LEGAL OPINIONS

OF THE

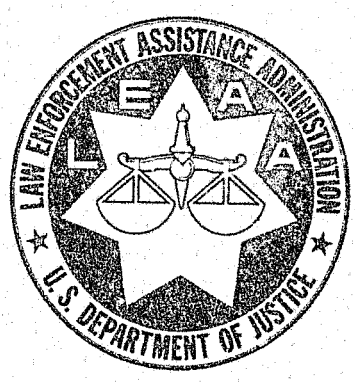
OFFICE OF GENERAL COUNSEL

OF THE

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
UNITED STATES DEPARTMENT OF JUSTICE

JULY 1 TO DECEMBER 31, 1976

WITH CUMULATIVE INDEX FROM JULY 1, 1973



WASHINGTON: 1977

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NOTE TO READER

Each year the Office of General Counsel deals with hundreds of requests for advice and counsel. Only those opinions of general interest and applicability are printed in this volume. These opinions are printed for the benefit of the public and the criminal justice community. The printing of these opinions conforms not only with the letter of the Freedom of Information Act, which requires that in certain instances opinions affecting governmental agency actions be made available to the public, but also with the spirit of that law, which calls for a more open Government and greater access of the public to information affecting actions of Government agencies.

A Legal Opinion of the Office of General Counsel is generated by a request from within the Law Enforcement Assistance Administration (LEAA) central office, an LEAA Regional Office, a State Criminal Justice Planning Agency (SPA), or some other appropriate source. No Legal Opinions are generated by the Office of General Counsel itself acting on its own initiative. Each of these Legal Opinions, therefore, responds to a request from a particular party and is based upon a particular and unique set of facts.

The principles and conclusions enunciated in these Legal Opinions, unless otherwise stated, are based on legislation in effect at the time that the Legal Opinion was released. All Legal Opinions issued after Sept. 7, 1974, are based on the Crime Control Act of 1973 (Public Law 93-83), as amended by the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415). All legal opinions issued after October 15, 1976, are based on the Crime Control Act of 1976 (Public Law 94-503). The reader is advised to cross-check the date of a particular Legal Opinion with the language of the legislation that was effective on that date.

The Legal Opinions contained in this volume have been edited for format, for syntax, and for clarity, but otherwise appear in all respects as they did when promulgated by the Office of General Counsel.

Any person intending to rely in any way on a position adopted or an interpretation expressed in these Legal Opinions is advised to take into consideration the conditions and qualifications presented in this Note to Reader. If any such person has a question about a particular Legal Opinion or any other point, the person should communicate with the nearest LEAA Regional Office or with the Office of General Counsel, LEAA, Room 1268, 633 Indiana Avenue, N.W., Washington, D.C. 20531.

Legal Opinions in This Volume

Legislation Establishing LEAA Cited in This Volume

Note on Sectional Changes

1. The Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) was the original legislation that established LEAA.
2. The 1970 amendments to that act were contained in the Omnibus Crime Control Act of 1970 (Public Law 91-644). The amendments redesignated Parts E and F of the 1968 act as Parts F and G and added a new Part E, entitled "Grants for Correctional Institutions and Facilities."
3. The 1973 amendments to the legislation were contained in the Crime Control Act of 1973 (Public Law 93-83). Those amendments redesignated Section 408 as Section 407 and incorporated the former Section 407 into Section 402(b)(6).
4. The Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415) provided LEAA with expanded authority to fund juvenile delinquency programs. This act made conforming amendments to the Crime Control Act of 1973.
5. The Public Safety Officers' Benefits Act of 1976 (Public Law 94-430, September 29, 1976) added a new Part J to the act.
6. The 1976 amendments to the act were contained in the Crime Control Act of 1976 (Public Law 94-503, October 15, 1976). The amendments made the following sectional changes to the act: Subsections (c) and (d) of Section 203 were redesignated as subsections (f) and (g); Section 301(b)(6) was deleted; paragraphs (7) through (10) of Section 301(b) were redesignated as paragraphs (6) through (9); Section 512 was deleted; and Sections 515(b) and (c) were redesignated as Sections 515(b)(1) and (2).

Crime Control Act of 1973, as amended

Acts of Congress Cited in This Volume

United States Code Cited in This Volume

Office of Management and Budget Circulars Cited in This Volume

Code of Federal Regulations Cited in This Volume

Decisions of the Comptroller General of the United States Cited in This Volume

Legal Opinion No. 77-1—Funding of Defender Services for Indian Tribal Members in Federal and Tribal Courts—August 19, 1976

TO: LEAA Regional Administrator
Regional V - Chicago

This is in response to your request of June 8, 1976, with regard to the use of Part C block grant funds to provide defender services for Indian tribal members.

The Menominee Indian Tribe has recently been restored to reservation status under the jurisdiction of the Federal Bureau of Indian Affairs. Jurisdiction for criminal prosecutions now rests with the United States District Court, Eastern District, Wisconsin, for felony actions and with tribal courts for misdemeanors.

The Wisconsin Council on Criminal Justice (WCCJ) (the State Criminal Justice Planning Agency or SPA) has funded Wisconsin Indian Legal Services, which provides legal services for indigent Native American defendants in Wisconsin. That defender agency has in the past represented Menominee defendants in the courts of Wisconsin. The Director of Indian Legal Services has been asked by members of the Menominee Indian Tribe to continue to provide representation under the new status.

Issues

These facts raise two legal issues:

1. May LEAA block grant funds be utilized to provide defense services for indigent members of the Menominee Tribe in prosecutions in Federal courts?
2. May LEAA block grant funds be utilized to provide defense services for indigent Menominee Tribe members in criminal prosecutions in tribal courts?

Statutory Considerations

Section 301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.§3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Law 93-83 and 93-415) (Crime Control Act), establishes the general purpose of Part C of the act as follows:

> Sec. 301.(a) It is the purpose of this part to encourage States and units of general local government to carry out programs and projects to improve and strengthen law enforcement and criminal justice.

The term "unit of general local government" is defined in Section 601(d) of the act to include "...an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior..." "Law enforcement and criminal justice" is defined in Section 601(a) of the act as follows:

> (a) "Law Enforcement and criminal justice" means any activity pertaining to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to police efforts to prevent, control, or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services), activities of corrections, probation or parole authorities, and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction.

Discussion

As the Section 301(a) statement of purpose indicates, the thrust of Part C funds under the Crime Control Act is to provide resources for the improvement of the criminal justice systems of State and local governments. There is no indication in the legislative history of the Crime Control Act that funding for the benefit of the Federal criminal justice system was either desired or intended. Further, if defender services in Federal court were rationalized on the basis of benefit to the individual defendant, there would still be no nexus between that activity and the improvement of law enforcement and criminal justice at the State and local level.

The United States Congress has provided by statute for the assignment of counsel to indigent defendants in Federal criminal proceedings. The Criminal Justice Act of 1964, 18 U.S.C. §3006 *et seq.*, as amended (Public Law 88-455, as amended by Public Laws 90-578, 91-447, and 93-412), establishes in the Administrative Office of the United States Court the legal responsibility to make payments under the act to court-appointed counsel of indigent defendants in Federal criminal proceedings. Procedures are established for the appointment of counsel in each Federal District Court. Thus, the Criminal Justice Act establishes as a Federal responsibility the assignment and payment of counsel.

This statutory provision, coupled with congressional failure to authorize the expenditure of LEAA funds to replace or supplement funds appropriated for the payment of counsel fees in Federal criminal proceedings, would make the use of LEAA funds for such purpose a clearly unwarranted intrusion by LEAA in an area Congress expressly assigned to the Administrative Office of the United States Courts. As a result, the use of Part C funds to finance a long-established function vested by Congress in another agency of the Federal Government would clearly be contrary to the provisions of 31 U.S.C. §628, which provides that:

> Except as otherwise provided by law, sums appropriated for the various branches for expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

An Indian tribal court which exercises jurisdiction over tribal members in criminal prosecution in tribal courts would be an agency of a unit of general local government under the Section 601(d) definition where the tribe has been recognized by the U.S. Secretary of the Interior as performing a court function. The provision of defender services to indigent defendants in tribal

court prosecutions would clearly be a law enforcement and criminal justice activity under the Section 601(a) definition in such circumstances.

Summary

In sum, it is the opinion of this office that the use of Part C block grant funds to provide defender services for indigent tribal members in Federal criminal court proceedings is not within the purposes established by Congress for the use of these funds, i.e., for the benefit of State and local law enforcement and criminal justice. Further, in view of the complete Federal statutory provision for assignment of counsel to indigent defendants in Federal criminal proceedings, use of Crime Control Act funds to provide duplicative funding would be in violation of 31 U.S.C. §628. The use of Part C block grant funds to provide defender services for indigent tribal members in criminal proceedings before tribal courts exercising the jurisdiction of the tribe to establish and operate tribal courts is a permissible use of such funds under Section 301 of the Crime Control Act.

Legal Opinion No. 77-2—Payment of LEAA Block Subgrant Funds to the U.S. Civil Service Commission—July 26, 1976

TO: LEAA Regional Administrator
Region II - New York

This is in response to your request of June 7, 1976, for an opinion as to whether Part C block grant funds can be used by a subgrantee to pay for training-consultant services provided by the U.S. Civil Service Commission.

The New York State Planning Agency (SPA) has requested LEAA approval of a contract between the New York State Police, a subgrantee of the State Planning Agency, and the U.S. Civil Service Commission for training and consultant services. The contract is in furtherance of the project objectives of job analysis of and recruitment for the position of New York State trooper.

Issue

The question is raised as to whether payments by the subgrantee to the U.S. Civil Service Commission, from LEAA funds, would amount to compensation of Federal employees and therefore be in violation of LEAA Financial Guideline M 7100.1A–Chg 1, Chapter 3, paragraph 38 (January 24, 1974), which provides as follows:

> Salary payments, consulting fees or other remuneration of full-time Federal employees are unallowable costs under Title I planning and action grants.

Discussion

Sections 301 and 306 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83 and 93-415), specify the purposes for which States may use LEAA Part C grant funds. These provisions contain no limitations on the range of grantees or contractors to whom State block grant funds can be disbursed for proper program purposes. Thus, a State's block grant funds may be disbursed to a Federal agency in return for benefits, such as services or equipment, as long as these benefits will improve the State's law enforcement and criminal justice system in a manner that is consistent with the act.

The LEAA Financial Guideline provision, *supra*, is intended to assure that Federal employees do not receive remuneration from a grantee of Federal funds which is in addition to the salary received from the Federal government. It is not intended to prohibit grant funds from being used to reimburse a Federal agency for services provided in assisting State or local law enforcement and criminal justice agencies.

In addition, the Intergovernmental Cooperation Act, 42 U.S.C. §4201, *et seq.*, lends further support to allowing the cost of a contract made for consulting services between New York State Police and the U.S. Civil Service Commission. A major purpose of that act is to encourage intergovernmental cooperation in the conduct of specialized or technical services to State and local governments essential to the administration of State and local governmental activities. The act enhances existing authority possessed by Federal agencies, such as the Civil Service Commission, to provide such services on a reimbursable basis.

Conclusion

LEAA block grant funds may be utilized for the purchase of contract services from Federal agencies where the services purchased are for the benefit of the State's law enforcement and criminal justice system.

Legal Opinion No. 77-3—Eligibility of Inmate Legal Services for Funding Under the Crime Control Act—August 19, 1976

TO: Executive Director
Texas Criminal Justice Division

This is in response to your letter of June 23, 1976, in which you request an opinion with regard to the legality of a proposed project to be funded under a subgrant to the State Bar of Texas. The project would provide counseling and legal representation to inmates of the Texas Department of Corrections on civil rights matters during administrative hearings and 42 U.S.C. §1983 cases in Federal court.

Under the grant, the State Bar of Texas would compensate attorneys for representing inmates in civil rights matters against the Texas Department of Corrections, initially in administrative proceedings and, if such proceedings fail to resolve the inmate's grievance, in judicial proceedings.

It is the opinion of this office that there is statutory authority to utilize LEAA funds for such a project under either Part C or Part E of the Omnibus

Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83 and 93-415) (Crime Control Act).

Issue

The issue presented is whether, in light of the fact that civil rights complaints are civil and not criminal actions, the proposed grant would "improve and strengthen law enforcement and criminal justice" (Part C, Section 301(a)) or contribute to the "improvement of correctional programs and practices" (Part E, Section 451).

Part C

Section 301(a) of the Crime Control Act states the general purpose of Part C of the act as follows:

> (a) It is the purpose of this part to encourage States and units of general local government to carry out programs and projects to improve and strengthen law enforcement and criminal justice.

Section 301(b) lists the general program areas in which States may utilize block grant funds. Section 301(b)(1) provides that these funds may be utilized for:

> (1) Public protection, including the development, demonstration, evaluation, implementation, and purchase of methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places.

The term "law enforcement and criminal justice," as used in Section 301 is defined in Section 601(a) of the act as follows:

> (a) "Law enforcement and criminal justice" means *any activity pertaining to crime prevention, control or the enforcement of the criminal law,* including, but not limited to police efforts to prevent, control, or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services), *activities of corrections, probation, or parole authorities,* and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction. (Emphasis added.)

As the definition indicates, correctional activities are considered to be an integral part of the law enforcement and criminal justice system. The relationship between an improved correctional system and the overall improvement of the law enforcement and criminal justice system cannot be doubted.[1] Assuring the legal rights of offenders under correctional system control is one essential aspect of correctional reform and improvement. One way to do this is to provide offenders with access to legal services, beyond

[1] See National Advisory Commission on Criminal Justice Standards and Goals, *Corrections Report,* Chapter 1–"Corrections and the Criminal Justice System," pp. 1-14.

court-related defender services, which will enable them to assert effectively their legal and constitutional rights to proper conditions and treatment while under correctional system supervision.[2] In addition, corrections experts agree that the correctional system can play an important role in the reduction of recidivism and the incidence of crime committed by ex-offenders. While rehabilitation programs play a key part in this role, it is generally agreed that improving all aspects of the correctional system may contribute to the reduction of recidivism:

> There is no doubt that corrections can contribute more than it does to the reduction and control of crime, and this is clearly one of its purposes. What is done in corrections may reduce recidivism. To the extent that recidivist crime is a substantial proportion of all crime, corrections should be able to reduce crime. A swift and effective criminal justice system, respectful of due process and containing a firm and humane corrections component, may provide useful deterrents to crime. Through these mechanisms corrections can contribute to the overall objective of crime reduction.[3]

Therefore, Part C funds may be used for correctional programs and projects which seek to insure the legal rights of offenders in the correctional system, including access to legal services. Such services include all types of legal services made available to offenders in the correctional system that are of a civil nature because the services fall within the ambit of Section 301(a) and (b)(1) of Part C of the Crime Control Act.

Part E

Section 451 of the Crime Control Act states the general purpose of Part E of the act as follows:

> It is the purpose of this part to encourage States and units of general local government to develop and implement programs and projects for the construction, acquisition, and renovation of correctional institutions and facilities, and for the improvement of correctional programs and practices.

Section 453(1) requires that a State planning agency's application for Part E funds:

> (1) set[s] forth a comprehensive statewide program for the construction, acquisition, or renovation of correctional institutions and facilities in the State and the improvement of correctional programs and practices throughout the State.

