Report for Recommendation 92-8

The Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program: A Regulatory Approach to Federal Grant-Making

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Executive Summary

The Office of Juvenile Justice and Delinquency Prevention (OJJDP), created by the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP Act), has among its responsibilities the administration of a formula grant program that distributes "conditioned" financial assistance to states and local governments for the purpose of improving their juvenile justice and delinquency prevention systems. Formula grant funds can be used for a broad spectrum of activities, including diversion of youth from the juvenile justice system, provision of community-based alternatives to confinement in secure facilities, improvement of sentencing procedures and detention criteria, and assistance in effective rehabilitation of offenders. Federal monies are allocated among states on the basis of the population in each state under the age of 18. In conjunction with a State Advisory Group (SAG), a designated agency in each state prepares 3-year program plans and disperses grant monies to local governments and private agencies.

Receipt of federal money is conditioned on compliance with 3 substantive mandates by the dates specified in the legislation. Compliance dates may be extended in certain circumstances. Specifically, the mandates require that--

1. juveniles who are accused or convicted of status offenses (that is, conduct not considered an offense if committed by an adult, such as truancy) and nonoffenders (such as abused children) must not be placed in secure detention or secure correctional facilities;

2. juveniles who are accused or adjudicated of delinquency (that is, conduct that constitutes an offense regardless of the age of the offender) or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution; and

3. no juvenile (whether a nonoffender or an alleged or adjudicated status offender or delinquent) may be detained or confined in any adult jail or lockup (one type of institutional facility).

In enacting these mandates Congress determined that status offenders represented a type of behavioral problem which might become worse because of exposure to a treatment and prevention mode that utilizes a jail-like environment and that confinement of juveniles with adults creates such risks to

the physical and emotional well-being of juveniles as well as to their rehabilitation that reliance on adult jails for detention and confinement purposes is simply unacceptable. The first two mandates were adopted in 1974 and the last in 1980.

At the same time, however, Congress recognized that there were exceptional circumstances wherein departures from the mandates were justified. Accordingly, it permitted secure holding of status offenders who violated a "valid court order" (e.g., a child who violated the terms of probation) as a means for courts to deal with so-called "chronic" status offenders. It also allowed rural areas to hold youths for up to 24 hours in an adult jail or lockup where there was no available appropriate alternative placement. Moreover, the legislative history of the JJDP Act approves the holding of alleged status offenders in secure facilities for up to 24 hours and alleged delinquents for up to 6 hours in adult jails as concessions to the difficulties police may encounter in determining and effectuating appropriate placements for detained youth. In addition, OJJDP has fashioned de minimis "full" compliance standards, which permit continued funding to states as long as the number of youths held in violation of the literal terms of the mandates is small or there are "exceptional" circumstances.

Congress has established specific deadlines for compliance with the mandates. The deinstitutionalization of status offenders (DSO) was to be accomplished within 3 years of a state's initial participation in the program and the jail removal mandate by 1985. Because of the perception that states might encounter difficulties in meeting these deadlines and because actual experience demonstrated such problems, Congress allowed for extension of the DSO deadline for up to 2 years where a state was in "substantial" compliance (measured by a percentage reduction in the holding of status offenders). The jail removal deadline could be extended to December 1988 on the basis of a finding of substantial compliance (defined alternatively 1) in percentage reduction terms and 2) as progress and good faith effort in trying to achieve full compliance). Moreover, OJJDP could grant a state a waiver where substantial compliance was not achieved (prior to 1988) and even after 1988 as long as the state was willing to use all its formula grant funds to achieve compliance with the jail removal mandate. With regard to the separation mandate, OJJDP has interpreted the deadline for final compliance in terms of a "reasonable" time, which has basically mooted the need for formal extension mechanisms.

In order to determine states' progress in attaining compliance, Congress required state establishment and OJJDP auditing of monitoring systems to cover secure public and private facilities, including jails and lockups. Over the years, there has been considerable concern expressed regarding the quality of these systems, though states have attempted to improve them.

Monitoring reports must be provided by the states to OJJDP on a yearly basis and are used to determine eligibility for the upcoming fiscal year's formula grant. Recently filed monitoring reports suggest that almost all states are in compliance with the DSO mandate and that, even where the separation mandate has not been attained, there has been substantial progress. Jail removal, however, remains unaccomplished in almost one-third of the states and appears to create the most contentiousness today in terms of OJJDP's relationship to the states. With the budget pressure on state and local governments, the achievement of full nationwide compliance in the near future may be put in jeopardy as juvenile justice improvement must compete with other budget priorities at the state and local levels. Moreover, even after compliance has been attained, there remains the problem of maintaining it--and backsliding has in fact occurred in some instances.

The entity in OJJDP that administers the formula grant program--the State Relations and Assistance Division (SRAD)--is very small in terms of personnel. The day-to-day business of relating to state agencies and communicating and "enforcing" federal policy falls to the "state representatives" (eight positions) whose counterparts on the state level are known as "juvenile justice specialists" (one per state).

Neither the Reagan nor the Bush Administrations have favored the continuation of the formula grant program. However, Congress has persisted in appropriating monies, which have ranged from a high of $63 million (1980) to a low of $40 (1988) (noninflation adjusted dollars). Using the GNP implicit price deflation for government purchases of goods and services, there was a 52 percent decline in purchasing power for the formula grant program between 1980 and 1989.

