and grants discussed in Chapters 3 and 4 of this report. Examples are:

> QUARANTINE FACILITIES: The United States has strict controls over the importation of plants and animals to protect against new forms of plant and animal disease and new types of insects. Alaska has an interest in agricultural research, particularly in species that thrive in Arctic climates. When personnel in Alaska agricultural research facilities want to import living specimens they must do so through the agricultural quarantine facilities, which happen to be in the Caribbean, a roundabout trip involving a habitat that is not particularly conducive to

Arctic species.

WETLANDS: Responding to the excessive federal regulations for the most minor use of wetlands and conflicting state and federal regulations, the Corps of Engineers has been trying to streamline the approval process by allowing states to take over the program. There are some pre-conditions for state takeover which appear reasonable in the context of the Lower 48 but which can create problems in Alaska, which has vast areas of wetlands. The main problem for Alaska is the condition that the state must identify the wetlands. This work has long been done in most states but remains a major task in Alaska.

CLEAN AIR: There is a problem in the application of certain car design requirements in the context of the very cold starts required in Alaska. Apparently certain requirements that make sense in other contexts cause hard starting in certain Alaskan settings and, more importantly, cause more, rather than less, pollution.

REVENUE SHARING: The revenue sharing program provides assistance directly to essentially every general purpose local government in the United States. Because some Alaska villages are very small, the limited revenue sharing compliance requirements (e.g., reports and audits) can be burdensome, a problem that is not confined to Alaska.

WEATHERIZATION: Alaska has gotten into a dispute with the Department of Energy over uncommitted funds under the weatherization program. The federal side of the argument is that unspent funds indicate a lesser need for funds the following year. The Alaska side is that the Alaska weather patterns make the Alaska spending pattern logical and comparable to other states in real program impact and costs, though not in timing.

FOOD STAMPS: Federal food stamp regulations apparently create problems, and create error rates for which the state can be penalized, when applied to persons who come to Alaska with little money (i.e. backpackers).

MEDICARE: Many Medicare and Medicaid regulations on quality of service are excessively detailed and frequently do not fit well with the small health care facilities found

in rural areas. An example is (or was, if intervention by the Alaska delegation is successful) that the director of nursing in a nursing home has to supervise full time, with no paperwork and no work with patients. For a nursing home with only one nurse, this regulation does not make a lot of sense.

EDUCATION: Federal regulations in elementary and secondary education have been burdensome in Alaska, although block grant legislation and regulatory reform activities by the Reagan administration have cleared away many of the problems, though there is no guarantee that the regulatory burdens won't reappear. At one point the state Department of Education proposed substituting state for federal funds in vocational education, simply to get out from under federal reporting requirements.

SUMMARY

This chapter concludes Part Two of this report with its general survey of federal regulation, federal grant programs, and special problems of Alaskans -- some unique to Alaska and some examples of the problems with federal regulations and grants that both citizens and officials of many states encounter. Part Three, which follows, provides a discussion of the many problems of state-federal relationships discussed in this part.

PART THREE: APPROACHES TO CHANGE

CHAPTER SIX: THE POLITICS OF DEVOLVING FEDERAL POWERS

INTRODUCTION

This part of the report is a discussion of getting something done to change the situations reported in the previous part. From the Alaskan perspective, the kinds of changes that are needed range from constitutional revision, court action, and federal law changes, to interstate cooperation, and the regulations and day-to-day decisions of federal and state administrators.

For the citizens of Alaska, or citizens of any state, to have an impact on the current division of responsibilities between federal and state governments, they need two things: (1) a precise statement of what they want decision-makers to do, and (2) decision-makers who agree with them that changes are needed. They also need to convince decision-makers that the particular changes they seek are the ones designed to eliminate the problems involved.

The relevant decision-makers in our democratic system are people much like those doing the persuading. The current president and his immediate predecessor were both state governors before becoming president. Members of Congress have commonly served in state legislatures and/or as elected officials in local government before being elected to Congress. On the whole, these are not people who are remote from the people they serve. Nor are they people who necessarily favor the concentration of power in Washington as a philosophical matter.

Those people are decision-makers who, like the rest of us, have been subjected to training and history that condition their viewpoints. Unlike the rest of us, they are also subject to pressures from all directions as they make their public policy decisions. To understand how best to bring about a devolution of governmental power from Washington to the states, it is necessary to understand what political and ideological forces put the power in Washington in the first place and what forces tend to keep it there.