[2] Access to legal services is discussed in Chapter 2 of the *Corrections Report, supra,* and is the subject of Standard 2.2 of the Report. pp. 17-28.

[3] *Id.*, at p. 3.

Senator Roman L. Hruska, in debate on the Part E amendment to the Crime Control Act, described the scope of corrections funding under Part E as follows:

> Under the proposed amendments to the Safe Streets Act corrections programs of all types will be eligible for funding under both Part C and the new authorization for Part E.[4]

This statement indicates that Congress intended the scope of Part E funding to be equally as broad as the authority to fund corrections programs under Part C. Therefore, the program being an eligible corrections program under Part C would, *ipso facto*, be eligible for funding under Part E.[5] In any event, it is equally clear that a program designed to protect and assure the civil and constitutional rights of offenders in the correctional system will, in fact, result in the ultimate improvement of correctional programs and practices.

Other Considerations

It should be noted that Crime Control Act funds may not be used to support civil *damage* suits on behalf of private litigants. This limitation insures that the benefit from the suit will be to the law enforcement and criminal justice system itself and consequently be within the statutory purposes of the act.

This office would also point out that nonlegal conflict-of-interest-type problems are inherent in a grant of funds by a State governmental unit to a recipient whose approved activities under the grant include the bringing of legal actions against other units of State government.

Conclusion

The Texas State Bar project to provide legal representation to offenders in Texas Department of Corrections facilities in administrative and judicial proceedings related to the protection of the civil rights of the offender is eligible for funding as a corrections program under both Part C and Part E of the Crime Control Act.

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[4] 116 Cong. Rec. §17536, daily ed., October 8, 1970.

[5] Office of General Counsel Legal Opinion No. 72-23, August 23, 1972, distinguishes court-related defender services, eligible for funding only under Part C, and legal services which are correctional in nature and therefore eligible for funding under either Part C or Part E.

Legal Opinion No. 77-4--Obtaining Toll-Free (800) Access for the Use of Potential Grantees When Calling LEAA Headquarters--August 17, 1976

TO: Director, Administrative Services Division
Office of Operations Support (OOS), LEAA

This is in response to your memorandum requesting an opinion concerning the legality of using appropriated funds to provide a toll-free access line which potential grantees could use in making inquiries about the status of their grant applications.

The Federal Property Management Regulations relating to telecommunications are contained in 41 C.F.R. Part 101-35, issued under authority of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §481, *et seq.* It is the policy of the General Services Administration, under 41 C.F.R. §101-35.103, to provide communication services for executive agencies at the minimum total cost to the government consistent with requirements of programed activities, and to enter into agreements with other departments and agencies which would permit their operation of special purpose communications facilities. However, GSA has no authority to provide any agency with a toll-free access line. Therefore, GSA can provide such a service to LEAA only if LEAA itself has independent statutory authorization to utilize a toll-free access line.

As an example, one Federal agency which is currently utilizing a toll-free line is the Consumer Product Safety Commission, whose mission is to reduce the unreasonable risk of injury to consumers from consumer products. The Commission operates a toll-free Consumer Product Safety Hotline, to be utilized by members of the public. The Office of General Counsel of the Consumer Product Safety Commission has indicated that the statutory authority for provision of the Hotline is contained in Section 5(a) of the Consumer Product Safety Act of 1972, Public Law 92-573 (15 U.S.C. §2054(a)) which provides in part:

> The Commission shall–
> (1) maintain an Injury Information Clearinghouse to collect, investigate, analyze, and disseminate injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products. . . .

If LEAA is to be able to provide a toll-free service to its grantees, authorization must be found in a similar type of provision in either the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83 and 93-415) or in LEAA's appropriation. Section 402(a) of the act provides:

> There is established within the Department of Justice a National Institute of Law Enforcement and Criminal Justice (hereafter referred to in this part as 'Institute') . . . . It shall be the purpose of the Institute to encourage research and development to improve and strengthen law enforcement and criminal justice, to disseminate the results of such efforts to State and local governments . . . .

Section 402(c) provides:

> The Institute shall serve as a national and international clearinghouse for the exchange of information with respect to the improvement of law enforcement and criminal justice, including but not limited to police, courts, prosecutors, public defenders and corrections.

These sections would appear to allow the Institute to employ a toll-free access line for the purpose of handling requests for information relating to law enforcement and criminal justice. Also, the language in Section 402(a) declaring that the purpose of the Institute is to "encourage research and development" could be interpreted so as to allow use of a toll-free access line by potential grantees in inquiring about the status of grant applications.

In regard to LEAA grants other than Institute grants, there is again language in the act which may demonstrate congressional approval of the use of a toll-free line in order to keep potential grantees informed about their applications. The "Declaration and Purpose" section of the act states:

> It is the purpose of this title to . . . encourage research and development directed toward the improvement of law enforcement and criminal justice and the development of new methods for the prevention and reduction of crime and the detection, apprehension, and rehabilitation of criminals.

If research and development is to be "encouraged," it is essential that potential grantees have the means by which to communicate readily with LEAA. A toll-free access line would fulfill this need and thus serve to encourage accomplishment of the purposes of the Omnibus Crime Control and Safe Streets Act.

Furthermore, under Section 515, LEAA is authorized:

> (b) to collect, evaluate, publish, and disseminate statistics and other information on the condition and progress of law enforcement within and without the United States; and
>
> (c) to cooperate with and render technical assistance to States, units of general local government, combinations of such States or units, or other public or private agencies, organizations, institutions, or international agencies in matters relating to law enforcement and criminal justice.

Thus, a toll-free access line could be utilized by all of the offices within the agency, in addition to the Institute, to handle requests for information relating to law enforcement. Also, in "cooperating" with the States and other institutions and organizations, LEAA could allow potential grantees to call in, requesting information about the status of their grant applications.

If LEAA does decide that it wishes to install a toll-free access line, a request should be made to the Office of Agency Assistance, Planning, and Policy, Automated Data and Telecommunications Service, General Services Administration. The statutory bases which LEAA believes authorize installation of the access line should be specified. The Office of General Counsel of GSA will then make a determination as to whether that agency can provide this service to LEAA.

Legal Opinion No. 77-5—Pennsylvania State Legislation—August 13, 1976

TO: Attorney General
State of Pennsylvania

This is in response to your request for an opinion on Pennsylvania General Assembly Act No. 117 of 1976 and the Federal Augmentation Appropriations Act of 1976, No. 17-A, and on the impact of these acts on the LEAA program in Pennsylvania.

The two Pennsylvania acts restrict distribution of funds granted by LEAA to the State of Pennsylvania. These funds were granted for the implementation of comprehensive law enforcement and criminal justice plans submitted by the State to LEAA under the requirements of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Law 93-83 and 93-415). Award of the funds was made conditional on the State's compliance with these comprehensive plans.[1]

Pennsylvania Act No. 117 requires that all funds awarded by LEAA to Pennsylvania be placed in the general fund of the State. Act No. 117 requires the State legislature to appropriate LEAA funds out of the general fund of the State. Act No. 117 also prohibits the State Treasurer from disbursing LEAA funds that have not been appropriated by the State legislature.

Pennsylvania Act No. 17-A appropriates out of the general fund of the State certain LEAA funds granted to the State for implementation of the State comprehensive law enforcement and criminal justice plans approved by LEAA. Act No. 17-A does not appropriate LEAA funds for the Office of Special Prosecutor. Act No. 17-A does not appropriate LEAA funds for disbursement to private organizations by the Governor's Justice Commission (the State Criminal Justice Planning Agency or SPA). The State of Pennsylvania in the comprehensive law enforcement and criminal justice plans submitted to LEAA represented that the Office of Special Prosecutor and the private organizations would receive LEAA funds. LEAA accepted these representations in approving the plans.

In Legal Opinion No. 75-3, July 18, 1974, this office considered similar action by the Illinois State legislature. This opinion construed a State of Illinois appropriations bill which contained language preventing the State Comptroller from honoring vouchers for programs contained in law enforcement and criminal justice comprehensive plans approved by LEAA. The bill would have eliminated funding authorization for programs contained in the comprehensive plan, and this office determined that such action violated the provisions of the Crime Control Act.

Like the Illinois proposal, the Pennsylvania enactments would vest in the legislature ultimate discretion over the distribution of LEAA funds. Under Section 203 of the act, this discretion must be vested in a State planning

[1] See Section 509 of the act.

agency designated by and subject to the governor's jurisdiction and control.[2] The Pennsylvania Governor's Justice Commission is the instrumentality designated by the Governor to receive and allocate LEAA funds.

It is not improper under the act for the State legislature to provide that the Governor's Justice Commission must operate according to State fiscal and administrative procedures which are not inconsistent with Federal policies and requirements. However, the legislature may not substitute its judgment for that of the Governor in determining how these funds should be expended or allocated.

It is a well-settled principle of Federal law that the Federal Government may specify the terms and conditions under which grant funds may be expended. In *King* v. *Smith*,[3] the Supreme Court invalidated a State law establishing qualifications for the receipt of Federal grant funds. The State law was contrary to the language and intent of the Federal statute which authorized the grant program and the Supreme Court concluded that the Federal government ". . . may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulation inconsistent with such Federal terms and conditions, is to that extent invalid."[4]

The Pennsylvania acts, passed by the General Assembly, appropriate LEAA monies in a manner inconsistent with the State's comprehensive law enforcement and criminal justice plans and are in derogation of the Governor's responsibility to develop and implement State comprehensive plans pursuant to the Crime Control Act. The refusal of the State Treasurer to honor previously approved fund requisitions contravenes the act and the LEAA grant conditions upon which the State of Pennsylvania received its LEAA funding.

If Pennsylvania does not comply with the comprehensive law enforcement and criminal justice plans approved by LEAA, LEAA will initiate appropriate action under the act. Such action could include a termination of payments of LEAA funds to Pennsylvania.[5]

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[2] See *Allen* v. *Mississippi Commission on Law Enforcement*, 424 F.2d 285, 288, 289 (5th C.C.A. 1970).

[3] 392 U.S. 309 (1968).

[4] 392 U.S. at 333. See also *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947) and Madden, "Providing an Adequate Remedy for Disappointed Contractors Under Federal Grants-In-Aid to States and Units of Local Government," 34 Fed. Bar Journal 201, 205-207 (1975).

[5] Section 509 of the act provides as follows:

> Sec. 509. Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this title, finds that, with respect to any payments made or to be made under this title, there is a substantial failure to comply with–
>
> (a) the provisions of this title;
>
> (b) regulations promulgated by the Administration under this title; or
>
> (c) a plan or application submitted in accordance with the provisions of this title;
>
> the Administration shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure.

Legal Opinion No. 77-6—Computation of the One-Third Personnel Limitation Rule of Section 301(d)—November 22, 1976

TO: Office of Regional Operations (ORO)
LEAA

This is in response to your request for a legal opinion interpreting what elements constitute "compensation for law enforcement and criminal justice personnel." In particular, you seek clarification as to whether fringe benefits are subject to the one-third limitation rule when computing grant costs for determining compliance with Section 301(d) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415 and 94-503).

Your request states that the regional offices have used only salaries and wages, and not fringe benefits, in determining compliance in the past. This is a correct interpretation of the statutory provision.

The one-third limitation as it applies to Part C block grants is set out in Section 301(d) of the act as follows:

> (d) Not more than one-third of any grant made under this section may be expended for the compensation of police, and other regular law enforcement and criminal justice personnel. The amount of any such grant expended for the compensation of such personnel shall not exceed the amount of State or local funds made available to increase such compensation. The limitations contained in this subsection shall not apply to the compensation of personnel for time engaged in conducting or undergoing training programs or to the compensation of personnel engaged in research, development, demonstration or other short-term programs.

The provision in this section is made applicable to discretionary grants by the application of the language in the unnumbered sentence in the paragraph following Section 306(a)(2) which provides:

> The limitations on the expenditure of portions of grants for the compensation of personnel in subsection (d) of section 301 of this title shall apply to a grant under such paragraph.

Resolution of this issue revolves around the meaning of "compensation," i.e., whether that term as used in Section 301(d) encompasses all forms of remuneration or is limited to salary. The term "compensation" could be broadly interpreted to include fringe benefits while "salary" on the other hand has been narrowly defined as a fixed annual or periodical payment for services, depending upon the time and not the amount of services rendered. (*Benedict* v. *U.S.*, 176 U.S. 357 (1899).)

Where the language of a statute is plain, the literal meaning governs unless it is obvious from the act itself that the legislature intended that it be used in a sense different from its common meaning. (See *Order of Railway Conductors of America* v. *Swan*, 329 U.S. 520 (1947); *Barber* v. *Gonzales*, 347 U.S. 637 (1954).) Sutherland writes:

> The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are

sufficiently flexible to admit of a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act. (§46.07, Sutherland, *Statutory Construction*, 4th Ed. (1973).)

Furthermore, when a word in a statute is ambiguous, the general rule is to study the legislative history in establishing the proper meaning. (Sutherland at §45.05.) A test for ambiguity has been held to be that "a statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." (*Madison Metropolitan Sewerage District* v. *Department of Natural Resources*, 63 Wisc. 2d 175, 216 N.W. 2d 533 (1974).) It appears that the application of "compensation" in the Crime Control Act is either ambiguous or sufficiently vague to *require* consideration of the legislative history.

Review of the legislative history confirms that Congress intended the word "compensation" to be considered synonymous with the word "salary." The legislative history consistently and clearly focuses on compensation as "salary." During the original Senate debates on S. 917, Senator Roman L. Hruska set forth concerns on Federal funding of State and local law enforcement personnel:

> Another major point in title I has to do with the payment of certain funds which are appropriated under it to support the pay of various municipal, State, or county law enforcement personnel.
>
> Title I now allows Federal funds to be used to support the salaries of local law enforcement officers. Up to one-third of any grant may be used to pay up to one-half of salary increases. This is a modified version of the original administration suggestion that up to one-third of each grant be used for police salaries; but the inherent dangers are the same.
>
> I have discussed the dangers of Federal control that flow from the use of a direct-grant system. They apply consistently when the object of that grant is police salaries. In effect, "He who pays the piper calls the tune."
>
> Once salary support is granted, it will be virtually impossible to withdraw it. Most Government programs seem difficult to terminate regardless of how temporary they were thought to be. However, withdrawing salary payments, in effect, cutting a policeman's salary, would be impossible. This provision would create a permanent dependence by local police on the Federal Treasury. (114 Cong. Rec. S 5348 (daily ed., May 10, 1968).)

On the House side, Representatives William McCullough and Charles M. Mathias wrote:

> As introduced, the bill could have permitted the Federal government to pay up to one-third of State and local police salaries and pay total police salaries for those engaged in training programs or performing innovative functions. (Additional views, H.R. Rep. No. 488, 90th Cong., 1st Sess. (1967).)

