REPORT IN SUPPORT OF RECOMMENDATION 74–2

STANDARDS AND PROCEDURES FOR THE DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

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The government's distribution of assistance has a public impact comparable to that of government regulation. Yet assistance is often regarded as an incidental activity, suitably left to agency discretion and the sway of "politics." The public interest would be better served by applying to assistance the standards of administration expected of regulatory programs. Assistance should be distributed in accordance with articulated criteria which promote the statutory objective of the program, and the agencies should make complaint procedures available for affected persons who assert non-compliance with federal standards.

This regularization of discretion in assistance programs would improve their operations, not hinder them, for it would provide the programs with the direction essential for their achievement of their statutory aims. It would also better ensure impartiality in the distribution of aid, involve interested persons in compliance-monitoring, and improve public understanding of the government's purposes. These advantages are examined in the first part of this report, along with the considerations which affect the form and specificity of federal standards. The concern for pluralism and federalism in our society both moderate the appropriate degree of central direction and increase the importance of its public formulation. The second part of this report outlines the minimal elements agencies should provide in the complaint procedures they develop for their assistance programs. The aim is to show that an open process of assistance administration is feasible as well as desirable.

I. Need for a Regularization of Discretion

A. Assistance as a Major Government Activity

1. *Scope of Recommendation*

(Recommendation A)

This proposal is focused upon those assistance programs in which agencies have the most discretion, as it is in these programs

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that structuring is most needed. Agency discretion is at its widest when the agency can choose the recipients, determine the amount of awards, fix the terms and set the objective to be attained. The entire Recommendation applies to the discretionary assistance programs in which agencies have a substantial choice as to all or most of these elements. The Recommendation applies to all types of federal assistance irrespective of the form of aid. Thus its coverage extends beyond grants to include such programs as surplus property distributions and loans.[1] It does not, however, cover assistance provided in the form of the services of federal personnel, because of the additional complexities the agencies face in having to take personnel policies into account in developing their distribution criteria. Consequently, programs like the National Health Service Corps are excluded.[2]

The Recommendation does not apply to any assistance program in which the federal agency has little or no discretion as to the distribution of aid. Thus, benefit programs, such as Social Security, in which individuals receive awards on the basis of statutory entitlement, are beyond the scope of this proposal. Also excluded are "formula" grant programs, since by statute the states are identified as the recipients. Lastly, the proposal is inapplicable to government procurement programs on the theory that the agency's discretion is sufficiently guided by the statutory and regulatory provisions specifying an awards basis and establishing dispute procedures.

It may be that this proposal should be applied more broadly to the excluded programs. Even though the agency has little choice about the identity of recipients, it may have latitude in specifying the things they must do with the aid, and in deciding how much they should receive.[3] The interpretation of statutory requirements may involve discretion. It would seem beneficial for agencies to articulate their objectives and standards when implementing this type of discretionary authority as well. Whether the agencies need to do more in this regard is left for now for more specific study. Attention here is concentrated upon the agency allocation actions, which are even more wholly discretionary, as in these the agencies must confront most bluntly the difficult underlying question: why should some receive while others do not?

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[1] 40 U.S.C. § 484; 12 U.S.C. § 1749.

[2] 42 U.S.C. § 254b.

[3] E.g., 29 U.S.C. §§ 49d, 49g (1970); 42 U.S.C. §§ 246, 3733 (1970).

2. *Importance of Assistance*

If assistance is used in its broadest sense, its economic impact as measured by the cost to the federal government is enormous, over $100 billion a year.[4] As limited to discretionary programs the annual federal cost is not insignificant. These expenditures affect the immediate recipients and applicants, the ultimate beneficiaries, geographic areas and types of activities. The impact of this spending on national economic life has only recently become the subject of intensive interest and research. The staff of the Joint Economic Committee, in its "first step" study of the range of federal subsidies, reported that these subsidies constitute an "incredibly diversified and pervasive system" of assistance to the private economy, that only a "meager understanding" exists of the economic effects, and that the subsidy system seems "somewhat" out of control in that "it continues to grow despite the fact that we know so little about it." [5]

Assistance represents government intervention to alter the distribution of services which would otherwise prevail under market conditions. Though less studied than regulation, assistance has a similar public importance. It is one means available to the government to allocate and direct the nation's human and material resources to achieve an intended purpose, analogous in many respects to licensing. In licensing, the government gives a limited group the right to make money by providing services to the consuming public; in assistance, the government gives a limited group the tax money which enables them to buy services or provide services for a portion of the public. Like licensing, assistance can be used to establish minimum standards for public services, to check prices for scarce resources and to benefit particular groups. The quality and quantity of professional services can be increased, for instance, through changes in occupational licensing requirements or through conditioned subsidies for improved professional training.

Assistance has in practice been used by the federal government to a considerable extent in shaping social and economic affairs.

[4] See U.S. Office of Management and Budget, *The Budget of the U.S. Government*, Fiscal Year 1974 66–68, 364–368, Table 17 (1974) (included for this purpose are 1973 estimated expenditures for income security, most of those for "physical resources," and the "general government" outlay for law enforcement aid).

[5] Staff of Joint Economic Comm., 92d Cong., 1st Sess., Study of *The Economics of Federal Subsidy Programs* 1, 4–5. (Comm. Print 1972); for other studies of "the grants economy" see K. Boulding & W. Pfaff, *Redistribution to the Rich and the Poor, The Grants Economics of Income Distribution* (1972).

Historically, federal grants have played a major role in the development of the nation's agriculture, colleges, transportation systems and economically "underdeveloped" areas—one needs but to recollect that the transcontinental railroads were financed through federal land grants. In more contemporary circumstances, federal assistance programs have had a considerable impact on how, where and whether Americans live. For example, highway aid, urban renewal, welfare and medical research grants have had consequences that match that of any other governmental activity. Assistance is also of particular social importance because it represents the distribution end of the redistribution of wealth through taxes. Assistance is also the principal means by which the federal government affects matters traditionally left to community control. The federal government gets its leverage through its purse over such sensitive areas as police functions, land use, family assistance and the welfare of the poor.

3. *Assistance as "Different"*

Assistance, though, is often considered to be "different," acceptably administered informally, without explanations, and even politically. All grant, benefit and loan programs continue to be statutorily exempt from the procedural requirements for the issuance of proposed rules.[6] In grant programs, adjudications and judicial review are usually explicitly called for only in formula programs, to protect the rights of the states to their statutory allotment of funds.[7] All other grants are commonly called "discretionary" because those affected have no administrative recourse from the agencies' determinations. Traditionally, at all governmental levels, assistance programs have had an inadequate development of executive controls over the conduct of officials, making direct courtsuits one of the few means of enforcing legal standards.[8] The distribution of federal assistance frequently has

[6] 5 U.S.C. § 553 (1970). The Conference has recommended that this exemption be repealed and that in the meantime the agencies observe these requirements as a matter of policy; Recomm. 69–8 (No. 16) "Elimination of Certain Exemptions from the APA Rulemaking Requirements," Admin. Conf. of the U.S. Recomm. and Rep. 305 (1970).