In addition to OJJDP, the State SAGs and state agencies, there are three other entities which Congress has involved in the administration of the formula grant program: the National Coalition of State Juvenile Justice Advisory Groups (a membership group of all the state SAGs) which is installed as the advisor to the Administrator and Congress on the formula grant program; a technical assistance provider to help states with their compliance efforts; and the Coordinating Council on Juvenile Justice and Delinquency Prevention which is comprised of the heads of federal agencies with some involvement in issues relating to juvenile justice and delinquency and which is required (as its name suggests) to coordinate federal policymaking and efforts in the juvenile justice area (taking into account the mandates of the JJDP Act).

The study undertaken by the consultants focused on issues of administration and procedure--not substantive policy. Whether or not the mandates represent good social policy and, in fact, whether or not they have been fully or substantially "attained" were issues beyond the scope of our research. Similarly, the question of whether some other type of federal grant-

making mechanism is preferable to the existing formula grant program was not addressed in our research or report. At the same time, it must be noted that some state officials indicated that the formula grant program, as it is currently administered, neglects such problems as delinquency prevention, gangs, violent, sex and drug offenders, and conditions of confinement.

Following completion of this study, Congress adopted amendments to the JJDP Act (i.e., The Juvenile Justice and Delinquency Prevention Act Re-Authorization Act). Even though it has become law, however, neither the conclusions of the study nor the draft proposed recommendations are so affected as to require modification. For the purpose of completeness, the report describes in general terms, as a postscript, how the amendments change the formula grant program.

I. Introduction

Despite the extent of Congress's regulatory authority under the Commerce Clause and other Article I powers, its ability to directly command the achievement of certain policies is subject to various express and implied constitutional limitations.[1] Nevertheless, its authority to "provide for the common Defense and general Welfare of the United States"[2] has proven to be a basis on which it can indirectly achieve its purposes through the mechanism of imposing conditions on the receipt of federal funds granted to states.[3] Grant programs vary in the degree to which such conditions are "merely" procedural, rather than "substantive."

The focus of this study is one such grant program wherein the substantive conditions on funding, along with the devices utilized to accommodate difficulties of compliance with those conditions, create what appears to be a hybrid institution: a federal grant-making agency which in many respects operates in the mode of a traditional regulatory agency. Moreover, at least among categorical formula grant programs designed to provide financial assistance to state and local governments for the delivery of social services, it is unique in its administrative characteristics.[4]

In 1974 Congress enacted the Juvenile Justice and Delinquency Prevention (JJDP) Act, which created the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Law Enforcement Assistance Administration of the U.S. Department of Justice. Among OJJDP's responsibilities--which

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*The authors gratefully acknowledge the research assistance of Frank Stluka, Maria Rullo, Scott Horowitz, and Shelton Brown III. In particular Mr. Stluka conducted and coded the results of the telephone survey, an effort which was crucial in obtaining a data base to check some of our conclusions. Mr. Stluka also prepared Appendices D1 - D3. *All of the Appendices are available upon request from the Conference.* Finally, without the cooperation and willingness of numerous state and federal officials, who set aside substantial time for our interviews, we simply could not have completed this project.

[1]*See, e.g.,*, New York v. United States, 112 S. Ct. 2408 (1992) (invalidating the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 and relying also on the Tenth Amendment).

[2]U.S. Const. art. I, §8, cl. 1.

[3]*See, e.g.,*, New York v. United States, 112 S. Ct. at 2419 (1992). *See also* Madden, *Terms and Conditions of Federal Grants*, 18 URBAN LAW. 551 (1986). For commentary expressing concern over and proposing limits on congressional power in this regard *see, e.g.,*, Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981); Note, *Federal Funds and the National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279 (1979); Note, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U. L. REV. 293 (1975).

[4]See text preceding note 427 *infra*.

remain in force today--was that of administering a formula grant program to states and local governments. Significantly, while the overall purposes of the formula grant program were broadly framed, the statute also required that several very specific, substantive and concrete outcomes had to be achieved by the states within a set timetable. Compliance with those outcomes or "mandates", as well as with a variety of other administrative and procedural requirements, continues to determine eligibility for JJDP formula grant funds.

Monitoring for levels of state compliance, determining grant eligibility status, reviewing submitted plans and reports, and responding to technical assistance requests all fall to OJJDP's State Relations and Assistance Division (SRAD). State participation in the formula grant program is strictly voluntary, with state funding levels determined on the basis of relative population under age 18. Administration of the formula grant program is guided by a substantial body of regulations, rules, policies and interpretations that the Office has developed over the past 17 years. Mechanisms such as de minimis criteria, exceptions, and waivers--characteristic features of regulatory bodies--have been adopted by either Congress or the agency over the course of the administration of the program.

The purposes of this study were (1) to examine OJJDP's approach in its administration of the JJDP formula grant program and (2) to formulate recommendations based on the findings. The report that follows describes and analyzes in detail the administrative processes used by SRAD to monitor, assist and determine state compliance with the statutory mandates and requirements. In addition, the report examines issues of communication and information dissemination to and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, timeliness, staffing and training. Finally, for comparative purposes, four other federal formula grant programs were examined to determine whether administrative, regulatory and implementation issues similar to those facing SRAD have surfaced, and if so, how they have been handled.