In 1970, Senator John L. McClellan during Senate debate on the amendment emphasized that:

> . . . the personnel compensation limitations set out in the section [301(d)] apply only to restrict the use of grant funds for the payments of salaries of police and other regular law enforcement personnel . . . .
>
> It is intended that the use of block grant funds for the salaries of personnel whose primary responsibility is to provide assistance, maintenance, or auxiliary services or administrative support to the regular operational components of law enforcement agencies shall not be subject to the limitations set forth in section 301(d), nor would the section apply to salary support for personnel engaged in research and development projects or other short-term programs supported under a title I grant. The House bill included an identical provision. (116 Cong. Rec. S 17532 (daily ed., October 8, 1970).)

Finally, the 1973 legislative history continues to emphasize salaries as compensation. Representative David Worth Dennis reminded the House that from the beginning a limit was put on the amount of Federal funds that could be used to pay ordinary salaries. (See 119 Cong. Rec. H 4873 (daily ed., June 18, 1973).) In fact, the 1973 discussion centered on whether the limitation should apply solely to police salaries or to all law enforcement personnel salaries. On the Senate side, Mr. McClellan introduced the following:

> The Committee has retained the provision of the Act that limits the use of grant funds to pay the salaries of police and other regular law enforcement and criminal justice personnel. The Act provides that not more than one-third of any grant may be used to pay such salaries. The House Committee, in H.R. 8152, restricted the application of this provision to police officers' salaries only. This Committee believes that the limitation should apply to all regular law enforcement personnel to assure that LEAA funds will be used primarily for innovative and improved methods of crime control and law enforcement rather than to augment State and local salary outlays. Moreover, the meaning of the existing law is understood by LEAA and by the States and cities and should not, in the Committee's view, be clouded by language changes that will introduce a period of uncertainty while the provision is undergoing interpretation. (119 Cong. Rec. S 11747 (daily ed., June 22, 1973).)

In sum, legislative history supports the position that "compensation" as used in Section 301(d) refers to salary and wages, not all forms of remuneration.

Legal Opinion No. 77-7—Applicability of Juvenile Justice and Delinquency Prevention Act Provisions to Indian Tribal Courts—October 7, 1976

TO: LEAA Regional Administrator
Region VIII - Denver

This is in response to your request for an opinion with regard to the applicability of provisions of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, *et seq.*, Public Law 93-415 (Juvenile Justice Act), to Indian tribal courts exercising jurisdiction over juvenile offenders.

The issue was raised by South Dakota. The South Dakota State Criminal Justice Planning Agency (SPA) has acted under the assumption that, because the State has no authority to enforce compliance with the Juvenile Justice Act's requirements for deinstitutionalization of status offenders (Section 223(a)(12)) and separation of adult and delinquent offenders (Section 223(a)(13)) where Indian tribal courts have sovereign jurisdiction over juvenile offenders, it would not be held accountable for the failure of Indian jurisdictions to meet these statutory requirements.

Issue

Will a State be held accountable for compliance with Juvenile Justice Act requirements by Indian tribal entities exercising sovereign court and correctional jurisdiction over juvenile offenders?

Discussion

The State planning agency is required under Section 223(a)(2) of the act to include in its plan "satisfactory evidence that . . . (it) . . . has or will have authority, by legislation if necessary, to implement such plan in conformity with this part." This authority may be granted through legislation or by executive order. The effect of the grant of authority is to put the sovereign authority of the State behind, and to hold the State accountable for, the actions and activities of the State planning agency in carrying out the purposes and requirements of the Juvenile Justice Act.

An Indian tribe within a State may, of course, be the beneficiary of funds subgranted by the State planning agency, either as a "unit of general local government" (Section 103(8)) or as a tribal entity. The sovereign authority of the tribe with regard to civil and criminal jurisdiction over acts committed on the reservation, however, varies from State to State and, in some States, from tribe to tribe within the State.

These jurisdictional variations result from provisions of Federal law specifying permissible Federal, State, and tribal jurisdiction; State laws and State interpretation of Federal and State laws regarding State and tribal jurisdictional authority; and local practices which have evolved over time. Where a tribe exercises jurisdiction over juvenile offenders through an established tribal court and operates correctional institutions for juvenile (and adult) offenders, and these activities are not subject to State law (i.e., the functions are performed under the sovereign authority of the tribal entity), the State cannot mandate tribal compliance with the statutory provisions of the Juvenile Justice Act. This office views the authority requirement of Section 223(a)(2) implicitly to limit the extent to which the State, through its designated State planning agency, can be held accountable for compliance with the requirements of the act. Therefore, where the State has no authority to regulate or control the law enforcement activities of a sovereign Indian tribal entity, it cannot be held accountable for the failure of that tribal entity to meet requirements of the Juvenile Justice Act.

In South Dakota, all of the eight tribal entities recognized by the Secretary of the Interior as performing law enforcement functions exercise a full range of law enforcement functions (see LEAA Financial Guideline M 7100.1A, April 30, 1973, Appendix 7). South Dakota did not act under Section 7 of Public Law 280 (Public Law 83-280, 67 Stat. 588) to assume civil and criminal jurisdiction over Indian country within the State. Therefore, insofar as the South Dakota tribes exercise sovereign jurisdiction over juvenile (and adult) offenders and, following adjudication, control institutional placement, the State of South Dakota is not accountable for tribal compliance with Sections 223(a)(12) and (13) of the act. It follows that the State's compliance

monitoring responsibility (Section 223(a)(14)) would not include tribal compliance with these act requirements.

This opinion does not mean that South Dakota should fail to provide financial assistance to tribes which are desirous of meeting these important objectives of the act, nor does it preclude the State from attaching appropriate special conditions to Crime Control Act and Juvenile Justice Act grants to Indian tribes in order to further these objectives.[1]

Summary

It is the opinion of this office that where a State does not have jurisdiction over juvenile (and adult) offenders for acts committed in Indian country (jurisdiction is in a tribal court), the State may not be held accountable for the failure of the Indian tribal entity to comply with the statutory requirements of the Juvenile Justice Act for deinstitutionalization of status offenders (Section 223(a)(12)) and separation of adult and delinquent offenders (Section 223(a)(13)).

Legal Opinion No. 77-8—State Eligibility to Renew Participation in Juvenile Justice Act Formula Grant Program Following Prior Withdrawal from Participation—October 22, 1976

TO: LEAA Regional Administrator
Region IV - Atlanta

This is in response to your request for an opinion with regard to State eligibility to renew participation under the formula grant program of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, *et seq.*, as amended (Public Law 93-415, as amended by Public Law 94-503) following a prior withdrawal from participation in the act.

In the instant case, North Carolina submitted a fiscal year 1975 Juvenile Justice Act Plan Supplement Document, which was approved by LEAA, and was awarded a formula grant. Subsequently, North Carolina withdrew its participation and refunded the balance of unobligated fiscal year 1975 grant funds to LEAA. In fiscal year 1976 no formula grant application was submitted by North Carolina. However, the State is contemplating renewing its participation by submitting a formula grant application for fiscal year 1977.

Issue

If a State originally participated in the formula grant program in fiscal year 1975 but withdrew from participation prior to accepting fiscal year 1976

[1] In this regard, see the proposed 1976 House and Senate amendments to Sections 306, 455 and 507 of the act. These amendments proposed to eliminate the possible imposition of liability on a State in regard to grants to Indian tribes. Consequently, the legislation will further encourage such awards to tribal entities.

formula grant funds, may the State renew its participation in fiscal year 1977 with an additional period of up to two years to meet the deinstitutionalization of status offenders requirement of Section 223(a)(12) of the Juvenile Justice Act?

Discussion

Section 223(a)(12) of the Juvenile Justice Act states that the plan submitted by a State to receive its formula grant entitlement under the act must:

> (12) provide within two years after submission of the plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, shall not be placed in juvenile detention or correctional facilities, but must be placed in shelter facilities . . . .

This office has interpreted the Section 223(a)(12) plan provision strictly because of the explicit two-year time limitation and the conference report characterization of the provision as a requirement for participation in the formula grant program.[1]

In Office of General Counsel Legal Opinion No. 76-6, October 7, 1975, analysis of the Section 223(a)(12) provision led to the conclusion that:

> It is implicit in the Juvenile Justice Act that failure to achieve the goals of Section 223(a)(12) . . . within applicable time constraints will terminate a State's eligibility for future Juvenile Justice Act funding.

Further analysis of this provision in Office of General Counsel Legal Opinion No. 76-7, October 7, 1975, established that a State could fail to comply with the requirement of Section 223(a)(12) either in the planning stage or in the execution of its approved plan. This opinion established a qualitative "good faith" standard to judge a State's ongoing efforts to implement its plan and meet the two-year deinstitutionalization requirement. Given such a "good faith" effort, the consequence of a failure to carry out the plan and thus meet the requirement within two years was described as follows:

> . . . an approved plan with appropriate assurances and a "good faith" effort to meet the requirements coupled with a later determination by the State that the requirements could not be met would only result in future fund ineligibility and not require repayment of funds previously expended in accord with the Act and in pursuance of its objectives. Thus, if a State receiving Juvenile Justice Act formula funds were to later ascertain that it could not meet the Act's requirements due to unforeseeable circumstances or no longer wished to participate, no sanction would attach unless a finding of lack of "good faith" was made. A State's failure to meet the 223(a)(12) requirement within a maximum of two years from the date of submission of the initial plan would result in future fund cut off unless such failure was de minimus.[2]

[1] Senate Report No. 93-1103, August 16, 1974, p. 29.

[2] Subsequent congressional clarification of the quantitative standard to be applied to the deinstitutionalization requirement has established 75 percent deinstitutionalization as the minimum compliance level which a State must attain in order to maintain its eligibility for formula grant funding beyond the initial two-year funding period.

Applied literally, the statutory provision and the above-quoted passage from Legal Opinion No. 76-7 would appear to require compliance within two years from the date of initial plan submission irrespective of a State's continuing participation under the Juvenile Justice Act. However, there are limitations on the rule of "literal interpretation" in construing statutes. As stated by Sands in *Statutes and Statutory Construction* (4th Ed., 1973), ". . . if the literal import of the text of an act is not consistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature."

It would be an absurd result to conclude that the mere submission of an application would bind a State to deinstitutionalize status offenders within two years irrespective of whether the plan was subsequently approved, an award of funds was made and accepted by the State, or whether identified barriers to achieving compliance could not be overcome within a reasonable period of time.

It is more consonant with the overall objectives of the act to interpret congressional intent to be that compliance is required following two consecutive years or two full fiscal years of participation in the formula grant program. This interpretation assumes that, if a State's participation is interrupted prior to completion of the first year or the second consecutive year of full participation, the interruption resulted from an inability to overcome barriers identified in the approved plan for compliance with the deinstitutionalization requirement. It assumes further that a good faith effort was made to overcome those barriers and that participation was terminated immediately upon the determination that the State could not achieve compliance within the statutory time limitation. Failure to meet these conditions would evidence a lack of good faith on the part of the State and constitute a substantial failure on the part of the State to meet the statutory deinstitutionalization requirement.

Conclusion

Where a State initially participated in the formula grant program of the Juvenile Justice Act in fiscal year 1975, but withdrew from participation prior to accepting fiscal year 1976 funds, the State may be permitted to subsequently renew its participation with up to two additional years for compliance with Section 223(a)(12) if LEAA determines that: (1) The withdrawal from participation resulted from an inability to overcome barriers identified in its initial approved plan for compliance with the deinstitutionalization requirement; and (2) a good faith effort was made to overcome identified barriers to compliance and withdrawal followed immediately upon the State's determination that compliance could not be achieved within the statutory time limitation.

Since the application of these criteria to North Carolina is a programmatic rather than a legal matter, this office defers to the LEAA Regional Office in making the determination of North Carolina's eligibility for renewed formula grant funding in FY 1977. If the Regional Office denies North Carolina's application based on a determination that the State is ineligible for formula

grant funding because of a substantial failure to comply with Section 223(a)(12), appropriate notice and opportunity for hearing must be provided pursuant to Section 226(2) of the act and LEAA hearing and appeal procedures.

Legal Opinion No. 77-9—Placement of Juvenile Offenders in Community Residential Treatment Programs with Adults—December 1, 1976

TO: LEAA Regional Administrator
Region I - Boston

This is in response to your request for an opinion interpreting the scope of Section 223(a)(13) of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, *et seq.*, as amended (Public Law 93-415, as amended by Public Law 94-503) (Juvenile Justice Act).

The Rhode Island State Criminal Justice Planning Agency or SPA has inquired whether its compliance with Section 223(a)(13) of the Juvenile Justice Act would be in jeopardy because Dismas House, a community halfway house operated by the Diocese of Providence, included in its residential population two juvenile offenders under the age of 18. It is the understanding of this office that some of the adults residing at Dismas House are under sentence following conviction for crime and that juveniles are placed there by the Juvenile Court following adjudication for delinquency.

Issue

Does Section 223(a)(13) of the Juvenile Justice Act prohibit the commingling of juvenile and adult offenders in community residential treatment programs?

Statutory and Guideline Provisions

Section 223(a)(13) of the Juvenile Justice Act requires that the State plan submitted under Section 223(a) in order to receive formula grant funds must:

> (13) provide that juveniles alleged to be or found to be delinquent shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges . . . .

Section 103(12) of the Juvenile Justice Act (definitions section) defines the term "correctional institution or facility" as follows:

> (12) the term "correctional institution or facility" means any place for the confinement or rehabilitation of juvenile offenders or individuals charged with or convicted of criminal offenses . . . .

LEAA State Planning Agency Grants Guideline M 4100.1E, Chap. 3, Par. 77 states the purpose of Section 223(a)(13) in subparagraph i(2):

> This provision is intended to assure that juveniles alleged to be or found to be delinquent shall not be confined or detained in adult jails, lockups or correctional facilities unless the juvenile can be kept totally separate from adult inmates, including inmate trustees, except that contact incidental to admission and booking.

Discussion

The key words of Section 223(a)(13) that must be considered in resolving the issue raised by Rhode Island are "institution" and "incarcerated." By the terms of the section, commingling is prohibited only in "institutions" where adults are "incarcerated" in either pretrial or postconviction status.

The term "correctional institution or facility," as defined by Section 103(12) is not used in Section 223(a)(13). The term was not in the original Juvenile Justice Act legislation but appeared as Section 601(1) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430 and 94-503). In that act the term is used to define the scope of funding under the Part E corrections program and to define the scope of correctional plan requirements. Had Congress intended the term to apply to Section 223(a)(13), it could easily have used the term itself in place of the word "institution." That Congress failed to do so is indicative of a lack of such an intent. Therefore, this office does not feel constrained to define "institution" through a different term which was defined for a different purpose for a different act.

Senator Birch Bayh, cosponsor of S. 821, the Senate bill that was the source of the Section 223(a)(13) requirement, discussed during floor debate the need to utilize community treatment programs for juveniles:

> Community-based treatment for delinquents is the most promising road to rehabilitation. Institutionalization has proven a failure, indicating that separation of a youth from his home environment does little to prepare him to cope in a law-abiding manner when he returns home. The cost of incarceration in a closed environment is at least four times as great as most community facilities, particularly non-residential services. The success of probation in general shows that at least half of the incarcerated population would succeed in the community under supervision. (120 Cong. Rec. S 13491, daily ed., July 25, 1974.)

Senator Bayh's statement distinguishes treatment and rehabilitation in an open, community-based treatment program from incarceration in closed, institutional environments. The statement provides a reasonable basis for distinguishing an "institution," as used in Section 223(a)(13), from community-based treatment facilities such as the halfway house facility administered by Dismas House.