[7] E.g., 42 U.S.C. §§ 1316, 3758, 3759.

[8] See L. Jaffe, *Judicial Control of Administrative Action* 459–500 at 474–75 (Abr. stud. ed. 1965).

the appearance of politics about it.[9] Announcements of awards are routinely made through Congressional offices, as if to suggest the good offices which brought about the agency decision. A frequent reaction to a proposal that agencies state their distribution criteria is: be realistic; it's all political; it's a pork barrel; it's only money.

The aim here is to examine the contention that, because assistance "only" involves money, it can legitimately be dispensed with less public concern. One justification for this suspension of the rule of law is that the government does not act coercively. It does not exclude those not receiving its dispensation from the activity, under threat of sanction. Anyone is free to sponsor basic research or provide housing for the poor—if they can afford to do so. And frequently they cannot, or at least cannot at an effective level. If these projects could be funded without federal action, the government would presumably not have wasted its money by establishing the program. The scale of aided activities and most of the recipients are dependent in practice, if not by law, upon government approval for their endeavors. Questions have been raised whether even the federal revenue system can afford the costs for all the subsidies it provides, but as of now, in any case, it continues to do so, and it is often the only entity in a position to promote alternative means to finance and regulate services it has led people to expect.

Moreover, the lack of coercion is a dubious base for distinguishing assistance from a coercive activity like licensing. Coercion plays a similar background role in both. The agencies get their daily operating significance, not from the threat of force, but from the carrot they have to dispense. They differ in how the government's coercive power is exercised to create that carrot. In the case of assistance, the government uses its coercive ability to collect taxes to gather the money the agency dispenses. In licensing, the government uses its power to exclude others from the activity. The principal activity of both agencies is similar: they choose initially among desirous applicants, and they determine the terms of service through the duration of the program. More importantly, in both areas, concern should not be limited to

[9] For examples of the impact of "politics" on the distribution of federal aid, see discussion in ABA National Institute on Federal Urban Grants, 22 Ad. L. Rev. 161–64 (Tufo), 230–235 (M. Semer) (1970); Cahn & Cahn, *The New Sovereign Immunity*, 81 Harv. L. Rev. 929, 943 (1968); Rocky Mountain News (Mar. 12, 1974) ("Impeachment committee members recipients of out-of-the-ordinary pork barrel favors."). "Politics" is a factor in enforcement decisions as well, see Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 Duke L. J. 1; M. Derthick, *The Influence of Federal Grants* (1970).

the immediate winners and losers of awards—coerced or not as the case may be—but with the impact of the agency's program on those ultimately served and the degree to which that impact accords with the public purpose in creating the program. To promote that purpose effectively, assistance programs need to observe the better practices urged upon regulatory agencies, of structuring their discretion.

"Politics," though, is sometimes offered as a separate justification for the different treatment of assistance. If Congress could not influence the selection process, the argument goes, it would never enact needed programs. The same argument could be made about any government activity if it were considered acceptable for Congress to influence them in this way. Under this proposal, agencies should make their discretionary decisions only in accordance with what the law states, and not with some unstated "political" understanding about who gets what. This proposal does not eliminate politics, however, if "politics" only means a legislative bargaining process. Congress can establish its program goals and selection criteria when it passes a law, and the agency should be guided by the enacted provisions. Increased congressional articulation should lead to better programs, even assuming that it leads to fewer ones. The process of articulation should induce the Congress to think through the endeavor with more depth, and to assume greater responsibility for the consequences of its decisions.

B. ADVANTAGES OF STRUCTURING DISCRETION

In sum, the proposed Recommendation calls upon the agencies administering federal assistance to identify publicly the performance outcomes they expect to achieve through their program; to develop standards, based on that formulation, for awarding and conditioning assistance; and to utilize public procedures for developing and enforcing the standards. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of its decision-making by creating a pressure for analysis and generalization of program aims. Applicants and recipients benefit from more consistent and predictable terms, and the open opportunity to seek an award. The interested public can monitor compliance in a way that promotes program purposes. It also makes the agency actions more comprehensible to all involved.

1. *Policy Articulation and Program Rationality*
(Recommendation B1)

Agencies should formulate the outcomes they want because only by doing so are they likely to realize attainable objectives. Assistance agencies are frequently delegated great discretion by Congress to promote a public purpose, identified only in general terms. The statute may merely name a public concern for attention, and give little guidance on how to achieve it or how to reconcile conflicting interests.[10] Comparably broad statutory standards occur in other government programs, and the Administrative Conference has generally urged all federal agencies to define adequate criteria to guide their decisions.[11] The advantages of doing so, in extending fairer and more predictable treatment, and in promoting "good government" have been noted. Like other large organizations, government agencies also have a management interest in adequately defining their standards, as such definition gives better guidance to personnel, and reduces the inefficiency of repeatedly resolving anew the same issue.[12]

Appropriately stressed in this context is an additional program advantage that follows from the effort of articulating agency policy—it counteracts the tendency to avoid the risks of decisionmaking. If the agency announces a definite policy on a difficult matter, it is likely to encounter criticism from those with differing viewpoints. It also stands to be judged by the outcome of its policy. To avoid these troubles, the agency officials may never formulate any overall policy. Instead they may make their choices on an *ad hoc* and individual basis, and they may fail to give any affirmative guidance to recipients about what they are expected to do. This can be a problem in any governmental program, but may be a greater one in assistance because all the individual activities aided are good causes. The agency may fund a project,

[10] *E.g.*, 42 U.S.C.A. § 3736(a)(2); 49 U.S.C. §§ 1601–1612 (1970); 42 U.S.C.A. §§ 3801–91

[11] Recommendation 71-3, "Articulation of Agency Policies," Admin. Conf. of the U. S. Recomm. and Rep. 24 (1973); see H. Friendly, *The Federal Administrative Agencies; The Need for Better Definition of Standards* (1962), also printed in 75 Harv. L. Rev. 863, 1055, 1263 (1962); Davis, *Discretionary Justice*, especially 97–103 (1969).

[12] See, A. Etzioni, *Modern Organizations* 53 (1964), quoting M. Weber, *The Theory of Social and Economic Organization* (329–30 (1947)) ("Rational organization is the antithesis of ad hoc, temporary, unstable relations. . . . Rules save effort by obviating the need for deriving a new solution for every problem and case; they facilitate standardization and equality in the treatment of many cases."); Bruce, What Goes Wrong with Evaluation and How to Prevent It, 1 Human Needs 10–10 (1972) (according to an HEW Assistant Administrator the "largest single cause" of ineffective evaluation studies may be the failure to derive agreed-up specific performance outcomes from broad statutory statements.)

which is indeed worthy, without sufficiently examining whether it is a priority project, or whether it will effectively achieve the statutory aim.