The three-person study team employed a variety of methods and approaches in gathering and analyzing information. Over 70 in-person interviews and a national telephone survey of state officials were conducted. In addition, a wide variety of policy and procedure manuals, caselaw, training materials, internal files, memoranda, correspondence, legislative materials, reports and other public and private evaluations of OJJDP and other relevant subjects were reviewed.

At the federal level, in-person interviews were held with the Administrator of the Office, present and former SRAD Directors, the Assistant SRAD Director, present and former SRAD state representatives, Office of General Counsel staff, and present and former Congressional oversight staff. Senior

administrative staff with the four federal formula grant comparison programs were also interviewed in-person.

At the state level, a telephone interview was conducted with the juvenile justice specialists from all 50 states and the District of Columbia. A summary of the methodology used for analyzing survey data, the full questionnaire containing the responses, and a separate narrative summary of the phone survey results are found in various referenced appendices to this report. In order to provide more in-depth information and insight, moreover, 10 states were selected for on-site data gathering and interviewing.[5] The 10 states were chosen to obtain as balanced a picture of state experiences and viewpoints as possible. Thus, states were chosen on the basis of region of the country, population, geographic characteristics, degree of urbanization, and status with regard to compliance with the mandates. The ten states included California, Illinois, Maine, Maryland, New Mexico, Montana, South Carolina, Wisconsin, Oregon, and Pennsylvania.

In-person interviews were conducted in each state with the juvenile justice specialist, State Advisory Group (SAG) chairperson (where available) and one or more members of the SAG familiar with the workings of the formula grant program. In a number of the states, representatives of the designated state supervisory agency, the youth corrections agency and agencies conducting statewide monitoring were also interviewed in-person.

In addition, representatives from a number of other involved groups and organizations were interviewed. These included the National Coalition of State Juvenile Justice Advisory Group's (NCSJJAG), the Reauthorization Committee of NCSJJAG, and Community Research Associates, Inc. (the technical assistance provider for SRAD). Members of the study team also attended as observers several National Coalition meetings and a congressional field hearing on reauthorization of the JJDP Act.

The report is divided into six sections. Section II provides a descriptive overview of the statutory and administrative structure and organization of the OJJDP formula grant program, the substantive mandates of the Act, and OJJDP's rules and major compliance policies. Section III is a detailed analysis of OJJDP's exercise of policymaking authority. Topics covered include consultation with outsiders, use of the Federal Register for notification purposes, administrative flexibility, personnel and coordination. Section IV examines the role and operation of entities outside OJJDP that also are involved in the implementation of the formula grant program. Section V describes various provisions of the Juvenile Justice and Delinquency Prevention Act Re-Authorization Act of 1992, which was enacted by Congress

[5]Officials from one state, California, were interviewed at a meeting of the National Coalition of State Juvenile Justice Advisory Groups in Santa Fe, New Mexico in September 1991.

following the completion of our study. The Re-Authorization Act changes various important aspects of the formula grant program, though not in ways affecting our evaluation of the program to date or our recommendations for future improvement. Section VI presents an overview of federal grant mechanisms along with analysis comparing OJJDP's formula grant program with four other federal, human service, formula grant programs. Finally, Section VII sets forth the 18 recommendations which result from our study.

II. The Office of Juvenile Justice and Delinquency Prevention and Its Formula Grant Program

The Juvenile Justice and Delinquency Prevention Act of 1974[6] followed more than a decade of experience with federal financial assistance programs for state, local and private nonprofit agencies employed for the purpose of dealing with the problems of juvenile crime and delinquency.[7] In 1967 President Johnson's Commission on Law Enforcement and the Administration of Justice not only recommended that the federal government's role in the area of juvenile justice be enhanced but also proposed a variety of strategies for reducing juvenile crime, including decriminalization of status offenses,[8] diversion of youth from court procedures into public and private treatment programs, and the use of community group homes and nonresidential treatment facilities rather than formal institutional settings.[9] Dissatisfaction with efforts under prior legislation, including lack of planning and coordination, along with increasing concern with regard to the perceived harmful effects of certain juvenile justice practices set the stage for the enactment of the 1974 Act,[10] which was subsequently reauthorized and amended no less than four times during the next 14 years.[11]

As the legislation stands today, the Office of Juvenile Justice and Delinquency Prevention (OJJDP), located in the Department of Justice,

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[6]Pub. L. No. 93-415, 88 Stat. 1109. It should be noted that the description of the JJDP Act in general and the formula grant program in particular contained in Sections II-IV of this report is based on the Act prior to its 1992 amendments.

[7]Raley & Dean, *The Juvenile Justice and Delinquency Prevention Act: Federal Leadership in State Reform*, 8 LAW & POLICY 397, 398-99 (1986).

[8]That is to say, keeping status offenders (conduct not considered an offense if committed by adults) outside the criminal/juvenile justice system for any prevention, treatment or sanction purpose.

[9]Raley & Dean, *supra* note 7, at 399.

[10]*Id.* at 400.