Further, while the term "incarcerated" is not defined by the act, the term "incarceration" is defined by Black as follows: "Imprisonment, confinement in a jail or penitentiary." (Black's Law Dictionary, 4th Ed., 19.)

This definition, although not binding, is indicative of a common understanding, reflected in Senator Bayh's statement, that an individual may be "incarcerated" in a jail, penitentiary, or closed institutional environment, but not in a residential community treatment program.[1]

In light of the legislative history indicating an intention to distinguish traditional "institutional" treatment from community treatment programs and the law dictionary definition of "incarceration" as limited to jails and penitentiaries, this office is of the opinion that the placement of juvenile offenders in an open, community halfway house where they have regular contact with adult offenders is not in violation of Section 223(a)(13) of the Juvenile Justice Act.

For purposes of Section 223(a)(13) an "institution" may, therefore, be defined as a "jail, lockup, penitentiary, or similar place of secure incarceration (including juvenile detention and correctional facilities of such a nature) which may, under State law, be utilized for the secure detention or confinement of juvenile offenders and adult persons who have been convicted of a crime or are awaiting trial on criminal charges." We view this definition as consistent with the statutory and implementing guideline provision, *supra*, and the intent of Congress to assist the States in providing more enlightened and effective treatment of juvenile offenders.

Conclusion

Section 223(a)(13) of the Juvenile Justice Act and the implementing LEAA guidelines do not prohibit the commingling of juvenile and adult offenders in nonsecure community-based residential treatment programs.

Legal Opinion No. 77-10—Use of Part C Funds for Purchase of Civil Defense Communications Equipment—December 1, 1976

TO: LEAA Regional Administrator
Region I - Boston

This is in response to your letter dated September 15, 1976, regarding an inquiry by the Massachusetts Governor's Commission on Crime and Delinquency (the State Criminal Justice Planning Agency or SPA) as to whether Part C funds can be used to purchase civil defense communications equipment for use by the New Hampshire Civil Defense Agency.

The New Hampshire Civil Defense Agency is established "to cope with disasters resulting from enemy attack, sabotage, or other hostile action, or from fire, flood, hurricane, earthquake, or other natural or man-made causes."

[1] The National Advisory Commission on Criminal Justice Standards and Goals in its *Corrections* report consistently treats community-based correctional programs as an *alternative* to incarceration under the traditional "institution model" for corrections. See Chapter 7, p. 221-246 of the report.

It is indicated that the equipment will be used to communicate with all police departments in the State and will be available 24 hours a day for police use in the event of an emergency.

The pertinent sections of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430, and 94-503) are Sections 301(a), 301(b)(1), and 601(a). These sections read:

> Sec. 301.(a) It is the purpose of this part, through the provision of Federal technical and financial aid and assistance, to encourage States and units of general local government to carry out programs and projects to improve and strengthen law enforcement and criminal justice.
>
> (b) The Administration is authorized to make grants to States having comprehensive State plans approved by it under this part, for:
>
> (1) Public protection, including the development, demonstration, evaluation, implementation, and purchase of methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places."
>
> Sec. 601. As used in this title–
>
> (a) "Law enforcement and criminal justice" means any activity pertaining to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to police efforts to prevent, control, or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services), activities of corrections, probation, or parole authorities, and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction.

In order to be eligible for general assistance from LEAA under the Omnibus Crime Control and Safe Streets Act, the agency seeking the grant must be primarily engaged in law enforcement or criminal justice activities (*see* LEAA Legal Opinion No. 74-4 (July 17, 1973), Legal Opinion No. 74-46 (November 28, 1973), Legal Opinion No. 74-74 (June 30, 1974), Legal Opinion No. 75-35 (August 21, 1975), and Legal Opinion No. 75-37 (May 20, 1975)). The New Hampshire Civil Defense Agency does not meet this criterion. Rather, the Civil Defense Agency's purpose is to provide assistance in the case of disasters. No enforcement powers, either civil or criminal, are possessed by the agency. Thus, the New Hampshire Civil Defense Agency is ineligible for general funding assistance.

Alternatively, agencies which do not meet this test can still qualify for assistance for a particular program or project which is primarily for law enforcement or criminal justice purposes. However, the purchase of communications equipment for a civil defense agency does not meet the primarily law enforcement criterion, since it appears that the equipment would be used only occasionally for law enforcement purposes.

For these reasons, the purchase of communications equipment for the New Hampshire Civil Defense Agency does not qualify for assistance under the Omnibus Crime Control and Safe Streets Act.

Legal Opinion No. 77-11—New Jersey Fair Share Housing Executive Order—Applicability to LEAA Grants—December 1, 1976

TO: LEAA Regional Administrator
Region II - New York

This is in response to your request of August 13, 1976, regarding Executive Order No. 35, issued by the Governor of New Jersey on April 2, 1976. This order directs State officials administering Federal grant programs to give priority consideration to New Jersey communities which are meeting their "fair share" of low and moderate income housing needs. LEAA funds used to support community development, comprehensive planning, and street lighting projects could be affected by the order.

The issue is whether or not the Governor can direct the New Jersey State Criminal Justice Planning Agency (SPA) to set priority allocations of funds for areas of LEAA block grant programing based on a community's "fair share" housing.

Section 203(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430, and 94-503) (Crime Control Act) makes the SPA subject to the jurisdiction of the chief executive of the State. Thus, the Governor of New Jersey may direct the priority of block grant fund allocations by the State planning agency.

The States have a degree of flexibility in the allocation and use of block grant funds. Opinions of this office have reiterated in a number of different contexts (match policy, EEO requirements, etc.) the general proposition that Federal funds granted to a State become State funds upon receipt by the State. The rule is summarized by the Comptroller General of the United States in the following statement:

> It consistently has been held with respect to Federal funds granted to a State that, when such funds are receipted by a State, they become State funds and, in the absence of a condition in the grant specifically prescribing to the contrary, are totally divested of their identity as Federal funds and become funds of the State and the expenditure thereof is subject to the laws and regulations applicable to the expenditure of State funds .... (14 Comp. Gen. 916 (1935); 28 Comp. Gen. 54 (1948); 42 Comp. Gen. 631 (1963).)

Thus, while block grant funds are divested of their Federal character, they continue to be subject to the statutory conditions prescribed by Congress in the authorizing legislation and the implementing regulations (guidelines) of the granting agency:

> It is clear that a grantee of Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal government. (Citations omitted, 54 Comp. Gen. 9 (1974).)

As a result, it is clear that the executive order requirements may be given effect *unless* prohibited by or inconsistent with the Crime Control Act or LEAA guidelines. This proposition is based on the Supremacy Clause of the

United States Constitution and the rule has been clearly stated by the United States Supreme Court in the case of *King* v. *Smith,* 392 U.S. 309, 333 (1928):

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulation inconsistent with such Federal terms and conditions is to that extent invalid. (Citations omitted.)

It will be incumbent upon the LEAA Regional Office to insure that implementation of the executive order (a State regulation) by the New Jersey State planning agency does not result in violation of or conflict with LEAA statutory or guideline requirements. As the Regional Office points out, there is potential for violation of Section 202(c) (allocation of planning funds to major cities and counties), Section 303(a) (adequate assistance to areas of high crime incidence and high law enforcement and criminal justice activity), as well as other statutory and guideline requirements in the implementation of the order.

However, insofar as the executive order is implemented in a manner consistent with the terms and conditions of the grant, there is no legal bar to the implementation of the executive order by the New Jersey State planning agency.

Legal Opinion No. 77-12—Application of the Requirements of the Juvenile Justice Act to Crime Control Act Part C Funds Utilized for Juvenile Detention or Shelter Programs—December 1, 1976

TO: LEAA Regional Administrator
Region VII - Kansas City

This is in response to your request for an opinion concerning whether the requirement of Section 223(a)(12) of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, *et seq.*, as amended (Public Law 93-415, as amended by Public Law 94-503) (Juvenile Justice Act), carries over to funding from Part C of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430, and 94-503) (Crime Control Act).

Statutory Provision

Section 223(a)(12) of the Juvenile Justice Act provides as follows:

> In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes consistent with the provisions of Section 303(a), (1), (3), (5), (6), (8), (10), (11), (12), and (15) of title I of the Omnibus Crime Control and Safe Streets Act of 1968. In accordance with regulations established under this title, such plan must—
>
> * * * * *

(12) provide within two years after submission of the plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, shall not be placed in juvenile detention or correctional facilities, but must be placed in shelter facilities . . . .

Issue

The Iowa Crime Commission (the State Criminal Justice Planning Agency or SPA) has raised the question of whether this requirement is applicable to Part C funds which are used for juvenile detention or shelter-related programs.

Discussion

The Crime Control Act and the Juvenile Justice Act are separate acts, so that the provisions of one do not automatically apply to the other. The Crime Control Act contains no requirement similar to that established in Section 223(a)(12) of the Juvenile Justice Act. It has b en said that:

> [W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. (C. Sands, 2A *Statutes and Statutory Construction* §51.02, at 291 (1973), quoting *Western States Newspaper, Inc.* v. *Gehringer*, 203 Cal. App. 2d 793, 22 Cal. Rptr. 144 (1962).)

In the Crime Control Act, Congress omitted any condition requiring States to provide for deinstitutionalization of status offenders in order to receive grant funds. Of course, an SPA can add appropriate conditions to subgrants of Part C Crime Control Act funds in order to further compliance with Section 223(a)(12) of the Juvenile Justice Act. This is what Iowa has done through a special condition attached to a Part C Crime Control Act subgrant to staff a newly established detention center. The condition prohibits placement of status offenders in the detention center. If the center were to violate the condition, the Iowa Crime Commission could pursue appropriate remedies under State law or the subgrant agreement. However, LEAA would have no contractual or statutory basis to pursue such an action.

It should be noted that the Section 223(a)(12) requirement extends beyond individual entities receiving Juvenile Justice Act funds. The State's commitment to deinstitutionalization is statewide. As stated in Office of General Counsel Legal Opinion No. 76-6, August 7, 1975:

> A State accepting Juvenile Justice Act funds is expressing its intent to provide for statewide accomplishment of the goal of deinstitutionalization of status offenders and the separation of adult and juvenile offenders through the accomplishment of the State plan objectives established by the State planning agency. . . .

Thus, the conditioning of subgrants to provide a contractual basis for enforcing and implementing the Section 223(a)(12) requirement is one of a number of methods available to the SPA to further compliance with this statutory requirement and thus retain eligibility for Juvenile Justice Act formula grants beyond the initial two years of funding. While such conditions

are not required, even for Juvenile Justice Act subgrants, they are advisable since they further statewide compliance with the Section 223(a)(12) requirement.

Conclusion

The Section 223(a)(12) requirement of the Juvenile Justice Act (deinstitutionalization of status offenders) is neither applicable to nor does it affect Part C funding under the Crime Control Act. Therefore, the States are not required to condition Part C funding for juvenile detention and shelter programs on compliance with this requirement.

However, the State planning agency may attach appropriate special conditions to subgrants made with both Crime Control Act and Juvenile Justice Act funds in order to further statewide compliance with the State plan requirements of the Juvenile Justice Act.

Legal Opinion No. 77-13—Applicability of Section 223(a)(13) of the Juvenile Justice Act to Children Not Under Juvenile Court Jurisdiction—December 31, 1976

TO: LEAA Regional Administrator
Region VIII - Denver

This is in response to your request of September 8, 1976, for an opinion as to whether State action in treating children who violate municipal traffic ordinances, State traffic laws, and fish and game regulations in the same manner as adults (i.e., they may be jailed with adult offenders before or after conviction) would be in violation of Section 223(a)(13) of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, *et seq.*, as amended (Public Law 93-415, as amended by Public Law 94-503) (Juvenile Justice Act).

The Colorado Children's Code specifically excludes from the definition of "delinquent child" any child who has violated a State traffic law, municipal traffic ordinance, or State game and fish law or regulation (C.R.S. 19-1-103(9)). Further, Colorado's district courts, which have exclusive original jurisdiction in delinquency cases, have no jurisdiction over game and fish violations and jurisdiction over State or municipal traffic violations only if the violator is a child under the age of 16 and jurisdiction is transferred to the district court from county or municipal court (C.R.S. 19-1-103(9)(c)). The letter from the Colorado Division of Criminal Justice (the State Criminal Justice Planning Agency or SPA) raising the issue states that "[a] significant number of children under the age of 18 years are detained in city and county jails, processed through municipal and county courts, and occasionally sentenced to county jails under this statutory exclusion."

Issue

Does Section 223(a)(13) of the Juvenile Justice Act include within the scope of "juveniles alleged to be or found to be delinquent" children who are charged with or convicted of violations of laws or ordinances in proceedings before nonjuvenile courts having exclusive jurisdiction or concurrent jurisdiction with juvenile courts?

Statutory Considerations

Section 223(a)(13) of the Juvenile Justice Act requires that the State plan submitted under Section 223(a) must:

> (13) provide that juveniles alleged to be or found to be delinquent shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges . . . .

Discussion

Section 223(a)(13) does not require the separation in institutions of all juvenile offenders from incarcerated adult criminals. Rather, it applies only to *"juveniles alleged to be or found to be delinquent."* Neither the word "juvenile" nor the word "delinquent" is defined in the Juvenile Justice Act. However, LEAA has adopted the view, in administering the statute, that juvenile court jurisdiction involves three categories of juveniles who are generally made subject to juvenile court jurisdiction by State law:

- Criminal-type offender—A juvenile who has been charged with or adjudicated for conduct which would, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.
- Status offender—A juvenile who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.
- Non-offender—A juvenile who is subject to the jurisdiction of the juvenile court, usually under abuse, dependency, or neglect statutes, for reasons other than legally prohibited conduct of the juvenile.

The first category of offender, whether delineated as a "delinquent," an "offender," a "ward of the court," or simply as a "child" under State law, is a delinquent as this term is used in the Juvenile Justice Act. It is the alleged or adjudicated criminal conduct of the juvenile together with the noncriminal classification of the offense under State law for jurisdictional purposes that makes an offense a delinquent offense and the offender an alleged or adjudicated delinquent. The Juvenile Justice Act does not purport to establish jurisdictional age-of-offense limitations for juvenile court jurisdiction nor does it prohibit States from establishing exclusive or concurrent criminal court jurisdiction over juveniles who violate criminal laws.

Generally, juvenile court jurisdiction is determined in each State through the establishment of a maximum age below which, for statutorily determined conduct or circumstances, individuals are deemed subject to the adjudicative

and rehabilitative processes of the juvenile court. Such an individual, subject to the exercise of juvenile court jurisdiction for purposes of adjudication and treatment for any conduct or circumstances defined by State law, is a "juvenile" as this term is used in the Juvenile Justice Act. This definition of "juvenile" includes individuals who may be, for particular conduct:

- Subject to the exclusive jurisdiction of the juvenile court;
- Subject to the concurrent jurisdiction of the juvenile court and a criminal court;
- Subject to the original jurisdiction of a criminal court which has authority to transfer to a juvenile court for purposes of adjudication and treatment (a form of concurrent jurisdiction); or
- Subject to the exclusive jurisdiction of a criminal court for the particular conduct but subject to juvenile court jurisdiction for other statutorily defined conduct or circumstances.