The absence of federal direction is likely to have grave consequences for the program. The funded projects will operate, of course—that's what the receipt of funds makes possible. In a sense, though, they have been abandoned. Without guidance, the recipients will devise their own endeavors, which may indeed be worthy but most likely they will reflect assorted views and immediate local concerns. As a result, the programs may fail to meet the general public need for which they were created, and will be criticized some day when Congress and the public ask what has been accomplished with the time and resources provided. Moreover, the individual programs will encounter, on an isolated basis, the pitfalls lying in wait for any activity that promotes change. Those who oppose the program can seize upon the inevitable incidents of controversy to launch a broad attack upon the recipient. The outcome may be determined by the local balance of political forces, in the absence of established federal rules dealing with sensitive policy problems. When these rules exist, they guide the recipient to avoid difficulties, and, in the fray, they help it, for the rules serve as an outside appeal and justification: we are doing what the federal government requires.[13] Some of the problems in federal assistance programs have been attributed to this failure of Washington officials to plan, anticipatorily, to deal with program realities, and to state policy where it is most needed.[14]

To serve the interests of their recipients, the public and their own coming day of accountability, federal assistance agencies should recognize their responsibility for the overall success of their discretionary programs. The first step in meeting that responsibility is each agency's identification of the attainable re-

[13] Note, The Legal Services Corp.: Curtailing Political Influence, 81 Yale L. J. 231 (1971).

[14] *E.g.*, A. Kahn, *Studies in Social Planning*, 64–67 (1969); Hazard, *Law Reforming in the Poverty Effort*, 37 U. of Chi. L. Rev. 242 (1970); S. Carey, *Falling Down on the Job: The United States Employment Service and the Disadvantaged* (1972). These shortcomings redound to bring criticism upon the federal agency. For example, the Law Enforcement Assistance Administration's acceptance of state funding proposals which underfunded the cities and other interests of statutory concern brought criticism, Congressional hearings, statutory amendments and finally increased regulatory attention. See Pub. L. No. 91–644, 84 Stat. 1883, *amending* 42 U.S.C. § 3733, (1964 ed. Supp.), codified at 42 U.S.C. § 3733 (1970); Advisory Comm. on Intergovernmental Relations, Report A–36, *Making the Safe Streets Act Work* 52 (1970); hearings on H.R. 14341, 15947 and Related Proposals, Subcomm. No. 5, House Comm. on Judiciary, 91st Cong. 2d Sess., Serial No. 17 (1970); Law Enforcement Assistance Administration, *Memorandum to State Planning Agency Directors*, No. 10, Change No. 1, p. 21 (March 1, 1972).

sults it wants to achieve through its program and any obstacles that hinder achievement of its goals. It should then work to bring about the desired outcomes by establishing suitable criteria for selecting recipients, and suitable terms governing their operations. The agency should look upon the actual program outcome as a test of the adequacy of its goals and implementing policies. It should examine its policies, in relationship to the results, at regular intervals and as experience dictates.

The agency's formulation of its objectives should be made in the form of a public statement. This helps educate agency personnel, recipients and those affected by the program. In addition, the published form may induce the agencies to face the breadth of their task and to generalize a sufficiently long-term and comprehensive policy. It also puts the responsible agency officials permanently on record on their policy decisions, and that gives them a personal incentive to think ahead.

The identification of obstacles in a program is an important part of developing agency policy. For example, a program which provided preschool aid for poor children recognized that the program might become an all black one in the South because white children might not enroll if not sought out and encouraged to participate. Grant applicants were instructed to advertise their openings and to canvas eligible households. While the obstacles should ordinarily be publicly identified, in some circumstances it may be self-defeating to do so. If the unpopularity of the program with local political officials is one of the obstacles to the program's success, it may only harden resistance to express this difficulty.

The agency's formulation of program objectives and performance outcomes can become a hindrance to the program and a mere exercise if the agency does not sensibly and seriously use it as a means of achieving the program's objectives. The process is not meant to produce a "body count," in which program accomplishments are measured solely by the more-easily-quantifiable indicia of activity without adequate attention to the program's more complex goals. To avoid this, the agencies need to give this matter special attention. They should endeavor to develop adequate measurements for the range of their goals, or recognize the limitations of the measurements which they are able to develop. An agency can also appear to have satisfied the purpose of this Recommendation by issuing statements which superficially are adequate but which are unanalyzed justifications for letting things ride. The articulation process can help the agencies achieve

better programs but only if the agencies are convinced enough of the value of the process to use it meaningfully.

There is also a risk when agencies give their programs clear direction that the policy direction will be a poor one on the merits, and that, as a consequence, numbers of programs will be led astray. The only reliable correctives for that human susceptibility to error are continued analysis and the open complaint procedures hereafter proposed.

2. *Fair Treatment of Recipients*
(Recommendations B2 and B3)

The agency's articulation of its funding terms and criteria facilitates fair treatment of those similarly situated, an advantage as pertinent in assistance programs as in any others. Even those who ultimately receive funds have an interest in the advance general statement of any requirements. Like licensees, assistance recipients need a predictable basis for planning and they do not want to be subjected to requirements not consistently imposed on others. At present, individual grants are sometimes treated like private contracts, with the government adding terms as it pleases, which the applicants have scant bargaining power to question. As a result, little attention may be given to the applicability of the terms and "special conditions" to other similar proposals. When agencies impose a term, not found in their general regulations, they should indicate the occasions for its use.

Of even more concern in this discussion is the importance of the formulation of the agency's funding terms and criteria in providing even-handed treatment to the class of those eligible for aid, both applicants and ultimate beneficiaries. Equal treatment is rightfully expected from the government unless differences are justified by the promotion of a public purpose. The articulation of funding criteria facilitates the making of awards on both an impartial and a program-related basis because it leads to wider notice and premises selection on satisfaction of the official criteria.

The government does not always provide enough money to make aid available to all in similar circumstances: to finance public housing for everyone with a low-income, or a mass transit system for every community. Thus, many assistance programs ration out public services. The scarcity and value of the aid creates a danger that favoritism, politics and even corruption will play a role. To avoid this at the citizen distribution level, on

due process grounds, a court has required the issuance of agency criteria for allocation of the limited vacancies in government-financed housing.[15] A similar concern, and a similar remedy, seems appropriate in regard to the government's wholesale manner of distributing aid among areas of applicants.