THE ROLE OF GOVERNMENT GENERALLY

DUAL THEMES OF LESS GOVERNMENT AND MORE STATE ROLES: Federalism and devolution questions are theoretically independent of what volume of government activity is undertaken. It would be intellectually possible to argue that government should intervene very little in the lives of citizens, and that existing social and economic regulation should be cut back substantially, but that whatever regulation remained should be conducted by the federal government. Conversely, one could argue for

major government roles, including an expansion of social controls of various types, larger income maintenance programs, etc., and at the same time argue that these programs should be decided upon and implemented by state and local governments.

However, as a practical matter throughout our national history those who have argued for an expansion of government's role have typically allied themselves with those that would have the federal government increase its role at the expense of the states. Those rejecting proposed expansions of federal power have often pursued two separate arguments: (1) that the power should not be exercised, and (2) that, if it is to be exercised, decisions about how to exercise it, and perhaps whether to exercise it, should be left to state and/or local governments. Examples of this approach can be seen in the Supreme Court opinions invalidating some of the early New Deal programs and in business rhetoric in dealing with business regulation from the period of the populists in the early 20th Century through environmental protection debates in the 1950s and 1960s.

The only logical link between opposition to government action generally and a preference for the locus of power being in state rather than federal hands is the presumption that state governments would be less likely to act than would the federal government. This presumption tended to operate in fields such as unemployment and worker compensation laws, labor-management relations, and more recently strip mining regulation.

The juxtaposition of views that government generally is too much involved in the life of the citizens and that power should be devolved to state and local government is still an important feature of the American political scene. These dual themes represented a major part of the basis on which President Reagan campaigned for the office that he now holds.

THE ROLE OF BUSINESS LEADERSHIP: However the American people may feel about these issues, those favoring devolution of power to the states have lost a major ally from earlier history. In issues of economic regulation, and by implication in issues of general philosophy, the business community was a major supporter of this perspective. However, the business community no longer plays this role. Business leadership generally has become quite pragmatic about the relationships of state and federal governments.

In 1982, some business leaders can be found who are encouraging shifts of power to state governments from the federal government, but many business leaders are doing the exact opposite. Major producers of energy were behind the proposals for power plant siting legislation,

which would have made it faster and easier to build new power plants by a federal permitting procedure that would override various state zoning, water quality, building permit, and land use controls. In the area of transportation of energy, one business group is pressing legislation for a coal slurry pipeline. The substance of the legislation is to apply federal rather than state rules for the involuntary taking of property for use by a public utility. Many companies are also looking for solutions to the nuclear waste problem that would preempt the exercise of state police powers.

In transportation, trucking companies are seeking national legislation overcoming state regulation of maximum truck weights and length. In banking, various interests went to the Supreme Court arguing for federal preemption of state laws governing the assumability of home mortgages. In product liability, many firms are supporting the concept of uniform national legislation on the subject to preempt various existing state laws. National no-fault auto insurance was a serious proposal for many years, backed, among others, by some large insurance companies. There is significant business support for federal legislation that would eliminate state usury laws, which set limits on permissible interest rates.

Thus, when one shifts from broader philosophical matters to practical decisions that together determine the relative roles of state and federal governments, the business community should not be assumed to be an advocate of stronger state roles.

OTHER SUPPORTERS OF DEVOLUTION: In fact, the intellectual inheritors of the business positions of the 1920s through the 1950s have become a quite different group. These are persons with no economic interest in the outcomes, who are opposed to extensions of federal power to state and local decisons and private conduct through the federal judicial system. The issues include the ability of state and local government to control abortion, the ability of school districts to have prayers as part of school activities, and the ability of school districts to set attendance areas (school busing). Often, however, the persons interested in these subjects are single-issue persons, with little knowledge of or interest in other subjects, such as relative state and federal roles in taxing, spending, and business regulation.

Thus, the potential forces that might form a coalition built around the notion of reducing federal powers would have to involve some "strange bedfellows". It is not at all clear that persons interested in issues such as school prayer would form common cause with the state and

local officials interested in devolution of federal power, nor that the state and local officials would be willing to make the concessions required to form such a coalition.