The basis for this definition of "juvenile" is the proposition that if State law subjects an individual to juvenile court jurisdiction for purposes of adjudication related to particular conduct or circumstances, it has thereby determined that the individual is considered a "juvenile" in the eyes of the law even though he may be treated as if he were an adult for other statutorily defined conduct or circumstances. The assumption or retention of jurisdiction over a juvenile by a criminal court does not, *ipso facto,* transform the juvenile into an adult. Rather, it reflects a judgment by the State legislatures or court authorities that the interests of society and the juvenile are best served by treating the juvenile as if he were an adult in certain circumstances.

The Colorado Children's Code defines a "child" as a person under 18 years of age (C.R.S. 19-1-103(3)) and an "adult" as a person 18 years of age or older except that any minor 18 years of age or older under continuing juvenile court jurisdiction, or who is before the court for an alleged delinquent act committed prior to his 18th birthday, is a child (C.R.S. 19-1-103(2)). These provisions define the general limits on juvenile court jurisdiction and can be used to distinguish a "juvenile" from an "adult" as these terms are used in the Juvenile Justice Act.

However, by excluding juveniles who violate State game and fish laws or regulations and State traffic laws or municipal traffic ordinances (except for those under age 16) from the jurisdiction of the juvenile court, the Colorado statute has removed such juveniles from the class of juvenile offenders "alleged to be or found to be delinquent" to whom Section 223(a)(13) is applicable. Only a juvenile under the age of 16 who is actually transferred to the juvenile court for violation of a State traffic law or municipal traffic ordinance would be within the parameters of Section 223(a)(13). In sum, where the court exercising jurisdiction over a juvenile offender does not derive its jurisdiction from the special status of the juvenile as a criminal-type offender subject to the special jurisdiction of a juvenile court, Section 223(a)(13) is inapplicable.

Conclusion

Individuals who are subject to juvenile court jurisdiction for adjudication and treatment based on statutorily determined conduct or circumstances are

"juveniles" as this word is used in Section 223(a)(13). However, where the "juvenile" is under the jurisdiction of a court whose jurisdiction is not based on the special status of the individual as a criminal-type offender under State law, the juvenile is not within the class of juvenile offenders to which the prohibition of Section 223(a)(13) applies.

Applying these principles to the Colorado statutory provisions, it is the opinion of this office that children not subject to juvenile court jurisdiction for violation of State and municipal fish and game laws, regulations, and ordinances, and children under 16 who are subject to transfer (but not transferred) to juvenile court for violation of State or municipal traffic laws or ordinances are "juveniles" under Section 223(a)(13). However, they are not within the class of juvenile offenders (alleged to be or found to be delinquent) to which Section 223(a)(13) applies. Therefore, these juveniles could be detained or confined in institutions with either juveniles alleged to be or found to be delinquent or incarcerated adults without violating Section 223(a)(13) of the Juvenile Justice Act.

This opinion is intended neither to condone the Colorado statutory scheme nor to imply that it is sound public policy to commingle children detained or confined for violation of State game and fish laws and ordinances or State and municipal traffic laws and ordinances in institutions with adult criminal offenders. However, the fact remains that compliance with Section 223(a)(13) is the issue in your request. Section 223(a)(13) does not apply to juveniles under the jurisdiction of courts that adjudicate criminal (or civil) offenses without regard to the status of the defendant as a child or as a juvenile.

Section 223(a)(13) requires separation in institutions of two specific groups—juveniles alleged to be or found to be delinquent and adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges. While this office believes it would be sound public policy to separate in any State institution juveniles alleged to be or found to be delinquent from adults incarcerated for noncriminal reasons (e.g., civil commitment or penalty), juveniles charged with or convicted of crimes in criminal proceedings from adults charged with or convicted of crimes or incarcerated for noncriminal reasons, and juveniles incarcerated for noncriminal reasons under the authority of a nonjuvenile court from any incarcerated adult, it would be beyond the terms of Section 223(a)(13), and hence LEAA's rulemaking authority, to require such separation as a condition for the receipt of Juvenile Justice Act funds.

Legal Opinion No. 77-14—Eligibility of Church-Related Institutions to Receive LEAA Funds—October 14, 1976

TO: Assistant Director, Office of Governmental Affairs
Lutheran Council

In response to your recent telephone conversation with a representative of this office and an earlier letter from your office concerning the eligibility of

church-related institutions to receive LEAA funds, we have prepared a formal legal opinion on this issue.

Church-related institutions may be recipients of both block and nonblock funds under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 91-644, 93-83 and 93-415) (Crime Control Act) and the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, *et seq.* (Public Law 93-415) (Juvenile Justice Act).

Legal Opinion No. 75-25 (January 30, 1975) relating to the Crime Control Act provided that, except for the passthrough to units of local government required under Section 303(a)(2) of the Crime Control Act, the act imposes no limits on the range of organizations to which the State Criminal Justice Planning Agency or SPA may disburse the State's share of its block funds. Nonprofit organizations are specifically contemplated in the act as potential recipients of discretionary funds. (See Section 306(a), 42 U.S.C. §3736(a).)

State plans under the Juvenile Justice Act must provide for the involvement of private agencies in the development and execution of the plan. (Section 223(a)(9), 42 U.S.C. §5633(a)(9).) In addition, at least 20 percent of the funding made available under the act for special emphasis and treatment programs must be made available to private nonprofit organizations. (Section 224(c), 42 U.S.C. §5634.)

An amendment to the Crime Control Act that has recently been passed by both Houses of Congress would permit direct funding by LEAA to nonprofit organizations for correctional programs.

A more significant issue is the existence of possible constitutional restraints against Federal financial assistance to church-related institutions.

The first amendment states that "Congress shall make no law respecting an establishment of religion." *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962) extended this prohibition to the States via the due process clause of the 14th amendment.

The three governmental activities against which the Establishment Clause is meant to protect are "sponsorship, financial support, and active involvement of the sovereign in religious activity." (*Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).) What specific activities are prohibited depends on a case-by-case analysis, given the Supreme Court's acknowledgement that it can "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." (*Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971).)

The court has set forth three general tests to determine whether a governmental program is permissible under the Establishment Clause: It must have a secular legal purpose; its principal or primary effect must not advance or inhibit religion; and it must not foster an "excessive entanglement" with religion. (*Id.*, at 612-13.)

The first of these tests will not ordinarily be an obstacle to LEAA funding. If the purpose of the applicant's program is not among those "secular, legal" purposes enumerated in the Crime Control Act or the Juvenile Justice Act, it is not eligible for LEAA funding from the outset.

In determining whether the program's primary effect is to advance religion, LEAA must assess whether the program is "so pervasively sectarian that secular

activities cannot be separated from sectarian ones." Further, if secular activities can be separated out, only they can be funded. (*Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, (June 21, 1976); 44 U.S.L.W. 4939, 4945; *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973).)

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. *(Hunt, supra.)*

Factors the court has looked at in examining the primary effect of a statute or government program include whether the inculcation of religious values is a substantial purpose of the recipient;[1] the impressionability of the participants in the program funded;[2] religious qualification for employment or membership;[3] the degree of control exercised by the religious body over the recipient;[4] and mandatory religious training.[5]

The extent to which religion permeates the institution also determines in large measure the degree of entanglement between the government and the recipient. (See *Hunt*, at 743-44.)

In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the court upheld a Federal statute under which HEW provided grants for the construction of college facilities and buildings used strictly for secular educational purposes. The court explained the relationship between the presence of religion in the recipient and excessive entanglement as follows:

> Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws. (*Tilton*, at 687.)

In *Meek* v. *Pittenger*, 421 U.S. 349 (1975), the court held that a Pennsylvania statute authorizing the State to supply professional staff to church-related schools violated the Establishment Clause. The court compared the facts in *Meek* to those in a similar earlier case and noted that:

> The prophylactic contacts required to ensure that teachers play a strictly nonideological role, the Court held, necessarily gave rise to a constitutionally intolerable degree of entanglement between church and state . . . . The same excessive entanglement would be required for Pennsylvania to be "certain," as it must be that [the subsidized] personnel do not advance the religious mission of the church-related schools in which they serve. (*Meek*, at 370.)

[1] *Lemon*, at 615-16.

[2] *Tilton*, at 685-86.

[3] *Hunt*, at 743-44; *Roemer*, at 4945; *Tilton*, at 686. Restriction in membership or employment on the basis of religion may also be violative of Section 262(b) of the Juvenile Justice Act, which states that no person, on the basis of creed, may be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in connection with any program or activity receiving assistance under the act. (Since the time this opinion was written, the nondiscrimination provision of the Crime Control Act was expanded to include "religion" as a prohibited ground of discrimination. See Section 518(c).)

[4] *Hunt*, at 743; *Roemer*, at 4945; *Tilton*, at 686.

[5] *Roemer*, at 4945; *Tilton*, at 687.

Excessive entanglement may arise not only from government inspection to insure that its funds are not being used for sectarian purposes; it may also arise from the routine administrative oversight the government exercises over its grants. In *Lemon*, the court cited *Walz* v. *Tax Commission, supra*, to warn of the dangers of direct payments to church-related schools:

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ."
>
> The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state. (*Lemon*, at 621-22.)

The court has subsequently modified this position. In *Roemer* v. *Maryland Board of Public Works, supra*, a statute authorizing the annual payment of State funds to religiously affiliated colleges was held constitutional, despite the possibility of State inspections and audits. The court found the statute closer to the one upheld in *Tilton* than the one struck down in *Lemon*, relying largely on the differences between the "character" of the recipient institutions involved. The colleges in *Roemer* performed essentially secular educational functions which were clearly separable from their religious activities. Unlike *Lemon*, the students involved were not of an impressionable age, the schools were not closely administered by religious authorities, and religion did not pervade the system. (*Roemer*, at 4948.)

The character of the aid is also significant. In *Tilton*, construction grants were awarded to build "nonideological" facilities. As noted earlier, the court found that this type of aid was less likely to require government inspection, and hence excessive entanglement, than subsidies of personnel. The possibility of government audits was not held to be a fatal defect in the statute. The court accepted the District Court's finding that they would be "quick and non-judgmental." (*Roemer* v. *Maryland Board of Public Works*, 387 F. Supp. 1282, 1296 (D. Md. 1974).[6]

[6] The District Court explained:

> The usage verification and the normal annual accounting which each college conducts obviate the need for state post-audit analysis in every case. Such analysis is available when needed, however. State auditors would accomplish a post-audit analysis, using accepted accounting techniques, in one day or less. This mechanical accounting of state grant expenditures is not entangling. *It is done now for federal programs by these same institutions.* It is quick and non-judgmental. (*Id.*) (Emphasis added.)
>
> The accounting and financial reporting procedures required of LEAA recipients by the LEAA Financial Grant Guideline Manual, M 7100.1A, (April 30, 1973) are consistent with the standard Federal requirements set forth in Office of Management and Budget Circulars A-87 and A-102.

Nor was the court bothered by the annual subsidy facet of the program, pursuant to which the State Council for Higher Education would insure compliance with the statute, and the recipient would report on the use of the funds awarded during the previous year. The court noted that although "[i] t is true that the Court favored the 'one-time, single-purpose' construction grants in *Tilton* because they entailed 'no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures," it agreed with the District Court that " 'excessive entanglement' does not necessarily result from the fact that the subsidy is an annual one." (*Roemer*, at 4947.) The court cautioned, however, that:

> There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of "*excessive*" entanglement, itself makes that clear. The relevant factors we have identified are to be considered "cumulatively" in judging the degree of entanglement. *Tilton* v. *Richardson*, 403 U.S., at 688. They may cut different ways, as certainly they do here. (*Roemer*, at 4948.)

One final element of entanglement that LEAA must weigh in determining the propriety of grants to church-related institutions is the possibility of a grant creating a political division along religious lines. The danger of this type of political fragmentation was a persuasive factor in the court's decision in *Lemon* v. *Kurtzman*, *supra:*

> To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.
>
> * * * * *
>
> The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. (*Id.*, 623-24.)

In short, the potential for controversy of government aid to religiously affiliated institutions may, in some circumstances, militate against awarding a grant. The character of the prospective grantee is, again, significant. In *Tilton* v. *Richardson, supra,* the possibility of political divisiveness on religious lines was discounted because it was less likely that political controversy would arise from aid to a college whose student body is "diverse and widely dispersed" than from aid to elementary and secondary schools whose problems are essentially local. (See also *Roemer*, at 4948.)

Applications from religiously affiliated organizations must, therefore, be judged individually, on the basis of the factors discussed above. Those factors, in summary, are whether the inculcation of religious values is a substantial purpose of the applicant; whether the applicant limits membership or employment on the basis of religion; whether religious training is a mandatory part of the applicant's program; the degree to which the applicant is controlled by a religious body; the impressionability of the participants in the program; the character of the aid provided; the degree of administrative oversight necessary to separate the sectarian aspects of the program from the secular; and the degree of oversight necessary to insure compliance with the accounting and financial reporting procedures required by Federal law.

Although this especially complex area is not conducive to blanket answers, this office hopes this opinion offers some practical guidance to your organization and others similarly situated that are interested in receiving financial assistance from LEAA fund sources.

Legal Opinion No. 77-15—Interpretation of Section 203(c)—Appointing Authority to Designate JPC—December 9, 1976

TO: Vice Chairman
Judicial Council of Georgia

This is in response to your question on whether the Judicial Council of Georgia is the appropriate agency for establishing the Judicial Planning Committee (JPC) in Georgia pursuant to Section 203(c) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430 and 94-503). Section 203(c) provides that:

> (c) The court of last resort of each State or a judicial agency authorized on the date of enactment of this subsection by State law to perform such function, provided it has a statutory membership of a majority of court officials (including judges, court administrators, prosecutors, and public defenders) may establish or designate a judicial planning committee for the preparation, development, and revision of an annual State judicial plan.

The Judicial Council maintains that it should be the appointing authority pursuant to Section 203(c). In support of this position, the Judicial Council states that the legislative history of the Crime Control Act of 1976 shows that:

> . . . in order for a body, other than the court of last resort, to qualify as the appointing authority for the Judicial Planning Committee, the following is required:
> (1) That the agency be created by law;
> (2) That it be authorized on the date of enactment to perform such administrative functions; and
> (3) That it have a statutory membership of a majority of court officials.

The Judicial Council states that it meets all of these requirements and that it was the intention of the Congress that it be the agency authorized to appoint the JPC for the State of Georgia and not the court of last resort.

The question must be considered in the light of the actual wording of Section 203(c) as well as the legislative history of that section. A literal reading of Section 203(c) of the act would allow either the court of last resort of each State or a judicial agency to establish or designate a JPC. The act provides no guidance on which of the two is to appoint a JPC. It is ambiguous in application to the current situation in Georgia.