The full implication of the articulation process will be to impel assistance programs towards one of three bases for providing aid: entitlement for all meeting minimum eligibility standards; competitive awards to the applicants who best meet the selection criteria and somewhat special treatment of experimental programs for the duration of the experiment.

a. *Entitlement.* Entitlement awards already exist in assistance in the form of the non-discretionary selection present in benefit and formula programs. This approach to selection is possible in discretionary programs, making a number of awards for the same purpose, if the agency can specify minimum eligibility requirements, related to the program's objectives, which select the proper number of recipients. For example, if a program were established to provide vitamin supplements in school lunches, every school with a lunch program might be given a right to aid. Congress has provided for the award of grants for the education of Indians to be made to local educational agencies on the basis of the number of Indians attending the local schools.[16] If more applicants meet the criteria than can be aided, the agency should refine its definition of eligibility, use criteria to assign priorities, or move to a more competitive model.

b. *Competitive Awards.* When the number of eligible applicants exceeds the number of awards to be made, the agency should specify its criteria for choosing among them. To return to the hypothetical example of the vitamin distribution program, if aid were insufficient to supply every eligible school, selection might be based upon the applicant's ability to aid the most children in need. The regulations for "annual interest grants for construction of academic facilities" set out eligibility criteria, and priorities for awards. In the first priority category are public institutions, developing institutions and those enrolling 20% or more of their students from low-income families; among these, aid goes to those in the most urgent need of new facilities, and those com-

[15] Holmes v. Housing Authority, 398 F.2d 262 (2nd Cir. 1968) (the decision focused on the state-aided housing program rather than on the federally-aided program for which some objective allocation criteria existed); see *Morton v. Ruiz*, 42 L.W. 4262 at 4272 (Feb. 20, 1974); Clagett, *Informal Action-Adjudication-Rulemaking: Some Recent Development in Federal Administrative Law*, 1971 Duke L. J. 51.

[16] 20 U.S.C. § 241bb, see 40 C.F.R. § 35.555.2 (pollution enforcement control projects).

mitted to the enrollment of substantial numbers of veterans.[17] The agencies have issued more specific funding criteria for some of their programs.[18]

When the agency specifies the standard guiding its choice, it also opens the awards process to competition. Competition helps ensure that the award will be made to the most meritorious project, and it is fairer to all those eligible since each has an opportunity to seek aid, even the non-regulars. These factors have made "competitive bidding" the accepted standard for the government's action in awarding valuable procurement contracts.[19] Competition is appropriate in assistance, as well, for the same reasons, but the award basis need not necessarily be that of the "lowest bid." Nor would it be necessary for the agencies to announce the competition via the procurement methods of published notice and sealed bids. The assistance agency can use any system that gives potential applicants effective notice and a fair opportunity to seek an award.

Developing the appropriate selection criteria is not without difficulty. It is a decision which the agency should make after considering the program's performance objectives. For instance, it might decide to award education aid to those who can best increase the reading performance for poor students. Numerical formulas, and "objective" standards, have the advantage of ease in application, but their use is limited in these and other award programs by their adequacy to guide the proper decision. Judgment will often have to be left to the decision-maker, but the agency should provide meaningful guidance in its standards about how officials should proceed.

Factors in addition to performance may enter into selection—geographical distributions being a prevalent example. Administrative responsiveness to area interests is often considered to be political, but to a degree it is appropriate in a federal system that distributes power partially on this basis. The agencies should identify its effect, though, so that it can be assessed by Congress and the public.

Still, in some programs, there may be no program-related basis to pick one applicant over another. Many are eligible and each could do the job in a substantially equivalent manner. If no basis of choice can be stated, low-cost may be the appropriate criterion,

[17] 45 C.F.R. § 170.82.

[18] See 39 Fed. Register 9440 (Mar. 11, 1974) (educational broadcasting); 24 C.F.R. Pt. 556 (Basic Water and Sewer Facilities Grants).

[19] See Speidel, Judicial and Administrative Review of Government Contract Awards 37 Law and Cont. Prob. 63 (1972).

or some arbitrary selection basis—the date of application, a periodic rotation through the alphabet of applicants, or even a lottery. But it may be possible to adapt the availability of this aid to other public needs. Unitary projects, providing many jobs, might be located, for instance, in economically depressed areas. The selection basis should still be stated, in order to encourage serious analysis of whether the project really will promote long term development, and to enable other areas, with similar needs, to compete for aid.

c. *Experimental Projects.* In research, demonstrations, problem-solving and other experimental programs, the agency may not be able to detail fully the outcome sought or the means of its accomplishment, because it does not fully know it. In that circumstance, great reliance has to be placed upon the competence of the researcher, and that may need to be subjectively weighed. As a result, the agency needs to retain some ability to choose recipients without having to justify its decision. The appropriate checks on the agency discretion are for the agency to state its program's research purpose, to specify its criteria as fully as its experience permits, to provide as much competitive opportunity as feasible, and to encourage public assessment of the research agenda and accomplishments.

Similar considerations apply in any newly established developmental program, even those which are not intended to be experimental as a permanent program feature. In their initial stage, they are experimental in the sense that they have to develop their selection criteria. To this extent they may be unable to articulate their criteria for a time and will have to make some allocations on a subjective basis. The program may have multiple objectives and there may be conflicting views about its major aims. When this is so, the agency should recognize the experimental character of its program and it should fund recipients in order to test out and evaluate the various conceptions of its goals. Afterwards, the agency should be able to assess which goals are achievable and it should formulate more objective criteria for its future awards.

While agencies may not be able to articulate fully their criteria in experimental programs, to the extent they can they should do so, and they should make the awards process as open and competitive as possible. Agencies have made some efforts to state publicly their criteria and research priorities. The Environmental Protection Agency, for instance, annually publishes the results of its research planning process "identifying the research objectives to be pursued by the agency and the approximate amount of

funds to be available" for grant and contract assistance.[20] The National Oceanic and Atmospheric Administration has published its objectives and selection criteria for funding "estuarine sanctuaries" as natural field laboratories; it specified the zoogeographic classifications which it wanted to fund in the program.[21]

To provide open access to participation, general requests for proposals might be issued, even though some of the assessment have to be subjective. In small programs, though, the administrative cost of soliciting these proposals might be out of proportion. When general proposals are not feasible, the agency should devise some other competitive arrangement. Competition might be limited to negotiations with researchers of established competence but, at the same time, some research money might be made available for supporting innovative proposals coming from new sources.

Encouraging public assessment is of particular value in research programs. It can be done by obtaining comments on proposed major awards, and by holding periodic public meetings on the agency's research agenda and accomplishments.

Analysis in advance by other researchers is helpful because of the difficulties in being sure that admittedly-uncertain projects have been thought out as fully as they could be. The certainty of public review afterwards creates a continuing reminder to the agency and the researchers that they are expected to be accomplishing something. Some projects will fail, the risk being built in, but overall the agency should come up with some successes or at least some conclusion about the value of continuing the effort.