It is this political reality which tends to govern the politics of potential calls for a new constitutional convention. The problems surrounding calling a convention, and ways to deal with them, are discussed in the preliminary report of the Statehood Commission. The fundamental problem is that there are no rules governing such a convention, so it is unclear whether such a convention could be limited to a single purpose (e.g., federalism) or, once convened, could consider every subject.

RELATIVE COMPETENCIES OF STATE AND FEDERAL GOVERNMENTS

In the evolution of federal power from about 1910 to about 1970, perceptions of the relative competency of state and federal government played a vital role. Those perceptions, in reverse, could play a major role in creating a climate for the devolution of federal power.

The question of relative competence of the two levels of government is discussed at length in Chapter 2, with a conclusion that there is little basis for arguing that the federal government is more competent than state government or the reverse. However, in the context of promoting devolution, public disenchantment with the effectiveness of federal personnel and policies can be a helpful factor. Fortunately for those seeking devolution of federal powers, there is some factual base for this disenchantment.

Federal programs in elementary and secondary education are widely recognized as causes of an explosion in paperwork in education and as the source of a number of rules that make little sense to school officials. Detailed categorical assistance programs for health and social services became sufficiently unpopular so that there was considerable support for replacing them with block grants. Many believe that public housing and urban renewal were totally unsuccessful policies.

In short, it is not difficult to find problems in most programs where the federal government has used grant programs to inject federal policies into matters previously decided by state and local government.

PUBLIC OPINION

The opinion of the public is likely to be a key factor in determining the success of attempts to devolve power from the federal government to state and local governments. Fortunately, ACIR obtains information from a national poll that provides an indication on changes in public sentiment.* These data suggest that public attitudes are changing in directions supportive of devolution of federal power.

One key question has been asked every year since 1972. It is: "From which level of government do you feel you get the most for your money -- federal, state, or local?" In 1972, 39% selected the federal government and 44% selected either state or local governments, with 17% indicating that they did not know. Between 1972 and 1981, the percentage indicating state or local government increased to 58% and those indicating the federal government dropped to 30%. An important change also occurred in perceptions of taxes. In 1972 -- given the choices of federal income tax, state income tax, state sales tax, and local property taxes -- 45% identified the local property tax as least fair. Only 19% listed the federal income tax as least fair. In 1981, however, 36% identified the federal income tax as least fair, well above the 2?% for state income and sales taxes combined.

Somewhat less encouragement for devolution comes from a question asked in May of 1978 and not repeated in subsequent surveys. The question was:

> Which of these statements about the ability of state and local governments to deal with today's problems comes closest to your view?
>
> 1. State and local government is too fragmented and disorganized to be effective.
> 2. State and local government does an adequate job in dealing with today's problems.
> 3. State and local government should be given more authority because it is closest to the people.
> 4. No opinion.

This question is not particularly well-designed because someone could believe both the third statement and either the first or the second. The results indicated that 36% thought the first statement to be true; 22% opted for the second answer; 33% for the third, and the remaining 10% had no opinion.

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*The data in this section are from ACIR, 1981 CHANGING PUBLIC ATTITUDES ON GOVERNMENT AND TAXES, 1981.

In a question asked only in the 1981 poll, respondents were given a list of services and asked: "President Reagan has indicated he would like to turn a number of programs back to the state and local governments and get the federal government completely out of the financing and administration of such programs. Various leaders and organizations have proposed that the following functions be turned back. From which functions would you like to see the federal government withdraw?" Because respondents could give more than one answer, the totals are more than 100%. The totals are:

Mass Transportation	30%
Day Care and Other Social Services	29%
Public Schools (kindergarten-12th gr.)	26%
Public Service Jobs	26%
School Lunch and Other Nutrition	25%
Highways	18%
Welfare (AFDC)	15%
Public Hospitals and Health	15%
Don't Know	13%

UNDERSTANDING HOW FEDERAL INTERVENTION OCCURS

Despite concerns about federal over-intervention in the daily lives of citizens and preemption of state and local responsibilities, federal power has continued to expand. This has developed despite the fact that national elected officials often have had backgrounds of service at the state and local level and many have strong platform commitments to limiting the roles and costs of governments. To understand proposals for breaking this pattern, it is important to know what has been causing the pattern.