The first sentence of Section 203(c) as well as other sections of the act contemplate a single JPC. Under the first sentence of Section 203(c), both the judicial agency and the court of last resort can create a JPC. This would result in two JPC's. The act contemplates only one JPC. References are made throughout the act to the "Judicial Planning Agency." It is a well-established principle of statutory construction that where wording in a statute is ambiguous, or where it is difficult to determine whether or not the language of an act creates an ambiguity, references must be made to the legislative history in order to interpret properly the meaning of a statute.[1]

The legislation authorizing the creation of JPC's arose in the Senate. The provision first appeared in Senate bill S. 3043 and the provision relating to the JPC's was incorporated into S. 2212. In the report on S. 2212,[2] the committee stated it was the purpose of these amendments to provide for the "establishment of judicial planning agencies by the courts of last resort of several states." When Senate bill S. 2212 was reported to the floor of the Congress, Senator Sam Nunn of Georgia provided an amendment, No. 228, to S. 2212. The first sentence of Section 203(c), as contained in S. 2212 and as reported out of the Senate Judiciary Committee, read as follows:

> The court of last resort of each State may establish or designate a judicial planning committee for the preparation, development, and revision of an annual State judicial plan.[3]

Senator Nunn's amendment modified that sentence to read as follows:

> The court of last resort of each State or the judicial agency authorized by State law to perform such functions may establish or designate a judicial planning committee for the preparation, development and revision of an annual State judicial plan.[4]

In explaining his amendment, Senator Nunn made the following statement:

> In my own State of Georgia, the general assembly created a judicial agency, the judicial council, which was charged with the planning and coordination responsibilities which are contemplated by this legislation. This body has been functioning for several years now and therefore possesses a great deal of experience and expertise in this area.
>
> With this in mind, I propose to make a minor change in the wording of section 203(c) of this bill to recognize the possibility that some States may have statutorily created judicial agencies of the kind existing in Georgia and, if this is the case, to authorize them, *rather than the court of last resort*, to establish or designate the Judicial Planning Committee. If we do not provide this alternative, States which have already created judicial planning agencies will be placed in a difficult legal position, as well as the fact that we would be setting back the cause of judicial improvement in these States.[5] (Emphasis added.)

[1] See *U.S.* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953); rehearing denied 345 U.S. 961 (1953); Sutherland, *Statutory Construction*, §46.04 (4th Ed., Sands 1973).

[2] S. Rept. No. 847, 94th Cong., 2d Sess. (1976), at 19.

[3] *Id.* at 45.

[4] See Senate debate, 122 Cong. Rec. S 12227-8 (daily ed., July 22, 1976).

Senator John L. McClellan, Chairman of the Senate Judiciary Committee Subcommittee on Criminal Laws and floor manager for S. 2212, made the following statement:

> I have no objection. I think that should be a prerogative left to the State to determine, so long as we do have court representation. Inasmuch as a procedure already exists in the State of Georgia and this simply would recognize it, I have no objection.[6]

In subsequent debate in the Senate,[7] Senator John A. Durkin introduced amendment No. 238 to modify further the first sentence of Section 203(c). Senator Durkin's amendment struck the language inserted by Senator Nunn's amendment No. 228 to modify the first sentence of Section 203(c) to read as follows:

> The court of last resort or a judicial agency authorized on the date of enactment of this subsection by State law to perform such functions provided it has a statutory membership of at least 75 percent judges, court administrators, and public defenders.

In explaining his amendment, Senator Durkin made the following statement:

> Mr. President, yesterday, the Senator from Georgia (Mr. Nunn) offered three amendments en bloc. The three amendments that are now before the Senate make a technical change in those amendments. The amendments have been cleared with the Senator from Georgia. It is my understanding that they have been cleared with the staffs of the floor managers.
>
> With respect to the State planning agency, the amendment of the Senator from Georgia provided that it could add the language which would allow it to be any judicial agency authorized by State law to perform the function as well as the chief justice, because in Georgia the State Judicial Council is the proper group.

The following colloquy then resulted between Senators McClellan and Durkin:

> Mr. McClellan: Has the Senator from New Hampshire conferred with the Senator from Georgia about this?
>
> Mr. Durkin: Yes; my staff has conferred with his, I have talked with the Senator from Georgia, and he concurs in the language.
>
> Mr. McClellan: Mr. President, I accepted the amendment offered by the distinguished Senator from Georgia yesterday and this does not do any violence to that amendment. It broadens it, as I understand it. Is that correct?
>
> Mr. Durkin: Right. The effect is that the Judicial Planning Agency, if there is to be a judicial council, would have to be 75 percent judges in existence and have the statutory authority as of the effective date of the act.
>
> Mr. McClellan: I wanted to be sure that the Senator from Georgia has been consulted and has no objection to it.

[5] *Id.*

[6] *Id.*

[7] 122 Cong. Rec. S 12353 (daily ed., July 23, 1976).

Mr. Durkin: He has no objection to it.

Mr. McClellan: Mr. President, I say to the Senator from Nebraska that I am perfectly willing to accept the amendment if the Senator is. It is just a rewriting of the amendment accepted yesterday.

The House of Representatives considered the Senate bill in debate. On September 2, 1976, it amended the Senate bill and passed a bill to reauthorize the LEAA program. The House bill[8] contained no provision for establishment of a JPC. In conference, House conferees agreed to the Senate provision establishing JPC's. They made one further modification to Section 203.[9] This modification was agreed to by the House and Senate.[10] The first sentence of Section 203(c) was amended to include the parenthetical expression cited above referencing the composition of the JPC's and judicial agencies.

It is a well-established principle of statutory construction that a court will utilize the comments of the sponsors of an amendment when the meaning of the statutory wording is in doubt.[11] In using comments of Senators and Representatives to determine the meaning of a statute, statements by the Senator who offered the amendment whose meaning is under question has added importance.[12]

Where a statute is susceptible to either of two opposed interpretations, it must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.[13]

The use of the word "or" in Section 203(c) is intended not to designate discretionary alternatives, but to provide separate categories.[14] It is clear from the legislative history reflecting the intent of the Senate sponsor that this provision was to give the authority to the judicial council, where it existed, to establish or designate the JPC.

The language of Section 203 as passed by the Senate was modified by the conference and passed by the Congress.[15] Because the language was modified by the conferees, one must ask whether that modification in the language changed the intention of the Senate. The problem is presented by the specific language of Section 203. The amendments to the first sentence in Section 203(c) by the conference modified the type of judicial agency which may establish a JPC. This agency is "a judicial agency authorized from the date of enactment of this subsection by State law to perform such functions provided it has a statutory membership of a majority of court officials (including judges, court administrators, prosecutors, and public defenders)."

The Georgia statute creating the Judicial Council makes clear that the council is a judicial agency authorized by State law on the date of enactment

[8] H.R. Rept. No. 1155, 94th Cong., 2d Sess. (1976).

[9] H.R. Rept. No. 1723, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. H 11465-74.

[10] 122 Cong. Rec. S 17319-25 (daily ed., September 30, 1976); 122 Cong. Rec. H 11707-11 (daily ed., September 30, 1976).

[11] See *National Wordwork Manufacturers Association* v. *NLRB*, 286 U.S. 612, 640 (1967).

[12] *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (C.A. D.C. 1974).

[13] *Shapiro* v. *U.S.*, 335 U.S. 1 (1948), rehearing denied 335 U.S. 836 (1948).

[14] *Piet* v. *U.S.*, 176 F. Supp. 576 (S.D. Calif. 1959).

[15] *Supra*, see footnote 10.

of Section 203(c).[16] The council is composed of eleven members, nine of whom must be judges of courts of record of the State.

The statutory membership of the Georgia Judicial Planning Council, however, does not include court administrators, prosecutors, or public defenders. An initial question which must be resolved is whether the parenthetical expression in Section 203(c) is illustrative or mandatory.

The legislative history of a statutory provision may be an important aid in determining whether it should be construed as mandatory or directory.[17] However, where statutory language is plain, no rules of statutory construction need be applied.[18]

Words in common use should be given their natural meaning. The word "including" is not one of all-embracing definition, but connotes an illustrative application.[19] *Websters New World Dictionary, College Edition,* defines a parenthesis as an additional word, clause, etc. placed as an explanation or comment within an already complete sentence.

To read the parenthetical expression as a clear indication that the House and Senate conferees intended to modify the requirements for the composition of the judicial agency would require some expression that the conferees intended to change the meaning.

It is a well-established principle that a change of wording of the statute does not amount to a change in the meaning of the statute unless an intent to make such a change is evident.[20] There is no expression of later intent to overcome the clear unambiguous statements of Senator Nunn in the Senate debate. There is no requirement that the judicial agency include representation from all the groups listed in the parenthetical phrase.

Although not an issue in this request for an opinion, it should be noted that administratively LEAA will require in its guidelines that the JPC have the composition illustrated in the parenthetical clause.

The LEAA Administrator has the authority under Section 501 of the act to "establish such rules, regulations, and procedures as are . . . consistent with the stated purpose of this title." LEAA believes that the JPC should be composed of a membership to include court administrators, prosecutors, and public defenders. The Crime Control Act of 1976 provides in pertinent part:

> The State planning agency shall consult with the judicial planning committee . . . as they concern the activities of courts and the impact of the activities of courts on related agencies (including prosecutorial and defender services). (§ 203(e).)
>
> Any judicial planning committee . . . may file . . . a multi-year comprehensive plan . . . (2) adequately take into account the needs and problems of all courts in the State and encourage initiatives by the appellate and trial courts in the development of programs and projects for law reform, improvement in the administration of courts and activities within the responsibility of the courts, including bail and pretrial release services and prosecutorial and defender services, and provide for an appropriately

[16] The enactment is found in Georgia Code Annotated § 18-1601.

[17] *Cole* v. *Young*, 351 U.S. 536 (1956).

[18] *U.S.* v. *Turner*, 246 F. 2d 228 (2d Cir. 1957), Sutherland, *Statutory Construction*, § 46.01 (4th Ed., Sands 1973).

[19] *U.S.* v. *Gertz*, 249 F. 2d 662 (9th Cir. 1957).

[20] *Muniz* v. *Hoffman*, 422 U.S. 459, 95 S. Ct. 2178, 2188 (1975). See also *Foureo Glass Co.* v. *Transmission Corp.*, 353 U.S. 222 (1957) at 227.

balanced allocation of funds between the statewide judicial system and other appellate and trial courts . . . . (§302(b)(2).)

In order that the Judicial Planning Committee can properly assess the impact of the activities of the courts on related agencies, it is deemed necessary that the composition of the JPC include, at a minimum, one representative from both the prosecutorial and defender services.

In making this administrative rule, LEAA is mindful that there must a rational basis to support such an action. Such a regulation is reasonably related to the purpose of the statute in creating a JPC and is, therefore, a proper action.

In view of the legislative purpose behind the establishment of such a planning body, the requirement that the composition of that body include members of prosecutorial and defender services as well as court administrators, in order to plan properly for the courts, is a reasonable one.[2 1]

In summary, it is the conclusion of this office that it was the intent of Congress that where a judicial agency was in being on the date of the enactment of the Crime Control Act of 1976 and had the statutory authority to perform such a function, that such an agency should be the one to designate or establish a JPC. The Judicial Council of Georgia qualifies as the appointing authority, and there is clear legislative history to show that Congress intended that the Judicial Council of Georgia be the appointing authority rather than the court of last resort. If the Georgia Judicial Council designates itself as the JPC for the State, it should take appropriate steps to conform to LEAA policy concerning JPC membership representation.

Legal Opinion No. 77-16—Application of the Term "Court of Last Resort" as Defined in Section 601(p) of the Omnibus Crime Control and Safe Streets Act, as Amended, to the Government of the Virgin Islands of the United States—December 23, 1976

TO: LEAA Regional Administrator
Region II - New York

The Crime Control Act of 1976 contains amendments to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430, and 94-503), which are designed to increase the participation of the judiciary in the LEAA program. These amendments make numerous references to the "court of last resort" of each State. The Law Enforcement Planning Commission, Office of the Governor, Government of the Virgin Islands of the United States, has asked for the assistance of this office in applying the term "court of last resort" to the courts of the Virgin Islands.

[2 1] *State of Fla.* v. *Mathews*, 526 F. 2d 319 (5th Cir. 1976).

Background

Section 205 of the act requires that LEAA allocate to each State Criminal Justice Planning Agency (SPA) funds appropriated by Congress.

The term "State" is defined in Section 601(c) as follows:

(c) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

The Virgin Islands is a territory of the United States and has participated in the LEAA program since its inception.[1]

The act in Section 203(a)(2) now specifies that the State planning agency should include as a member the "chief judicial officer or other officer of the court of last resort."[2]

The act in Section 203(c) authorizes the court of last resort in certain instances to establish or designate a judicial planning committee. Under Section 203(f), this committee, if established, must be provided with planning funds by the State planning agency.

The Virgin Islands must identify its "court of last resort" in order to comply with the new requirements of the Crime Control Act. The term "court of last resort" is defined in Section 601(p) as follows:

(p) The term "court of last resort" means that State court having the highest and final appellate authority of the State. In States having two or more such courts, court of last resort shall mean that State court, if any, having highest and final appellate authority, as well as both administrative responsibility for the State's judicial system and the institutions of the State judicial branch and rulemaking authority. In other States having two or more courts with highest and final appellate authority, court of last resort shall mean that highest appellate court which also has either rulemaking authority or administrative responsibility for the State's judicial system and the institutions of the State judicial branch. Except as used in the definition of the term "court of last resort", the term "court" means a tribunal or judicial system having criminal or juvenile jurisdiction.

The Virgin Islands Law Enforcement Planning Commission asks if the District Court of the Virgin Islands, United States Court of Appeals or the United States Supreme Court is the court of last resort for the Virgin Islands. While this question will ultimately have to be answered by the Virgin Islands, this office can provide some guidance.

Discussion

The United States Constitution in Article IV, Section 3, Clause 2, provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States . . . ."

[1] Sec 48 U.S.C. §1391, *et seq.* (1970).

[2] If the chief judicial officer cannot or chooses not to serve, he may submit to the Governor of the State a list of three nominees for his position. He can submit less than three names if there are less than three other officers of the court of last resort.

It is clearly established under this provision of the Constitution that Congress has the entire dominion and sovereignty, national and local, over the territories and can legislate directly with respect to the local affairs of a territory.[3]

The Constitutional Courts of the United States are created under Article III of the United States Constitution. They include the Supreme Court, the United States Courts of Appeals, and the United States District Courts. They do not include the territorial courts.

Chief Justice Marshall in *American Insurance Company* v. *Canter*, 1 Pet. 511, 546, 7 Law Ed., 242, 257, defined the authority of territorial courts as follows:

> They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.... In legislating for them, Congress exercises the combined powers of the general and of a State government....

Chief Justice Marshall's opinion was subsequently expanded upon in *McAllister* v. *United States*, 141 U.S. 174, 188 (1891) where the Supreme Court stated that "the whole subject of the organization of territorial courts ... was left, by the Constitution, with Congress under its plenary power over the territories of the United States."

Congress in 48 U.S.C. §1611 provided that:

> The judicial power of the Virgin Islands shall be vested in a court of record to be designated the "District Court of the Virgin Islands," and in such court or courts of inferior jurisdiction as may have been or may hereafter be established by local law.

In 48 U.S.C. §1612, the Congress provided in part that "The district court shall also have appellate jurisdiction to review the judgments and orders of the inferior courts of the Virgin Islands to the extent now or hereafter provided by local law."