Special difficulties in assuring fair allocations arise in those experiments and demonstrations which involve the provision of services to a limited public.[22] These should not go on forever on their research rationale. When their effectiveness has been shown, if not discontinued, the services should be made available to all eligible or rationed out in accordance with their new rationale. The task is like that in allocating other limited public services, but it may be more complicated, as the tendency will be to continue existing projects in place, for reasons of economy, even though their original non-competitive selection may have been made on the basis of typicality, rather than effectiveness. The

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[20] 40 C.F.R. § 40.120–3.

[21] 15 C.F.R. Part 921, 39 Fed. Register 8924 (Mar. 7, 1974); see 39 Fed. Register 8927 (Mar. 7, 1974) (library research and development).

[22] See Willcox, *Public Services under a Government of Laws.* (unpublished speech 1968).

agency should anticipate these transfer problems to an extent in setting up the program, keeping in mind its purpose of coming to some conclusion within a definite period. The ultimate disposition, however, has to turn upon what is learned through the experience.

d. *Continuing Assessment of Fairness.* These categories, of entitlements, competitive awards and experiments, slide into one another, and programs can move from one to another, as the selection basis becomes more or less regularized and specific in response to the exigencies of meeting the public need. What remains constant is the necessity in all of them to keep re-examining the underlying public need and the fairness of the program's allocation of public goods. That fairness question is a conspicuous one in competitive programs which ration out aid among numerous applicants. It exists as well in entitlement programs, on an even larger monetary scale, if one considers the disparate treatment given the eligible class over others, whose situation may not be all that different.

The equity issue goes well beyond being a procedural one, but administrative procedure has a relevance to its examination. For the justification of these differences in treatment is that they meet a public need, and the adequacy of that explanation, for the most part, is tested by the public's willingness to accept it. Thus, by insisting on a public surfacing of the justification for program choices, administrative procedure serves an even larger public interest—that of making it possible for the public to refine its sense of common fairness.

3. *Provision of a Feedback Structure*
(Recommendation C Generally)

The promulgation of agency standards works to improve compliance and to make public interest in the programs a force for achieving the agency's objectives. The agency's public statement of its objectives and its terms for awards creates a constituency which expects their fulfillment. It also clarifies the responsibility for failures. The recipient-operators will be accountable for their efforts to meet the stated objective, but the agency will be responsible for the program failures that result from the misidentification of objectives.

The standards also provide the frame of reference for the essential feedback of grievances to management through complaint procedures. Agency officials should recognize that the effec-

tive operation of their program is mainly achieved through its official rules and policies. In a large continuing organization, the official statements are the means of communication that relate the diverse interests of the participants to a common purpose. Without their articulation, and without a means to bring operations and the formal policy into conformity, the participants lose touch with one another and the program. The consequence of that breakdown frequently is that the top officials do not know about the actual state of affairs, and developing difficulties, until confronted by a major program failure.

The official rules are frequently seen, however, as obstacles in the way of getting things done. Programs succeed, it is thought, in spite of the red tape, put together by energetic people who "care" and do not dally over the technicalities. That approach undoubtedly succeeds in instances, but usually only for projects that receive concentrated attention. More seriously, it does no good for the long-term operation of the program. For one thing, it frees other officials to pick and choose the policies to be discarded. When the existing rules are genuinely in the way of program success, the problem is their content or deficiencies in their application, not the existence of rules as such. The remedy is either to re-write the rules or better supervise their implementation.

The establishment of complaint procedures brings latent problems with the official standards to the surface for attention. The problems may be isolated ones or readily correctable: a case of an individual error or a poorly-drafted rule. They also may reveal deeper program failures: the inadequacy of the stated selection criteria to guide the choices that in fact have to be made; an unexpected obstacle; a pattern of resistance. They may even show an unresolved conflict between officially endorsed goals. The complaint proceedings may serve to work out these issues, by permitting the concentrated examination of a concrete case-problem. If not adequate, the agency should use the other mechanisms at its disposal to work out a new policy: additional research, investigations, public discussion, changes in the rules, or whatever.

Complaint procedures are especially valuable for this feedback purpose because they involve those outside the agency. The independent position of the complainants permits them to tell the agency executives that the official standards are not being observed in practice. Even so, interested persons only do this, and the complaint procedures only works to serve this necessary function, if the agency has established standards. Without a stated

agency policy, the dissatisfied public does not know the ground-rules and to whom it should complain. Furthermore, without some statement of what they can rightfully expect, those who deal with an organization are at the mercy of the discretion of low level officials. Rules protect. Their issuance as official policy gives those benefitted by their content the wherewithal to assert their claim. Finally, the standards shape the issues to be raised in the complaint procedures, thereby helping to keep the process manageable. This benefit is more fully explored in the last part of this report.

4. *Involvement of the Public in Policy Development* (Recommendation B5)

The public should have the opportunity to participate in the development of all assistance aims and standards but most especially in these. The notice-and-comment rule-making procedures of the Administrative Procedure Act are appropriately used for this purpose as they permit wide participation without undue interference with the administrative process. The Administrative Conference has already recommended the deletion of the statutory exemption of grant, benefit and loan programs from the APA's procedural requirements for proposed rule-making.[23] This recommendation notes the applicability of those procedures to these agency decisions. It is precisely because agency decisions in formulating goal and criteria are controversial and difficult that they benefit from being publicly aired. The agency has the opportunity to learn in advance from the public comments of pitfalls and deficient analysis, thus avoiding program failures in operation.

Of fundamental importance is the value of public proceedings in forming a public understanding about governmental purposes. The public's acceptance of aims is their principal justification. People are aware that governmental actions affect their daily lives, but they often do not understand what, if any, reason lies behind the decisions, let alone what influence they can have on them. To make its actions comprehensible to the public, the government first has to ensure that there is some rationality to them, by articulating its standards. In addition, it should develop its policies through public proceedings, the more important the decision, the more visible the proceeding.

[23] Recomm. 69-8 (No. 16) "Elimination of Certain Exceptions from the APA Rule-making Requirements," 1 Admin. Conf. of the U.S., Recomm. and Rep. 305 (1970).

The government benefits from these public discussions. Its policies are shaped by the public's willingness to accept changes. Promotion of public transport, for instance, depends upon individual decisions not to drive. The government needs to know what types of changes are most acceptable, and the public has to understand the reasons for the change. Public discussion focused around a proceeding to consider priorities in awarding aid can prove mutually educational and beneficial in working out an acceptable policy.