[11]*Id.* at 403-409.

administers a variety of programs including a formula grant program to states and local governments. The purposes of that program are "to assist them in planning, establishing, operating, coordinating, and evaluating projects directly or through grants and contracts with public and private agencies for the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system."[12] Funds made available for appropriation are allocated annually among participating states on the basis of relative population under age 18.[13]

In addition to the formula grant program and programs for training, research, and the collection and dissemination of information with regard to the prevention and treatment of juvenile delinquency,[14] the Office administers a special emphasis grant program that provides funds to public and private nonprofit agencies and organizations for a variety of purposes, including the establishment of community-based alternatives to traditional forms of institutionalization of juvenile offenders and implementation of special emphasis prevention and treatment approaches to juveniles who commit serious crimes.[15]

Of all the features that characterize the OJJDP formula grant program, the most distinctive are the specific substantive mandates, which condition receipt of funds. Compliance with these mandates enables a state to use allocated funds for a broad variety of programs and services related to juvenile justice and the treatment and prevention of juvenile delinquency. The three substantive mandates (along with the dates of their enactment) are as follows:

> 1. Juveniles who are accused or convicted of status offenses (conduct not considered criminal if committed by an adult, such as running away and truancy) and nonoffenders (such as abused, dependent, and neglected children) must not be placed in secure detention or secure correctional facilities (1974).
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> 2. Juveniles who are accused or adjudicated of delinquency or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution (1974).

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[12]42 U.S.C. §5631(a).

[13]*Id.* §5632(a)(1).

[14]*Id.* §§5651-61.

[15]*Id.* §5665.

3. No juvenile may be detained or confined in any adult jail or lockup (1980).[16]

Congress has imposed deadlines for compliance with these mandates and, over the years, provided for extensions through various mechanisms, including substantial compliance standards and waivers of termination. In addition, the Office has formulated administrative rules to accommodate good faith efforts by states to achieve the mandates in the face of substantial financial and other barriers and thus avoid the sanction of grant denial or termination.

Notwithstanding the relatively small size of state allotments,[17] virtually all of the state officials interviewed felt that the federal money has been extremely important in starting and sustaining valuable initiatives for the improvement of juvenile justice and delinquency prevention. By many accounts, the statutory mandates along with the potential loss of federal funds have at times been used at the state level to fend off attempts to undermine compliance efforts. In other states, officials have preferred to "sell" the mandates to state legislators and interested groups on their merits alone because of local aversion to federal "control." Fears of legal liability (whether under state or federal law) have provided additional motivation for compliance with the mandates, as have the economic costs of juvenile jailing and the overcrowded condition of many facilities.

Today, despite the sometimes slow pace of compliance efforts, there has been reported significant progress in meeting the deinstitutionalization of status offenders mandate along with the separation mandate. Jail removal--the most recent and likely the most costly of the three--still lags in many states, though approximately two-thirds of the states now report full compliance.

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[16]"Juveniles" within the meaning of this mandate include alleged and adjudicated status offenders, nonoffenders, and delinquents (i.e., juveniles who are charged with or convicted of offenses which would be crimes if committed by an adult).

While jail removal may, in many instances, make the separation mandate superfluous, that is not always the case. For example, the jail removal mandate does not apply to facilities used for long-term confinement of juveniles and adults, *see* text at notes 90-91 *infra*. The separation mandate is applicable in those circumstances, however.

The deinstitutionalization of status offenders mandate does not cover "delinquent" offenders and it extends to "secure" facilities, that is those public and private residential facilities wherein construction features are designed to physically restrict the movements and activities of those in custody.

[17]There is a $325,000 minimum allocation. Seventeen states and the District of Columbia received the minimum allocation in FY 89. For a list of the participating states, see Appendix A, which is available upon request from the Conference.

However, it is crucial to note at this point that the adoption and implementation of the mandates has not been uncontroversial. For example, OJJDP observed as late as 1989 that:

> Since its inception, DSO (deinstitutionalization of status offenders) has been hotly debated, engendering high praise from its supporters and strong criticism from those who oppose it. . . .
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> Many saw [it] as the solution to providing fair, more humane treatment for status offenders . . . . For others, DSO represented a shirking of public responsibility that often resulted in inadequate responses and a loss of parental authority and justice system control over seriously troubled youth.[18]
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> Moreover, some federal and state officials have raised serious questions regarding the need for as well as the structure of the existing formula grant program. For instance, the telephone survey of state juvenile justice specialists conducted as part of this study found that nearly three-quarters of the specialists believed that the program, as currently administered, neglected significant juvenile justice needs including prevention, gang problems, violent, drug and sex offenders, and conditions of confinement.[19] Some also identified what might be considered undesirable side-effects of the mandates, such as an increased prevalence of waiving minors to the adult criminal justice system and a tendency to charge youth with more serious offenses rather than status offenses.[20]

The issues thus raised regarding the appropriateness (as a matter of social policy) of the OJJDP Act's mandates as they currently exist or might be reformulated or enlarged, the need for a federal role in the area of juvenile justice, and, if there is a need, the appropriate type of federal financial assistance program are all extremely significant. They deserve thoughtful and detailed examination both within and outside of government. However, from

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[18]U.S. Department of Justice (Office of Juvenile Justice and Delinquency Prevention), *Assessing the Effects of the Deinstitutionalization of Status Offenders* in Juvenile Justice Bulletin/OJJDP Update on Research (Jan. 1989) at 1.

[19]See Appendix D3 at 4, which is available upon request from the Conference.

[20]*Id.* at 4-5 *infra*.

the beginning, the focus of this study has eschewed such broad substantive questions. Rather we have concentrated on the administration of the OJJDP formula grant program within the confines of the OJJDP Act as it currently exists and the largely procedural issues which such a focus presents.