In *Caldwell* v. *Caldwell*, 127 F. Supp. 179 (D.C. Virgin Islands 1954), the court held that the provision of 48 U.S.C. §1615 regarding the rules of civil procedure made by the Supreme Court of the United States shall apply to the Virgin Islands District Court and not make this court a Federal District Court within the meaning of the judicial code. This case was followed in other Federal cases and appears to be good law.[4]

The issue is clouded by the Federal attributes of the territorial courts of the Virgin Islands. The Congress has provided in 28 U.S.C. §1291 that the Federal Courts of Appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."[5] This

[3] See *Simms* v. *Simms*, 175 U.S. 162, 168 (1899) and *Binns* v. *United States*, 194 U.S. 486, 491 (1904).

[4] See, for example, *Government of the Virgin Islands* v. *Bell*, 392 F. 2d 207 (1968).

[5] See *Government of the Virgin Islands* v. *Lovell*, 378 F. 2d 799 (3rd Cir. 1967).

appellate function for the Virgin Islands is exercised by the Third Circuit Court of Appeals. It could therefore be argued that a Federal Court of Appeals or even the United States Supreme Court is the court of last resort for the purposes of Sections 601(p) and 203 of the LEAA Act. However, common sense and logic would clearly appear to be against this argument.

There is no indication that Congress intended that a Federal Court of Appeals or the United States Supreme Court establish a judicial planning committee for the Virgin Islands. There is no indication that Congress provided for either the Chief Justice of the United States or the chief judge of the Third Circuit to sit on the supervisory board of the Virgin Islands Law Enforcement Planning Commission.

The functions of a judicial planning committee will relate not to cases or controversies which are the foundation for action by the Federal constitutional courts, but to the administration of justice in the Virgin Islands.[6]

Congress did not vest the judicial power of the Virgin Islands in the Federal constitutional courts. It vested that power in the territorial courts of the Virgin Islands and the District Court of the Virgin Islands, which is the highest court of the Virgin Islands. By virtue of 48 U.S.C. §1612, the District Court of the Virgin Islands entertains appeals from the inferior courts of the Virgin Islands. Congress showed no intention in the Crime Control Act of 1976 to change the jurisdiction and authority of the courts of the Virgin Islands. The definition of court of last resort in the Crime Control Act was a general definition applicable to all "State" judicial systems.[7] It, therefore, appears that the District Court of the Virgin Islands and not the Supreme Court or a United States Court of Appeals is the court having the highest and final appellate authority of the Virgin Islands and would be the court of last resort as defined by Section 601(p) of the Omnibus Crime Control and Safe Streets Act, as amended.[8]

The question of the utility of establishing a judicial planning committee on the Virgin Islands is a separate question altogether. The 1976 comprehensive plan for the Virgin Islands indicates that there are two district court judges and six municipal court judges. There were only 226 criminal cases filed in 1974, and there was no increase in the backlog of cases between December 1973 and

[6] Some support for this may be found in *Boggess* v. *Berry Corp.*, (9th Cir. 1956) where the court noted that the United States Court of Appeals is a constitutional court impowered to act in judiciable cases and controversies and has no jurisdiction to review administrative or legislative issues or controversies which were vested in the District Court of the Territory of Alaska by the Alaska territorial legislature, 233 F. 2d 389.

[7] It is a well established principle of statutory construction that a legislative body such as the Congress of the United States is presumed to know its own laws, and a later general statute does not overrule an earlier specific statute unless it does so clearly. See *U.S.* v. *Hawkins*, 228 F. 2d 517; *Anderson* v. *Gladden*, 188 F. Supp. 666.

[8] This conclusion is strengthened by the provisions of 48 U.S.C. §1405x. This section reads as follows: "The judicial power of the Virgin Islands shall be vested in a court to be designated 'the District Court of the Virgin Islands' and in such court or courts of inferior jurisdiction as may have been or may hereafter be established by local law: Provided, That the legislative assembly may provide for the organization and conduct of a Superior Court of the Virgin Islands and may transfer from the district court to such Superior Court jurisdiction over any or all causes other than those arising under the laws of the United States. Appeals from the Superior Court shall be as provided by law in the case of appeals from the district court. June 22, 1936, c. 699, §25, 49 Stat. 1813."

January 1975. With a judicial structure of this size, the $50,000 or more available to the judicial planning committee might be better utilized in a different fashion. This is an issue which should be worked out between LEAA and the local SPA and the District Court.

Legal Opinion No. 77-17—Impact of Crime Control Act of 1976 on Use of Part B and Part C Funds for Evaluation—December 31, 1976

TO: LEAA Regional Administrator
Region I - Boston

This is in response to your request of November 11, 1976, for general guidance with respect to the impact of the Crime Control Act of 1976, Public Law 94-503, 90 Stat. 2407 (Oct. 15, 1976), on distinctions previously drawn between the permissible use of Part B and Part C fund sources for evaluation activities under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430, and 94-503).

Statutory Amendments

The Crime Control Act of 1976 amended the State plan requirements of Section 303(a) by providing a new Section 303(a)(17) relating to the evaluation of Part C-funded programs and projects:

> (17) provide for the development and, to the maximum extent feasible, implementation of procedures for the evaluation of programs and projects in terms of their success in achieving the ends for which they were intended, their conformity with the purposes and goals of the State plan, and their effectiveness in reducing crime and strengthening law enforcement and criminal justice . . . .

This requirement is made applicable to both Part E funds granted under Section 455(a)(1) of the act (by amendment to Section 453(10)) and to formula funds granted under Section 221 of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601, *et seq.*, as amended (Public Law 93-415, as amended by Public Law 94-503) (Juvenile Justice Act) (by amendment to Section 223(a)).

In addition, the Crime Control Act of 1976 amended Section 601 to provide a definition of the term "evaluation" in Section 601(q) as follows:

> (q) The term "evaluation" means the administration and conduct of studies and analyses to determine the impact and value of a project or program in accomplishing the statutory objectives of this title.

This definition was added during Senate floor debate as a "technical amendment" to the bill. There was no discussion of the intended impact of the definition on existing evaluation funding authority.

Discussion

Office of General Counsel Legal Opinion No. 74-43, November 19, 1973, distinguished the use of Part B and Part C fund sources for evaluation activities. This opinion analyzed the congressional understanding with respect to the use of Part B funds for evaluation activities related to the planning and administration functions of State planning agencies and the use of Part C funds to pay the cost of actual program and project evaluation under the authority of Section 301(b)(1) of the act.

Section 301(b)(1) of the act provides:

> (b) The Administration is authorized to make grants to States having comprehensive State plans approved by it under this part, for:
> (1) Public protection, including the development, demonstration, *evaluation*, implementation, and purchase of methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places. (Emphasis added.)

This opinion concluded that only Part B funds could be utilized for:

1. Activities related to the development and administration of a State evaluation plan, including the evaluation components of a State plan.
2. Evaluation of overall program effectiveness—that is, evaluation of the net effect of all planning functions and Part C action grant evaluation activities.
3. Development of overall evaluation strategies and work plans.
4. Normal monitoring of the financial management or progress of State subgrants where classified as an evaluation activity.

The addition of Section 303(a)(17) to the State plan requirements mandates that the planning process provide for both the development and implementation of procedures for program and project evaluation. These procedures must be designed to measure three specified elements of program and project performance. These required evaluation activities (or funds for these activities) are of a "program" or "project" nature related to functions contemplated by the State plan. Therefore, the source of funding for both the development and implementation of evaluation procedures pursuant to an approved State plan to implement Section 303(a)(17) may be the block fund allocation of Part C.

While there is no legislative history regarding the definition of evaluation in Section 601(q), the plain meaning of the term as defined by Congress in the Crime Control Act of 1976 extends beyond the more restrictive definition utilized in Legal Opinion No. 74-43, *supra*, to limit Part C-funded evaluation activities under Section 301(b)(1) to the actual costs of all program and project evaluation.[1] Congress has broadly defined evaluation to include both the *administration* and *conduct* of studies and analyses to determine the impact and value of a project or program. Applying the plain meaning rule of statutory

[1] Legal Opinion No. 74-43 uses the following definiton of the term evaluation:
Evaluation (1) assesses the effectiveness of an ongoing program in achieving its objectives, (2) relies on the principles of research design to distinguish a program's effects from those of other forces working in a situation, and (3) aims at program improvement through a modification of current operations. (J. Wholey, Federal Evaluation Policy (1970) at 23.)

construction,[2] it must be concluded that the term, evaluation, as used in Sections 301(b)(1) and 303(a)(17), includes activities related to the administration of evaluation activities performed pursuant to Section 301(b)(1) and to the State's program for the development and implementation of evaluation procedures pursuant to Section 303(a)(17).

In sum, Legal Opinion No. 74-43, *supra,* is modified by the amendments with regard to items (1), (2) and (3) of the conclusions cited above. Part C funds may now be utilized for both the development and administration (in addition to implementation) of program and project evaluation procedures. However, those activities that constitute the normal monitoring of the financial management or progress of State subgrants (item (4) above) continue to be a function of routine grant administration and are fundable only with Part B funds.[3]

In addition, it should be noted that LEAA's National Institute of Law Enforcement and Criminal Justice has responsibility to develop, in consultation with State planning agencies, criteria and procedures for the performance and reporting of all evaluation of programs and projects carried out under the act (Section 402(c)), including Section 303(a)(17). Congress anticipated that State planning agencies would proceed to implement Section 303(a)(17) in a manner consistent with the criteria and procedures to be developed through the consultation process. The House report made the following statements which impact on each State's implementation of Section 303(a)(17):

> The section also requires the implementation of such procedures "to the maximum extent feasible." This envisions that procedures will be developed in the course of the year, based upon the past experience with evaluation and upon feedback from the Institute. [See explanation of Section 402 amendments *infra.*] Projects getting underway during the year should have an evaluation component built in, or at a minimum, be structured (in terms of standards, purposes, and reporting requirements) so as to allow evaluation. Existing projects should be evaluated as evaluation procedures are tested and refined. Thus, feasibility refers primarily to the readiness of evaluation procedures, rather than the availability of funds, although massive expenditures on the evaluation of old programs are not contemplated. (H.R. Rept. No. 94-1145, 94th Cong., 2d Sess., 22, May 15, 1976).
>
> * * * * *
>
> Subsection (b) amends Section 402(c) to require the Institute to make evaluations and receive and review results of evaluations from the States. This ties in with the amendments to Section 303 of existing law encouraging statewide uniform evaluation procedures. It makes clear the responsibility of the Institute to receive evaluations from the States of all LEAA programs and projects; moreover, it allows the Institute to perform itself any additional evaluations of State or nationwide programs which it deems advisable.

[2] See Sutherland, *Statutes and Statutory Construction,* §§46.01-46.07 (4th Ed., C. Dallas Sands, 1973).

[3] The Crime Control Act of 1976 amends Section 301(b)(8) to provide authority for Part C-funded Criminal Justice Coordinating Councils (CJCC's) to perform monitoring and evaluation of all law enforcement and criminal justice activities. The House-Senate Conference Report on the bill (122 Cong. Rec. H 11472 (daily ed., Sept. 28, 1976)) clearly indicates congressional intent to permit CJCC's to utilize either Part C or Part B fund sources in the performance of monitoring and evaluation activities.

> The new sentence added at the end of the second paragraph of subsection (c) gives the Institute the responsibility for establishing uniform standards for performing and reporting evaluations. While the States are mandated to develop procedures for evaluation, evaluations must be performed according to professional standards and reported in a manner which allows comparison of results. The Institute, as the professional research arm of LEAA, is responsible for assuring that this is done.
>
> Under this section, the Institute would propose standards for evaluation and reporting. The States would develop their procedures in accordance with these standards. The section provides for continuous consultation between the Institute and the States so that the standards can be revised and refined as experience dictates. (H.R. Rept. No. 94-1145, *supra,* at 24.)

Since the House report indicates that a phased implementation, using Institute standards for performing and reporting evaluations, is contemplated, LEAA Regional Offices should carefully evaluate State plan implementation of Section 303(a)(17) in light of the congressional intent.

Conclusion

The Section 303(a)(17) plan requirement and the Section 601(q) definition of evaluation in the Crime Control Act of 1976, taken together, permit the use of Part C block grant funds for the development, implementation, and administration of procedures for the evaluation of Crime Control Act-funded programs and projects. In addition, Part E funds and Juvenile Justice Act formula grant funds may also be used for the purpose of program and project evaluation related to correctional and juvenile justice programing that use those fund sources.

Legal Opinion No. 77-18—Representation of the Judiciary on the Supervisory Board of the Iowa State Planning Agency—December 23, 1976

TO: LEAA Regional Administrator
Region VII - Kansas City

The Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701, *et seq.*, as amended (Public Law 90-351, as amended by Public Laws 93-83, 93-415, 94-430, and 94-503), requires that the State Criminal Justice Planning Agency (SPA) in each State receiving funds under the act include in its membership representatives of the judiciary. Iowa law limits the participation of the judiciary in nonjudicial activity and the director of the Iowa SPA has asked how Iowa can comply with the LEAA Act.

Background

Section 203 of the LEAA Act defines the nature and purpose of SPA's. The Governor of each State is responsible for administration of the LEAA program in his State and the SPA is his instrumentality for carrying out this

responsibility. Because of the diverse interests involved in the LEAA program, Section 203 defines the agencies, organizations, and individuals who must be represented on the SPA. The representative requirements of Section 203 are met through the establishment in each State of a supervisory board which oversees and directs the operations of the SPA.[1]

Section 203(a) of the LEAA Act was amended by the Crime Control Act of 1976 to mandate specifically judicial representation. The pertinent provisions read as follows:

> (2) The State planning agency shall include as judicial members, at a minimum, the chief judicial officer or other officer of the court of last resort, the chief judicial administrative officer or other appropriate judicial administrative officer of the State, and a local trial court judicial officer. The local trial court judicial officer and, if the chief judicial officer or chief judicial administrative officer cannot or does not choose to serve, the other judicial members, shall be selected by the chief executive of the State from a list of no less than three nominees for each position submitted by the chief judicial officer of the court of last resort within thirty days after the occurrence of any vacancy in the judicial membership.

Legal Discussion

The LEAA Act establishes a grant-in-aid program for the benefit of the States and units of local government throughout the country. Iowa participates in the LEAA program by applying for block grants under Parts B and C of the LEAA Act and by agreeing to the terms specified in the LEAA Act as well as in other Federal laws.[2]

In *Ely* v. *Velde*, 497 F.2d 252 (4th Cir. 1974) (*Ely II*), the Circuit Court of Appeals for the Fourth Circuit enunciated the basic principle underlying the LEAA Act that is applicable to the question presented by Iowa. In *Ely II*, the court considered whether the State of Virginia was obligated to comply with the requirements of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) in using LEAA funds for the construction of a penal reception and diagnostic center. The court stated:

> A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached. The state voluntarily requested Federal participation in the center and in this manner obtained construction funds conditioned upon compliance with NEPA and NHPA. The Federal grant thus served national policy in two respects: it contributed to law enforcement in Virginia and it encouraged preservation of environmental values at Green Springs. The state, we hold, is not entitled to use this money without fully observing both aspects of the national policy the grant was designed to promote. (*Ely II, supra* at 256.)