The federal agency may also find it useful to provide more than the bare minimum statutory procedures in developing rules of unusual complexity or considerable public interest. Accordingly, the agency may provide oral conferences, evidentiary hearings or other procedures. It may even be appropriate to hold regional meetings and conferences as a convenience for the affected public, or to develop regional rules when justifiably they are of limited geographic effect.

C. RESTRAINTS ON FEDERAL DIRECTION OF ASSISTANCE (Recommendation B4)

Notwithstanding the need for purposeful direction of assistance programs, several factors operate to restrain the federal agency and the specificity of its issuances. These limits are imposed by statute, by the recipient's independent operating responsibility, by a concern for pluralism and by the deference to federalism prevalent in the structuring of assistance programs. As a result, the appropriate federal role is usually that of enunciating general objectives for the program, dealing with crucial problems, and specifying program terms only to the degree practicable and needed. Excessive detail and mandated uniformity is likely to detract from the achievement of the program's objectives.

1. *Statutory Limits*

If the statute gives a federal agency no discretion in dispensing funds, the program does not come within the scope of the recommendation. Even when programs are within it, the agency should observe all applicable statutory provisions in exercising that discretion. For example, statutes may restrict the eligible class to public agencies, or indicate some priority purposes for funding.

2. *Promotion of Pluralism and Operational Flexibility*

No one wants the federal government to be running everything.

The avoidance of government-mandated uniformity is a particular concern in the assistance area as the recipients are often those whose independence is of special public interest—universities, the providers of professional services, the mothers of families. Furthermore, in any endeavor, the people responsible for operations are hampered by excessive detail or the insistence on a single approach. The allowance of grassroots initiative can also have a payoff in the form of new and unexpected program solutions. Too, simply letting people do things their own way increases the program's popularity. Sheer diversity should not be stifled just to make things uniform. From the other perspective, Washington officials cannot anticipate all the varying conditions that arise throughout the country. Wisely, they may not want to encumber themselves in the detail and complexity necessary to run everything as a standard operation.

For these reasons, it is in the interest of all to confine the central role, but it is still necessary to have one. The public interest demands that some entity assume the responsibility for establishing an organizing common purpose for the endeavor and the federal agency is well placed to do that. The formulation of goals by it also helps to ensure the due independence of the other participants. It sets the task for which they are accountable, thereby freeing them from the insinuation of other compromising obligations. Indeed the more specific the federal requirements, the greater clarity there is about the extent of the recipient's obligations.

Furthermore, the federal agency should not use the concern for the recipient's flexibility as an excuse never to descend from generalities to deal with the real operating problems and failures. It should face the crucial issues and give meaningful direction about what it wants accomplished. Thus, the federal agency should ordinarily provide the program with general direction, but in articulating standards, it should be only as specific as it has to be. As a starting point, it should seek a balanced formulation, being clear about the purpose of its requirements. Further adjustments should be made on the basis of experience. It should feel less constrained in giving specific guidance to its own personnel about the criteria for awards decisions, than in setting requirements for recipients about the day-to-day operation of aided programs.

This need to abstain from governmental domination of other social entities is not just an assistance phenomenon. Regulatory agencies defer to the right of "free" enterprises to run their own affairs. Since regulatory licensing faces similar concerns, it may serve as a useful source of examples on how to give federal direction of those activities in which governmental intervention is required. The Federal Communications Commission, for instance, in implementing a requirement for community programming, has to both avoid the generality of that mere phrase and, at the same time, the imposition of detailed chronological and substantive content. Instead, an intermediate degree of specificity, calling for a total amount of programming of the required type, may best accommodate the community need with the licensee's responsibilities.[24]

3. *Delegations to States*

The states administer many federal assistance programs, particularly those in the formula category. This makes a concern for federalism a relevant consideration, but to a large extent, it represents only a special form of the other restraint on the federal agency just discussed. Thus, the approaches already suggested apply in this area as well.

The states constitute in a governmental form an expression of the concern to check and limit national powers. The areas in which they are delegated a major assistance role are often areas like social services, and law enforcement, in which there has been a traditional reluctance to have either any central executive control or any government interference at all. This concern for varying local situations, diverse community values and avoidance of government intrusion all operate to moderate the imposition of strict federal controls. On the other hand, adequate articulation is important because otherwise the local concerns might obscure the general public cause that occasioned the increased federal involvement. The states have accepted responsibility for running these programs in accordance with the federal statutory purpose and provisions. Accordingly, the federal agency should exercise its responsibility, when given it, to give the programs direction and to ensure faithful compliance with the law and necessary administrative requirements.

[24] See FCC "Primer on Ascertainment of Community Problems by Broadcast Applicants," 36 Fed. Reg. No. 4092 (Mar. 3, 1971).

II. Complaint Procedures in Regard to the Application of Standards

(Recommendation C)

The importance of having complaint procedures has already been indicated: the procedures aid the agency by providing an independent reading on program implementation, and they benefit applicants and others affected by providing some recourse from official misconduct. These reasons are applicable in all types of programs, and to the range of decisions made by the agencies.

Further discussion will be directed at establishing the feasibility of the adoption of this proposal by the agencies. The report covers the availability of the procedures, the minimum rights of the complainants, the obligation to resolve protests, the need for agency initiative, and remedial problems.

1. *Availability of Complaint Procedures*
(Recommendations C2 and C3)

The procedures apply with respect to any matter governed by a federal standard. The standards may be statutory or regulatory, and the term includes the criteria developed by the agency for distributing aid. The complaints may come from applicants, recipients, beneficiaries or anyone, if they were intended to be benefitted or protected by the standard in issue.

Thus, the procedures apply to the federal action in denying and awarding aid, and in imposing conditions or failing to do so. They also would be available when affected third persons claim that a recipient has failed to observe federal standards in his aid application or in the operation of an assistance program. The agency might receive complaints, for instance, that an environmental impact statement should have been filed in connection with a research project. One criteria for the award of estuarine sanctuary grants is whether they conflict with existing or potential competing uses.[25] It should aid the program to learn of possible conflict from complaints.

The procedures would be available only with respect to matters which are governed by federal standards and only for these persons intended to be protected or benefitted by the standard. These limitations help to make the procedures manageable. It limits those who can complain and what they can complain about. An allegedly wrong decision cannot be protested by those unaffected.

[25] 15 C.F.R. § 921.12, 39 Fed. Reg. 8924 (Mar. 7, 1974).

An unpopular decision cannot be objected to except on the grounds that a federal standard has been violated.

If appropriately no federal standards exist in regard to an issue, no complaints need to be heard. Thus, in experimental programs if the choice of a recipient has to be subjective, it would be acceptable for the agency to refuse to hear complaints solely about the merits of its choice. This does not mean that the proceedings should be entirely unavailable in experimental programs. They should be available if a showing can be made that the award was improper under whatever standards may exist. Profit-making agencies may be ineligible for aid; if nonetheless such an award were made, the losing applicants should be able to complain about the violation of the standard. In the other types of awards programs—the entitlement and competitive ones—awards should be subject to the complaint procedures, without exception, whenever disputes about the application of standards are appropriately raised. As already discussed, agencies should have standards to guide their selections in these regular and continuing programs; thus the agency should be able to explain its decisions in applying its awards criteria and the other program requirements.