A. Administrative Structures for Implementing the Formula Grant Program

1. The Office of Juvenile Justice and Delinquency Prevention

a. Overview.

The Office began its institutional life in 1974 as part of the Law Enforcement Assistance Administration in the Department of Justice. LEAA was phased out in 1982 and OJJDP operated for a time as part of a newly created Office of Justice Assistance, Research and Statistics. In 1984 the Justice Assistance Act[21] created the Office of Justice Programs (OJP) headed by an Assistant Attorney General. Other than OJJDP, the program offices of OJP include the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, and the Office for Victims of Crime. Each program office receives professional, technical and administrative support, including financial management, congressional liaison, and legal and personnel services, from OJP. All five program offices within OJP are headed by presidential nominees whose appointments are subject to Senate confirmation.

OJJDP is, by statute, "under the general authority of the Attorney General."[22] The OJJDP Administrator is required to have had experience in juvenile justice programs prior to appointment.[23] Status as a presidential appointee with Senatorial confirmation was intended "to underscore the importance of the Office and to provide the appropriate status and identity required for the national focus on delinquency prevention. . . ."[24]

The Administrator is specifically empowered "to prescribe regulations consistent with this Act to award, administer, modify, extend, terminate, monitor, evaluate, reject, or deny" the formula and discretionary grants

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[21]Pub. L. No. 98-473.

[22]42 U.S.C. §5611(a). *See also id.* §5672(a).

[23]42 U.S.C. §5611(b).

[24]S. Rep. No. 95-165, 95th Cong., 1st Sess. at 52 (1977).

authorized by the JJDP Act.[25] Moreover, under the "General and Administrative Provisions" of the statute, the Administrator is authorized "after appropriate consultation with representatives of States and units of local government, to establish such rules, regulations, and procedures as are necessary for the exercise of the functions of the Office and as are consistent with the purpose" of the JJDP Act.[26]

Finally, the Administrator is directed to "develop objectives and priorities for all Federal juvenile delinquency programs and activities relating to prevention, diversion, training, treatment, rehabilitation, evaluation, research, and improvement of the juvenile justice system in the United States."[27] Thus, despite statutory restrictions such as those applicable to the allocation of formula grant funds, the Administrator is given a significant leadership role in the area of juvenile justice and delinquency prevention policy.

The Reagan and Bush Administrations have not requested that Congress fund the OJJDP formula grant program.[28] Nevertheless, appropriations have been made by Congress and have ranged from their highest point (during the Carter Administration) of $63.7 million (1980) to a low of $40.7 million in 1988. During most of the 1980s funds available for formula grants ranged between $40 and $45 million. The first two fiscal years of the 1990s saw somewhat of an increase with formula grant monies approaching $50 million.[29] However, using the GNP implicit price deflation for government purchases of goods and services, there was a 52% decline in purchasing power for the formula grant program between 1980 and 1989.[30]

Discretionary grant fund appropriations have steadily decreased from approximately $21 million in 1978 to $6 million in 1989, with some increase in 1990 ($9 million) and 1991 ($7 million).[31]

Staffing levels authorized by Congress for OJP increased between 1987 and 1990 (from 323 positions to 352).[32] However, the rate of utilization of these positions was consistently below these authorized limits, a pattern which

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[25]42 U.S.C. §5611(b).

[26]*Id.* §5672(d).

[27]*Id.* §5614(a).

[28]See *GAO Disputes Data Used by U.S. to Measure Impact of JJDP Act*, 15 CRIM. JUST. NEWSLETTER, No. 9 at 3-4 (May 1, 1984) (noting the opposition of Reagan Administration to the reauthorization of Act on the basis that mandates had been achieved).

[29]OJJDP Budget Planning Staff Doc. (12/19/88). These figures are not expressed in inflation adjusted dollars.

[30]See note 427 *infra*.

[31]OJJDP Budget Planning Staff Doc. (12/19/88).

[32]Department of Justice, Justice Management Division, A Management Review of the Office of Justice Programs [hereinafter "JMD Report"] (Nov. 1990), Figure J.

apparently affected all five program bureaus in OJP.[33] At the same time staff turnover in OJP between 1987 and 1990 was very high. In OJJDP it averaged 25% during that period, as compared with an OJP-wide rate of 30% and a Justice Department-wide rate of 15%.[34]

b. Organization within the Office.

OJJDP has four Divisions, only one of which--State Relations and Assistance (SRAD)--was the primary focus of this study. At the same time, several of the other components engage in functions that relate to the responsibilities of SRAD. (Table 1 is an organizational chart for the Office.)

The other three divisions of OJJDP and their functions are as follows:

> 1. The Training, Dissemination, and Technical Assistance Division (TDTAD) is responsible for programs that train professionals and others who work with juvenile offenders and their families and for technical assistance to public and private agencies engaged in the planning, establishing, funding, operating, and evaluating juvenile delinquency programs. Finally, TDTAD serves as a clearinghouse and center for the preparation, publication, and dissemination of information regarding juvenile justice.[35]

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[33]*Id.* at 22 and Figure J.

[34]*Id.* at 22 and Figure 4.

[35]There is also a new, separate Information Dissemination Unit which is responsible for publication of OJJDP-related information.