[1] LEAA Guideline Manual M 4100.1E, State Planning Agency Grants, January 16, 1976, paragraph 23a(1) reads: "*Act Requirement.* The Act authorizes LEAA to make grants to the States for the establishment and operation of State law enforcement agencies for the preparation, development and revision of the State plans. LEAA requires that the State Planning Agency have a supervisory board, (i.e., a board of directors, commission, committee, council, etc.) which has responsibility for reviewing, approving, and maintaining general oversight of the State plan and its implementation. Since the SPA supervisory board oversees the State plan and its implementation, it must possess the 'representative character' required by the Act." See also *Allen* v. *Mississippi Commission of Law Enforcement*, 424 F.2d 285 (5th Cir. 1970).

[2] See generally *Allen* v. *Mississippi Commission of Law Enforcement, supra; Ely* v. *Velde*, 451 F.2d 1130 (4th Cir. 1971) (*Ely I*); and *U.S.* v. *Apodoca*, 522 F.2d 568 (10th Cir. 1975).

The question presented by Iowa deals with the national policy in the LEAA Act which is designed to contribute to improvements in law enforcement and criminal justice in Iowa. The question deals specifically with the requirement cited above in Section 203 of the LEAA Act for judicial membership on SPA's. The Senate Judiciary Committee explained Section 203(a)(2) of the LEAA Act as follows:

> These mandatory judicial membership requirements will insure an appropriate voice on behalf of the court systems of the States in the preparation of any State comprehensive plan and inevitably result in a fairer allocation of funding. (Senate Rept. No. 94-847, 94th Cong., 2d Sess., p. 18.)

Iowa contends that it cannot meet the mandatory judicial membership requirements of the new amendments. Iowa contends that the State statute creating the Iowa SPA does not provide for judicial membership on the planning agency and that the State Constitution prohibits judges from serving on the SPA.

The Iowa legislature established the Iowa Crime Commission to "act as the State law enforcement planning agency for purposes established by State or Federal agencies." (Iowa Code C 71, 73. §80C.2.)

The membership of the Iowa Crime Commission is specified in the Iowa Code as follows:

> 80C.6 Commission membership. The commission shall consist of nine members who are concerned with and knowledgeable about the problems of criminal justice and who are appointed by the governor as follows:
>
> 1. Five members representative of law enforcement and criminal justice agencies maintaining programs to reduce and control crime, two of whom shall be officials of cities or counties, two of whom shall be officials of the state and one of whom shall be a representative of a juvenile justice agency.
>
> 2. Four citizen members who have demonstrated knowledge and concern in the prevention and control of crime and delinquency. At least one citizen member shall be appointed to represent the citizens of the state who are affected by unemployment, low income or substandard housing.
>
> The governor shall appoint an executive director of the commission who shall be his official representative, and who shall be the principal executive administrator of the commission.
>
> All commissioners designated by the governor shall serve at the governor's pleasure. No member of the general assembly shall be appointed as a voting member of the commission.

Article III, §1 of the Iowa State Constitution provides as follows:

> The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive and the Judicial and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others.

Iowa apparently feels that this provision of the Iowa Constitution bars judges from serving on the Iowa Crime Commission and cites an opinion of the Attorney General of Iowa interpreting this provision of the Iowa Constitution as a bar to the legislators serving on the Crime Commission.

There are essentially two ways to approach this problem. The first is to construe Iowa law as being consistent with the new requirements of the Crime Control Act. If Iowa law is not consistent with Federal law, then the second approach is to resolve the conflict between Federal and State law.

Consistency Between Federal and State Law

Under our dual federalism system of government, when Congress legislates in accordance with its constitutional powers, efforts should be made, where possible, to apply the Federal law to avoid irreconcilable conflict between State and Federal laws and, where practical, consistency should be found between Federal and State laws governing the same sphere of interest.[3]

The law establishing the Iowa Crime Commission provides for nine members. This law provides for two State officials representative of law enforcement and criminal justice agencies, for two officials of counties or cities representative of law enforcement and criminal justice agencies, for one official representative of a juvenile justice agency, and for four citizens with demonstrable knowledge and concern in the prevention and control of crime and delinquency.

The language of the Iowa law appears to be broad enough to allow the chief judicial and administrative officers of the court of last resort either to be the two State officials or to be two of the citizen members. Similarly, the local trial court executive could be appointed as one of the city or country representatives, as the juvenile justice official, or as a citizen member.

This interpretation would allow the Governor to bring the Crime Commission into immediate compliance with the Crime Control Act while seeking such additional legislation as he may deem appropriate to provide expressly for judicial membership on the Iowa Crime Commission.

The problem with the Iowa Constitution could be approached in a number of fashions. In the first instance, the Iowa Attorney General's opinion does not expressly find that judges or State legislators cannot serve on the Iowa Crime Commission. The opinion dealt with the authority of a legislator to serve on a State commission vested by statute with responsibility and authority to act for the State. The opinion dealt extensively with Article III, Sections 21 and 22 of the State constitution. These provisions have no application to the judiciary.

To the extent the opinion dealt with Article III, §1, it dealt with cases where legislatures in different States passed laws vested in themselves or their members powers to approve or disapprove actions of the Governor and other

[3]This principle was applied in *California State Board of Equalization* v. *Goggin*, 191 F.2d 726 (9th Cir. 1951) *cert. denied*, 342 U.S. 909 (1952). The court stated: "Where problems in sphere of dual sovereignty are involved, legislation should receive a construction which permits both to function with minimum of interference each with the other."

members of the executive branch. There were no cases cited in the opinion where legislators or judges served on boards established to oversee the operations of a Federal grant program and where the Federal law mandated the participation of legislators and judges as a precondition to the States' participating in the Federal program.

The question presented by judicial participation on SPA's is not a purely State question. It arises out of the cooperative conception of the Federal relationship where "the states and the National Government are regarded as mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem at hand."[4] Thus, opinions dealing strictly with legislators or even judges performing purely State functions cannot be applied to the question presented in this opinion.

In the second instance, under the maxim of *expressio unius est exclusio alterius*,[5] Section 80C.6 could be interpreted as authorizing judges to serve on the Crime Commission. The Iowa legislature in enacting §80C.6 of the Iowa Code to provide for the membership of the Iowa Crime Commission did not exclude judges from serving on the commission. The legislature did provide, however, in the last sentence of Section 80C.6 that "No member of the General Assembly shall be appointed as a voting member of the Commission."

This enactment could be interpreted as a finding by the Iowa legislature that Article III, §1 of the Iowa Constitution did not expressly prohibit either legislators or judges from serving on the Iowa Crime Commission. The Iowa legislature may have felt that legislators could be barred from serving on the Iowa Crime Commission only through enactment of the express prohibition in Iowa Statute 80C.6. If this is a correct interpretation, then there would be no bar to judges serving on the Crime Commission because the legislature did not by law bar them from serving on the Commission.

It could be also argued effectively that appointment of judges to the Iowa Crime Commission is fully consonant with the Iowa Constitution. The judicial members on the Commission would be exercising functions properly belonging to the judicial department and not to the executive department.

This position finds ample support in the Code of Judicial Conduct promulgated by the American Bar Association and substantially adopted by 41 States, including Iowa.[6]

[4]Congressional Reference Service, Library of Congress, The Constitution of the United States, Analysis and Interpretation, p. XX (1972). *King* v. *Smith*, 392 U.S. 309 (1968).

[5]See Sutherland, Statutory Construction, §47.23 (4th Ed., Sands 1973) and Iowa cases cited therein. Sutherland states: "As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions."

[6]Planning in State Courts, *National Center for State Courts*, July 1976, p. 16, N. 30. This publication also contains an excellent discussion of court planning and separation of powers at pages 14 to 18, and it provides additional support for the position that judges can and should participate in joint planning efforts.

Canon 4 of the Code of Judicial Conduct states that: "A judge may engage in activities to improve law, the legal system and the administration of justice." The canon further provides as follows:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:
>
> * * * * *
>
> C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

The Senate Report on the Crime Control Act of 1976 provides persuasive legislative history on this point. The report states that judicial membership requirements for SPA's were added to the Crime Control Act to "insure an appropriate voice on behalf of the court systems of the State in the preparation of any State comprehensive plan." (Senate Rept. No. 94-847, 94th Cong., 2d Sess., p. 18.)

The Omnibus Crime Control and Safe Streets Act establishes a comprehensive planning process that, of necessity, must consider the needs in each State of all elements of the criminal justice system including the judiciary. The process can only be successful to the extent that all elements of the system participate in the process and share equitably in the funds made available to the State through LEAA.

Congress was aware of the separation of powers problem when it considered the Crime Control Act of 1976. Judges and court administrators in testifying before the House and Senate Judiciary Committees cited the separation of powers doctrine but did not feel that judicial membership of the supervisory boards of SPA's violated this principle.

Chief Justice Howell Heflin of Alabama, for example, during hearings on the Crime Control Act of 1976, testified on behalf of the Conference of Chief Justices and made the following statement before the Senate Judiciary Committee, Subcommittee on Criminal Laws and Procedures:

> Each State in the Union has language in its Constitution, which from the very beginning of its statehood has been interpreted to provide for the separation of powers. The LEAA program as presently structured by Congress and administered within the borders of a State by an executive agency violates this constitutional doctrine.[7]

Chief Justice Heflin went on to urge Congress to enact a number of amendments "to bring about the needed improvements in and to the court

[7]Hearings on Amendments to Title I (LEAA) of the Omnibus Crime Control and Safe Streets Act Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 94th Cong., 2d Sess., pp. 257, 267.

systems of the States under the present congressional Act."[8] Justice Heflin stated that:

> Adequate representation from the judiciary on the State planning agency should be required. Such representation should assist in the liaison and coordination between the judicial branch and other components in the criminal justice field.[9]

Finally, your office has also asked if the judicial membership requirements could be met by appointing individuals who are not judges but who represent the judiciary. Section 203(a) specifies by position three judicial members who must be on the supervisory board. The first is the "chief judicial officer or other officer of the court of last resort." The second is the "chief judicial administrative officer or other appropriate judicial or administrative officer of the State" and the third is a "local trial court judicial officer." In most States the chief judicial administrative officer is a court administrator and not a judge.

The question then comes down to interpretation of the term "judicial officer" as used in the description of first and second positions cited above. In Section 203(c), Congress provided for the establishment of a judicial planning committee with a statutory membership of a "majority of court officials." Section 203(c) states that the term court officials includes "judges, court administrators, prosecutors, and public defenders." When Congress wanted to provide for the court administrator to serve on the supervisory board, it used the term "judicial administrative officer." "Judicial officer" appears to be a narrower term than "court official" and is different from a "judicial administrative officer." By using the terms "chief judicial officer of the court of last resort" and "local trial court judicial officer" Congress clearly appeared to provide that the term meant a person, such as a judge, who exercises judicial powers.

Conflict Between Federal and State Law

It is clearly established that the Federal law governing the expenditure of grant-in-aid funds takes precedence over State laws and regulations when a State agrees to participate in the grant program. The leading case on preemption of Federal law over State law in grant programs is *King* v. *Smith*, 392 U.S. 309 (1968). The Supreme Court in that case found that the State of Alabama had voluntarily agreed to participate in the Federal aid to families with dependent children's grant program and that State regulations implementing that grant program were inconsistent with Federal requirements and were, therefore, improper and invalid. The Supreme Court in *King* v. *Smith* at page 2141, footnote 34, stated:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulations inconsistent with such federal terms and conditions is to that extent invalid.

[8]*Id.* at 268.
[9]*Id.* at 269.

King v. *Smith* has been followed in numerous cases. In *Townsend* v. *Swank*, 404 U.S. 282 (1971), the Supreme Court found that a State law inconsistent with Federal grant regulations was invalid under the Supremacy Clause.[10] (See also *National Welfare Rights Organization* v. *Mathews*, F.2d (Civil Action No. 75-1741); *PAAC* v. *Rizzo*, 502 F.2d 306 (3rd Cir. 1974); *City of Hartford* v. *Hills*, 408 F.Supp. 889 (D. Conn. 1976); and Madden, "Providing an Adequate Remedy for Disappointed Contractors Under Federal Grants-In-Aid to States and Units of Local Government," 34 Fed. Bar Journal 201, 206 and 207 (1975).)

In *Lower East Side Neighborhood Health Council South Inc.* v. *Richardson*, 346 F.Supp. 386 (S.D. N.Y. 1972), the court considered a matter analoguous to the Iowa problem. Congress under the Economic Opportunity Act of 1964, 42 U.S.C. §2701, *et seq.*, (1970), authorized grants for the establishment of comprehensive health services program. The Lower East Side Neighborhood Health Council claimed that the New York Health and Hospitals Corporation (HHC) had applied for and received a grant without meeting the statutory requirements of the Economic Opportunity Act relating to community participation. The court found that the Economic Opportunity Act required "either a properly structured board of directors or a neighborhood council to participate in planning and other aspects of the project." (*Lower East Side* at 388.)

HHC contended that their application provided for a community board to oversee the program. HHC argued that it was required by State law to create such a community board and that the discharge of its State obligation satisfies the requirements of the Economic Opportunity Act. The District Court discussed this contention as follows:

> We make no determination as to whether fulfillment of the State law requirements is the equivalent of discharging the federal obligation . . . . We hold only that if there is any conflict between state and federal law, federal law, under which the grant was made, controls. (*Lower East Side* at 388.)

The court went on to enjoin the Federal Government from giving funds to HHC until HHC met Federal requirements.

The decision of the court in *School Committee of Town of Monson* v. *Amrig*, 520 F.2d 577 (1st Cir. 1975) is also instructive. In this case, the Town of Monson, Massachusetts, challenged the rejection of its grant application under Title III of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§841-848 (ESEA).

The ESEA created a program similar to the LEAA program. Annual formula grants are made by the United States Office of Education to the Massachusetts Department of Education upon submission of a statewide comprehensive plan prepared and administered in consultation with a State advisory council. The State advisory council must be "broadly representative of the cultural and education resources of the State." (*School Committee* at 578.) The ESEA also required the Department of Education to seek the advisory council's views on

[10] U.S. Const. Art. VI, §3.

grant applications from units of local government in the State. The court stated that the purpose of Congress in establishing the advisory council was to:

> . . . forestall any tendency of state education authorities to limit grants to those proposals harmonious with the insular views of a single segment of the community. The advisory council functions to introduce a heterogeneous array of perspectives into the grant process. (*School Committee* at 580.)

United States Office of Education regulations additionally required that applications be reviewed by a panel of professional experts.

The court found that the Massachusetts Department of Education improperly rejected Monson's application because the State did not have the benefit of review by either a panel of experts or the advisory council and did not have requisite "diverse" views contemplated by the ESEA and regulations. (*School Committee* at 581.)

Conclusion

The LEAA Act, as the court observed in *Ely II*, establishes requirements for the receipt and expenditure by the States of LEAA funds. This above discussion makes it clear that Iowa in accepting LEAA funds must comply with the requirements of the LEAA Act for judicial representation on the Iowa Crime Commission, and that LEAA has a legal duty to assure that these requirements are met.

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