The established standards help to make the complaint procedures manageable, in another way, by guiding the complaint officer in resolving the complaint. They give him the test for the appropriate decision, through an examination of the language and purpose of the federal requirements. Still, a discretionary element often remains as to the exact choice made in carrying out even a well-defined standard. If the initial decision was not unreasonable, the decision should be allowed to stand. The aim in these procedures should be to check excesses by officials, not to second-guess them.

Even with these limits, the procedure will be unmanageable in those areas in which the agencies should have standards if they either have none or they have poor ones, which are ambiguously or insufficiently stated. The cure is not to sweep the problem into obscurity by not establishing a complaint procedure, but to have the agency improve the definition of its standards. The complaint process helps in this by maintaining a continuing pressure on the agencies to do a better job. The process may also produce a case law which advances the specification of requirements but the development of major policy initiatives is more appropriately done by the agency through rule-making procedures. The primary function of the complaint procedure is like that of more formal adjudications, to resolve disputes about the application of existing

standards, not to be the main vehicle for evolving new policy and standards.

2. *Minimum Rights for Complainants*
(Recommendation C2)

Under the proposal, those affected would have at least the right to submit written evidence and argument to support their complaint. This imposes a minimal burden on the agency, like that in notice-and-comment rule-making. The agency has to consider the submissions and respond as it judges best in the light of the protest and the standard. The principal check this puts on the agency is the need to justify its decisions to those concerned, a not insubstantial pressure for correctness, but one that imposes minimal cost and time burdens on the agency.

Steps should also be taken to ensure that those affected by decisions are aware that the complaint procedures exist. Of course, those whose actions are complained of should be informed and they should have an opportunity to respond and participate on an equal basis. The complaint should be resolved within a reasonable time. The participants should be notified of the outcome and the reasons for the decision.

Additional procedural rights for the complainants should be provided where possible, and when important issues are raised these protections can include an opportunity for an oral conference with the agency decision-maker, oral argument, evidentiary hearings and re-evaluation at a higher and independent level within the agency.

3. *Disposition of Protests*

Within the structure established by the agency for raising different types of complaints at certain times or before certain officials, the agency's responsible official should have to resolve any complaint of a violation properly raised.

The decision to be made depends upon the terms of the applicable federal standard, as does the kind of relief to be given. If, for instance, the standard involved requires the denial of funds upon a finding that federal law has been violated, the agency would be required by the law to do that, once it made the finding that a violation exists and has not been cured. The standard may, though, call for the exercise of agency judgment about the seriousness of the violation before it imposes certain sanctions. The agency may have to decide that there has been "sub-

stantial" non-compliance before it can terminate funding. The relevant standard may give the agency the discretion to bring about compliance in ways other than by denying funds. It might be able to add conditions to the assistance award, or might be enough for the recipients to begin to take steps towards compliance. The agency should take whatever action is consistent with the terms and purpose of the standard in question.

4. *Agency Initiative*

The recommendation calls upon the agency to identify the procedural format appropriate for its program and to take the necessary steps to institute it, including legislative approval where required or appropriate. The number of programs and their variety makes it both unwise, if not impossible, to specify standard procedures, other than the essential minimum, which would apply to all of them. If the agencies are convinced of the usefulness of this recommendation, they are in the best position to develop procedures suitable for their program—they have the necessary acquaintance with its needs and special features. After the agencies have had some experiences in using the procedures, it may be possible to specify arrangements most appropriately used in certain situations, but that has to await more development.

Agency initiative is important for additional reasons. The complaint procedure is one part of the agency's overall scheme for developing and implementing program decisions. If it is to utilize the feedback from the proceedings effectively, the agency needs the flexibility to develop the arrangements suited to its organizational arrangements. Furthermore, it is important to recognize that the agency's responsibility for enforcement is a broad and continuing one. The complaint procedures do not exhaust the need for other agency efforts to ensure compliance. The agency should not take a passive role, turning over to the affected the burden of detecting and protesting violations. The agency should take affirmative action to secure adherence. Such efforts may include increased scrutiny of applications, on-the-scene inspections by agency personnel, outside audits, and agency-initiated termination proceedings. The complaint procedures are an important addition to the agency's enforcement program, but it is not a substitute for it.

The agency has a number of alternatives to consider in developing the procedural format for its complaint procedures. These

include the ability to direct recipients to establish complaint procedures, which affected persons have to exhaust. It can also regulate the timing of disputes. Complaints about the violation of standards in a grant application, or about past operations, might have to be raised at the time of federal funding action. The minimal nature of the complaint procedures gives the agency considerable leeway to develop more manageable proceedings and to invent new ones. It also has a responsibility to consider the impact of its procedures within the context of the other procedural remedies available to the aggrieved. The establishment of federal relief may have consequences upon them by virtue of primary jurisdiction or exhaustion of remedy requirements.[26] The federal agency should consider whether court review, at the federal or state level, would be an appropriate enforcement measure for particular decisions, and it should take appropriate action to obtain legislative authorization.

5. *Remedies*

Complaint procedures are sometimes claimed to be impractical because of the difficulties in developing remedies which will provide adequate recompense while not halting the course of important public projects. There are, though, many possibilities for remedial relief not fully tried in assistance. Suggestions about some of these were made in Conference Recommendation 71–9.[27]

The suitability of remedies should be evaluated in relationship to the purpose of the overall effort. The aim in establishing complaint procedures is to have the law enforced in accordance with its intent. It is more important to make relief available, since it deters misconduct, than to have it be perfect. The relief should be sufficient to make it worthwhile for the aggrieved to seek redress but it need not necessarily provide exact recompense or be precisely restorative of the pre-existing situation if that is not possible or would seriously hinder the agency program. Of course, if the law requires that a certain remedy be made available, once a prescribed violation has been found to have occurred, the agency would have no choice but to provide it, be it denial of funding or whatever. If that is too severe a remedy, the agency should consider asking Congress for more discretion in providing suitable relief.

[26] See Tomlinson & Mashaw, "The Enforcement of Federal Standard in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement," 58 Va. L. Rev. 600, 651–54 (1972), 2 Adm. Conf. of the U.S. Recomm. and Rep. 531, 582–85 (1973).

[27] Recomm. 71–9, 2 Adm. Conf. of the U.S., Recomm. and Rep., 50 (1973).