Table 1

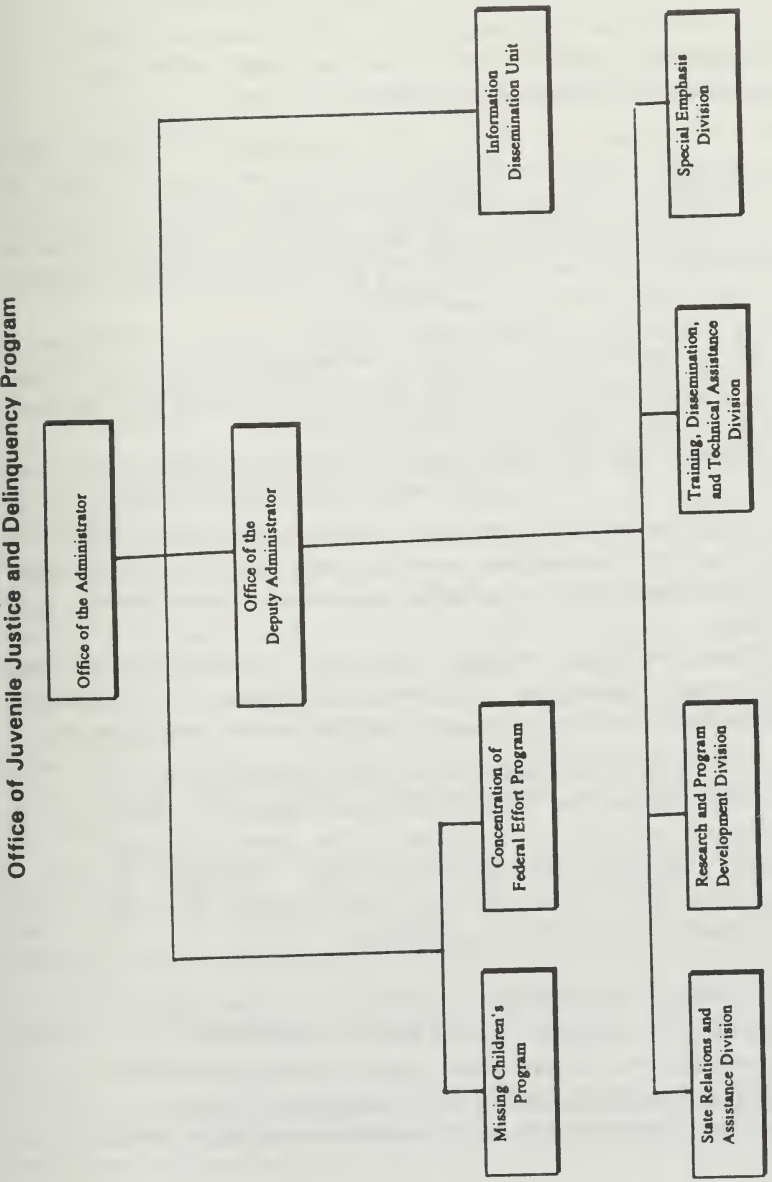
Table 1
Office of Juvenile Justice and Delinquency Program
Office of the Administrator
Office of the Deputy Administrator
Information Dissemination Unit
Special Emphasis Division
Training, Dissemination, and Technical Assistance Division
Concentration of Federal Effort Program
Research and Program Development Division
Missing Children's Program
State Relations and Assistance Division

1. The Research and Program Development Division (RPDD) sponsors programs to evaluate trends in juvenile delinquency, the causes of delinquency, effective prevention strategies, and alternatives to traditional dispositions in the juvenile justice system, among other matters.

2. The Special Emphasis Division (SED) administers the discretionary grant program used to foster promising approaches to delinquency prevention and control.

SRAD is the division of OJJDP which administers the formula grant program including oversight of compliance with the statutory mandates. In addition, it provides, through its own staff or through the services of outside contractors, technical assistance to grant recipients to aid in their compliance with the mandates as well as in their use of grant monies for other purposes related to juvenile justice and delinquency prevention.

SRAD is headed by a Director and Assistant Director. Staff work is performed by so-called "state representatives." There are eight positions now allocated for state representatives, though filling them in recent years has been made difficult by hiring freezes instituted by OJP.

Within the last year, two-person teams of state representatives have been assigned to regions (4) of the country. This was reportedly done in part to ensure that less experienced staff members could learn from more experienced employees as well as to provide more continuity in coverage for each state than had been the case previously due to staff turnover and frequent shifts in staff responsibilities.

The official description of the roles and responsibilities of state representatives make it clear how crucial they are to the day-to-day functioning of the Division and, therefore, to the success of the formula grant program:

1. "The State Representative has lead responsibility for all activities initiated by [SRAD] with [state agencies], unless otherwise assigned . . . . He/she is the conduit through which information and assistance flows. Requests for assistance from other staff must come through the State Representative or the Division Director."

2. "Where information is provided [to a state agency] directly by the Director or other staff, this information must be recorded on a 'contact sheet' and the original given to the assigned State Representative for information and filing . . . . The State Representative cannot represent this Office unless

fully informed, and the Division's messages will not be consistent unless coordinated."

3. "In addition, the State Representative should inform OJJDP staff about innovative, successful projects, and program needs in assigned states."

4. "The State Representative is viewed by the [state] as their representative and advocate in Washington with the 'bureaucracy.'"

5. "[T]he State Representative is also expected to accurately interpret Agency policies, statutes, and regulations, and to assist State staff to effectively use established Agency procedures."