Federal programs get started because someone sees a need for them. Generally there is a perceived problem, such as impure drinking water, rats in urban ghettos, loss of historic landmarks to new construction, bridges in need of repair, deaths due to drunk driving, or crowded public prisons. Often there is a constituency that is concerned with this problem and wants to see something done about it. Typically, there will also be journalistic attention paid to the problem, with television documentaries and the like.

A number of persons at the federal level will have an interest in a "program" to deal with the problem. Many members of Congress think they need positive actions which they can show to their constituents and, in Washington, passing a piece of legislation is considered the equivalent of positive action. Members, their staffs, and committee staffs all have an interest in legislative action. Federal agencies, which are often asked for cooperation in drafting and supporting legislation, may have

an interest in expanding their "turf", power, and appropriations. Even if these baser motives are excluded, federal line agency personnel are often dedicated to their missions and look for ways to do more to promote historic preservation, aid in preserving the public health, or whatever their mission might be. National interest groups also have an interest in action at the federal level. First, their members -- often organized around the need for action -- may want action. Second, the function of a national interest group is to deliver national policies, not state and local ones.

Typically, legislation will be introduced for federal action to deal with the problem. This legislation normally has common features such as federal regulation or federal minimum standards for state regulation, research, and perhaps grants to fund state and local activity. Such legislation typically does NOT involve federal assumption of responsibility for the problem as, often, the problems are substantially greater than could be handled with appropriations likely to be available at the federal level.

The interest groups, media, and congressional staff members interested in the legislation then work to bring to the public a perception of the severity of the problem and to Congress a perception of popularity of federal action to deal with the problem. Congressional hearings are held; TV interviews are held; investigative reporters find dramatic examples of the problem, etc.

State and local officials have typically played a significant role in this process. That role has not normally been to oppose grant legislation. The functionally specialized state and local officials assigned to deal with particular problems have typically been supportive of federal grants to deal with them. The resources available are inevitably less than what these officials think they need, so additional money from any source looks good. In addition, they may actually favor federal standards in their area on the grounds that those standards will force state and local officials to provide funding for better quality programs. Thus, organizations of school superintendents, teachers, librarians, police officers, and public health officials, to mention only a few examples, have often been supportive of expanded federal roles in their areas.

State and local elected officials typically do not oppose, and often have supported, additional federal programs on subject matters ranging from animal shelters to zoos. In deciding whether to support a new program for rat control or law enforcement, a state legislator, governor, mayor, or county commissioner does not have to deal with federal resource constraints. Money for the program is seen as being supplemental to funds already being received from the federal level. In

this sense, a new federal program is something for nothing.

In fact, many of the federal programs complained of as reflecting too much federal interference in problems inherently local were passed through the strong efforts of state and local officials. The federal program providing support for costs of improving bridges on local roads is a classic example. Past support of narrow categorical programs such as these has not prevented state and local officials from complaining about excessive federal regulation, but has certainly limited the seriousness with which the complaints are taken.

Likewise, state officials have not always objected to federal preemption of state and local decisions. A classic situation was federal preemption of state usury laws. Usury laws limit the rate of interest that can be charged in private transactions. When the market rate of interest exceeds the rate that can legally be charged in a particular state, no one wants to make loans in that state because they can make more money on loans in another state. In this situation, the usury laws tend to prevent credit financing of auto sales and housing, creating severe dislocations for those involved in those industries.

The solution is, of course, either for the state to repeal the usury law, change the allowable rate of interest, or simply decide that the law is worthwhile despite the negative consequences. Each one of these alternatives creates potential political problems for any state official selecting it. An easier solution for state officials appeared when language preempting these laws appeared, probably at the suggestion of banking officials, in federal legislation. The preemption removed the effect of the laws without making legislators change the interest rates or repeal the laws. A provision indicating that a preempted law could be reinstated by legislation at the state level passed subsequent to the federal law maintained the fiction that states were still controlling the subject matter. This legislation was welcomed, not opposed, by a significant number of state officials.

Thus, members of Congress have been expanding federal powers because of responses to constituency concerns coupled with a lack of substantial opposition to such expansion, particularly when new regulation of business was not at stake. The question is whether devolution of federal power and concern with new federal intrusions has any constituency at all.

SUPPORTERS OF DEVOLUTION

The examples above suggest that state and local officials, members of Congress, and business-oriented interest groups all take quite pragmatic views on individual issues involving creation of additional