Remedies take several forms—declaratory orders, injunctions, damages, civil fines, even criminal sanctions. Agencies should consider their suitability. The agency could halt funding of all or part of the program. It might simply declare the existence of a violation and use that declaration to negotiate changes. It might order compliance, or apply additional conditions to bring about compliance.

There are particular difficulties in providing relief with respect to award disputes. There may be program reasons for wanting to have the recipients begin operation quickly. The agency may therefore be reluctant to halt a program while a complaint is resolved. The agency may also be concerned about making all its awards before its spending authority lapses at the end of the fiscal year. One approach would be to expedite the complaint determination. If it is not possible to halt the award and transfer it to the wrongful loser, he may still be given some relief in the form of a priority on funding in the next funding period. The appropriations problem might be dealt with by considering as obligated for fiscal year purpose any funds about which a dispute is pending when the funding period expires.[28] If that is not permitted under an agency's statute, it should consider asking Congress for this authority or some other measure adequate to meet the need.

Damages may be a possible remedy in some programs. Their present use seems restricted because of the difficulties thought to exist in developing an appropriate damage formula and in finding a way to provide recompense without interfering with the Congressional control of appropriations. These difficulties seem surmountable, especially when seen in the perspective of the similar task encountered in giving relief to government contractors. It has been suggested, for instance, that the recently-recognized rights of wrongfully denied bidders could be remedied by rerunning the bid, but, if that would create intolerable delay in a necessary project, damages might be provided in the form of lost profits.[29] Assistance recipients are often "non-profit" but their loss might be measured by a "liquidated" amount or by the "indirect costs" for overhead they would otherwise have received. To pay off these awards, an arrangement might be made like that for Court of Claims awards for successful contractors with payments made out of a special appropriation or even out of the agency's appropriation.

[28] West Central Missouri Rural Dev. Corp. v. Shultz, Cir. A, No. 1237–73 (D.D.C. June 20, 1973).

[29] See Speidel, *supra* note 19.

This survey is not meant to propose any particular new remedies for adoption, only to demonstrate that complaint procedures need not be unavailable because of a lack of suitable remedies. The possibilities for relief are there; they need but to be developed into a practical form through some imaginative work by the agencies.

III. Delegated Assistance Programs (Recommendation D)

State, local and non-profit agencies are often delegated a major responsibility not only to administer federal assistance program but also to make discretionary decisions about further distributions, determining who the recipients will be and the terms of awards. Community action programs are an example.[30] Delegates may also have discretion, more limited as to topics, which nonetheless has considerable impact. For instance, local agencies receiving public housing grants can determine eligibility criteria for admissions.[31]

These discretionary decisions for the delegate affect the program's fairness and performance. The delegates need a structuring of their discretion for the same reasons that apply to federal agencies. Indeed, the need may be greater, because the division of authority may lead to confusion about who is responsible for what. If the program is successful or encounters difficulties, the identification of the delegate's policy helps clarify what has happened and why.

1. *Articulation of Objectives, Criteria and Requirements*

Accordingly, if it has the power to do so, the federal agency should require the delegate to observe this Recommendation. The delegate should articulate the performance objectives guiding its discretion, its eligibility and awards criteria, and its funding requirements. The delegate programs may fall into the same categories as federal ones, some of them being experimental in nature, others being limited to competitive or entitlement awards. The same considerations already discussed apply when the delegates programs are of these types.

[30] 42 U.S.C. §§ 2782–2812 (OEO); cf. 42 U.S.C. § 246 (Comprehensive health planning); 42 U.S.C. §§ 3701–3795 (law enforcement assistance).

[31] 42 U.S.C. §§ 1401–36.

2. *Delegate's Procedures*

The delegates should observe public notice-and-comment procedures in developing their policies on these matters, but it would be inappropriate to require observance of the federal Administrative Procedure Act. If the delegates are state and local government agencies, they may be governed by acts providing suitable public procedures of their own. In other cases, appropriate public procedures should be developed to govern these decisions.

Similarly, in dispensing discretionary assistance, the delegates should make complaint procedures available for those affected by its decisions allegedly not conforming with the government criteria and requirements developed by the delegate.

3. *Federal Review*

The decisions of delegate agencies in developing their criteria and requirements, within their discretionary authority, are important because of their impact on the program's success and upon the program's public. It is desirable to resolve in advance of implementation any questions about the propriety of the delegate's decisions under federal standards.

Under Part C of this Recommendation, complaint procedures would apply with respect to the federal action in approving the grant. If such federal review is not already provided for by statute, the federal agency should establish it by regulation, if it can. It should take special care to provide notice to those potentially affected by the decisions and to create suitable and convenient protest procedures at an appropriate time. That may be in connection with the federal action in funding the recipient.

IV. Relationship to Previous Conference Recommendations

The Conference has already urged agencies administering discretionary grant programs to adopt "minimum procedures" including the issuance of regulations specifying its "criteria or standards, and priorities among criteria or standards, for the selection of grantees . . ."[32] This Recommendation expands and refines that part of the Recommendation. Like the previous one it urges agencies to articulate their standards but it emphasizes the program reasons for doing so. It also deals with a new topic, the manner in which the agencies should develop their criteria,

[32] Recomm. 71–4 "Minimum Procedures for Agencies Administering Discretionary Grant Programs," 2 Admin. Conf. of U.S. Recomm. and Rep. 25 (1973).

by first identifying the objectives and performance outcomes sought in the program. The complaint procedures here proposed were not a part of the former Recommendation. The current proposal also recognizes a distinction between experimental programs and other types of aid, and it is this distinction which helps to make the complaint procedures feasible. In experimental programs, agencies may not be able to develop standards and to that extent they will not have to make the procedures available. This Recommendation also modifies the previous one by recognizing that in experimental programs the agencies will not always be able to comply fully with the recommendation that they articulate their criteria. The present Recommendation also has a wider coverage in that it applies to the discretionary distribution of any type of assistance, not grant programs alone. The earlier Recommendation remains in effect, though, as it covers several topics not dealt with here, such as the avoidance of conflicts-of-interest, notification of agency action and the public availability of notices.

The Conference has also dealt with grant programs in Recommendation 71–9, "Enforcement of Standards in Federal Grant-in-Aid Programs," but that one has a different emphasis and coverage, notwithstanding some overlap.[33] That Recommendation urged agencies to adopt complaint procedures, similar to those urged here, in grant programs which provide support or services to citizens. That category included formula grants as well as the discretionary distribution programs dealt with here, but it exempted research, training, demonstration and individual fellowship grants. Its emphasis was on the enforcement of standards, not their development, and its concern was with the enforcement of standards that affected individual beneficiaries and other citizens, not those affecting the applicants and recipients of aid. Thus, this proposal differs in making complaint procedures available in a wider range of programs and in making them available to the recipients and contenders for aid as well as affected third parties.

[33] *Supra* note 27.