6. "The responsibilities of State Representatives include the provision of technical assistance to State agencies in solving problems which interfere with plan development/implementation or with achieving/maintaining compliance with statutory mandates."[36]

State Representatives discharge these responsibilities in conjunction with a variety of specifically assigned tasks, including review of the required state 3-year plans and their supplements; processing of grant applications; review of annual performance and monitoring reports; conducting field audits of monitoring systems; reviewing budget changes; monitoring plan implementation; providing technical assistance and training with regard to plan development and implementation; responding to inquiries from state government and interested persons and organizations with regard to resources and programs which support juvenile justice and delinquency prevention activities.

State representatives have also been assigned duties that go beyond their liaison role with states. These have involved, for example, work on special task forces, participation in training sessions for state personnel, and preparation of announcements regarding special programs and initiatives.

Until recently, one of the state representatives also functioned in the position of "Monitoring Coordinator" whose job was to oversee state

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[36]Community Research Associates, Inc., State Representative Role and Responsibilities (May 1989) [hereinafter "State Representative Roles"], contained in Vol. 1 OJJDP Formula Grants Program Manual (April 1989).

representatives' determinations of state compliance with the statutory mandates, prepare annual summaries of compliance status, and identify issues of compliance that might call for the adoption of general interpretative and policy statements. With the recent institution of the regional/team approach to the functions of state representatives, the position of Monitoring Coordinator was abolished. The individual who had held that position and, by all accounts, had been one of the staff members in the Division most familiar with formula grant compliance issues has now left OJJDP.

Finally, there has historically been one position for a General Attorney in OJJDP, which is to provide day-to-day legal advice and assistance to the Administrator, SRAD and other OJJDP personnel. However, that position has not been filled during the last several years. Accordingly, the Office of General Counsel, a support office in OJP, is currently the sole source for program-related legal advice and administrative counsel to OJJDP.

2. State Administrative Structures

The Juvenile Justice and Delinquency Prevention Act requires the involvement of various entities at the state level: a state agency, a juvenile justice "advisory group," and a supervisory board.

The state agency, designated by the governor of each state, may be an agency that focuses on problems of crime generally (for example, the Wisconsin Office of Justice Assistance and the South Carolina Office of Criminal Justice Programs), on issues of juvenile delinquency and crime specifically (for example, the New Mexico Youth Authority), or on the broad range of issues relating to children (for example, the Illinois Department of Children and Family Services). These entities may be part of the Office of the governor or more traditional line agencies.

The patterns of state agency staffing for the formula grant program are almost as varied as the number of participating states. Often, however, no more than one full-time personnel slot is assigned to the program, though the total workload may be divided among several people. The person who is designated as the primary staff liaison with OJJDP is known as a "juvenile justice specialist." That person may also have official responsibilities beyond the operation of the formula grant program. In addition, some aspects of the program, such as financial administration and monitoring, may be delegated to other state agencies.

The designated state agency provides the staff assistance necessary for the preparation and administration of those plans required as a condition of grant assistance and for the implementation of those plans. Such work may include, among many other tasks, the evaluation of applications by local governments and private groups for money to fund juvenile justice projects and obtaining

monitoring data for compliance with the statutory mandates. The "supervisory board" of the state agency (e.g., a crime commission or council) may, within the discretion of the governor, be vested with final authority for plan preparation and administration, including the establishment of plan priorities, plan approval and the award of grant money to applicants.[37] Alternatively, that final authority may be vested in the other entity required by the JJDP Act, the state juvenile justice advisory group (SAG) appointed by the Governor.[38]

By statute, the SAG must, at a minimum, participate in the development and review of the state's required 3-year juvenile justice plan prior to submission to the supervisory board for final action; submit to the governor and legislature annual recommendations relating to its functions and compliance with the statutory mandates; and have the opportunity to review and comment on all juvenile justice prevention grant applications submitted to the state agency. In addition the SAG may be assigned a variety of other functions, including a role in monitoring for compliance with the statutory mandates and reviewing the progress and accomplishments of projects funded under the state plan.[39]

In fact, some states have viewed issues of juvenile justice as integral to the problems of child protection and development generally. Therefore, they have given their SAGs a variety of advisory and other functions over the whole gamut of social services related to children and not just the formula grant program. While neither the statute nor OJJDP regulations contemplates that approach specifically, the statutorily required membership for the SAG acknowledges the need for a multi-focus approach to the problems of juvenile crime and delinquency. SAG members may include law enforcement, corrections and probation personnel; members of public agencies concerned with welfare, social services, mental health and special education; representatives of private organizations with a special focus on maintaining the family unit or on social services for children; representatives of community-based delinquency prevention and treatment programs; representatives of businesses employing youth; and persons with special experience in addressing problems of school violence and learning disabilities.[40]

The patterns of formal and informal interactions among state agency staff, supervisory board, SAG and other state institutions (such as the police and the courts) vary from state to state and can be very complex. While state agency staff and/or the juvenile justice specialist assume the lion's share of the administrative load for the formula grant program, various members or

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[37]42 U.S.C. §5671(c)(1).

[38]*Id.* §5633(a)(3).

[39]*Id.*

[40]*Id.*

committees of the SAG and/or the supervisory board have in some cases assumed substantial responsibility for plan preparation and administration. State officials responsible for implementation of the plan in some states even get involved in decisionmaking regarding particular cases. Local police officers have called the state juvenile justice specialist for assistance or advice regarding the incarceration or other handling of a child in custody.

The JJDP Act permits no more than 7½% of the **total** annual allotment to a state to be made available for developing the state plan and general administration. This amount requires state dollar-for-dollar matching funds.[41] Five percent of the **minimum** annual allotment to a state must be made available to the SAG to assist its operations (which need not be matched by state or local funds).[42] Two-thirds of the funds made available to a state (other than the SAG allotment) must, unless the state is granted a waiver by OJJDP, be expended through programs of units of local government and local private agencies. The remainder can be expended by the state government.[43]

3. The National Coalition of State Juvenile Justice Advisory Groups

The National Coalition of State Juvenile Justice Advisory Groups, which consists of the members of the SAGS of all the states and territories participating in the formula grant program, began in 1979 as a purely voluntary organization of those persons interested in issues of juvenile justice and treatment of juvenile offenders. It has evolved to the point that its role in the implementation of the JJDP Act has been provided for in the Act itself.

The Administrator of the Office is directed under the JJDP Act to "provide technical and financial assistance to an eligible organization composed of member representatives of the State advisory groups."[44] Its statutory role includes "conducting an annual conference of such member representatives for purposes relating to the activities of such State Advisory groups"; "disseminating information, data, standards, advanced techniques, and program models developed" through various initiatives funded by OJJDP including the discretionary grant program; "reviewing Federal policies regarding juvenile justice and delinquency prevention"; "advising the Administrator with respect to particular functions or aspects of the work of the Office"; and "advising the President and Congress with regard to State

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[41] *Id.* §5632(c).

[42] *Id.* §5632(d).

[43] *Id.* §5633(a)(5).

[44] *Id.* §5651(f)(1).

perspectives on the operation of the Office and Federal legislation pertaining to juvenile justice and delinquency prevention."[45]

The Bylaws of the Coalition mirror and, at the same time, expand these roles. Specifically, the Coalition is operated to provide:

> 1. a national forum for the promotion and advancement of programs, practices, activities and procedures which contribute to the prevention and treatment of juvenile delinquency and to the improvement of the juvenile justice advisory system;
>
> 2. a mechanism for State Juvenile Justice Advisory Groups to assist in the training of new SAGs and SAG Chairs, to share information among themselves and to assist in the development of national policy and legislation in juvenile justice matters;
>
> 3. a mechanism to work more closely with the Office of Juvenile Justice and Delinquency Prevention, as well as other organizations and groups involved in the juvenile justice area; and
>
> 4. information to the general public on issues related to juvenile justice.

The Coalition has a Chair and various officers, a Board of Directors composed of the Chairs of the member SAGs, a National Steering Committee, and an Executive Director with a small administrative staff. There are also four regional coalitions, Northeast, Midwest, Southern, and Western. Annually six meetings are held: one for each regional coalition, a meeting of all the SAG chairs, and a national conference. At these meetings various training is provided both SAG members and juvenile justice specialists. In addition, the Coalition publishes a newsletter that may cover recent developments in OJJDP and in the states, including model programs and approaches to juvenile treatment. In 1991 the Coalition expected to receive from the Office in excess of $574,000 for its activities, including its meetings, training sessions, technical assistance, and general operating expenses. Dues paid by members are another source of funds to defray these costs.

Despite what appears to have been the close relationship between OJJDP and the Coalition envisioned by Congress, the actual course of that evolving

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[45]*Id.* §5651(f)(2).

relationship has been characterized by periods of contentiousness rather than collaboration and cooperation. Annual proposals by the Reagan and Bush Administrations to eliminate the juvenile justice formula grant program have been a further source of friction.

4. Technical Assistance Provider

With an amount not to exceed 2% of the appropriations for the formula grant program, the Administrator is directed to make grants to, or enter into contracts with, public or private entities for the purpose of providing technical assistance to states, local governments, and private agencies to facilitate compliance with the requirements of the formula grant program, including the three statutory mandates.[46] Funds available for these purposes since the 1989 fiscal year have approximated $1 million annually.

Needed technical assistance is either identified by participating state agencies in the 3-year plans submitted to the Office or ad hoc as the need arises in response to particular problems. Requests are processed through the OJJDP state representative. Community Research Associates, Inc. (CRA) of Champaign, Illinois has been the principal technical assistance (TA) provider, having won two competitive multi-year contract awards. CRA assistance often takes the form of suggestions on program options or facility design as well as the preparation and staging of training programs for state juvenile justice specialists and SAG members with regard to the formula grant program in general and compliance issues in particular.

At least in part because of the loss of experienced OJJDP state representatives over the last few years and rotations of personnel in and out of SRAD, CRA has had to assume the principal responsibility for technical assistance available to states struggling to achieve or maintain compliance with the statutory mandates. This is true despite the fact that the JJDP Act--along with various publications and other materials distributed by the Office--assumes that the Office itself will play a significant role in providing information and assistance to the states in deciding how to spend grant funds and to achieve compliance with the mandates.

5. The Coordinating Council on Juvenile Justice and Delinquency Prevention

This "independent organization in the executive branch" is composed of the Attorney General and the heads of various departments and agencies having responsibility for programs touching on the problems of juvenile crime and

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[46] *Id.* §5631(b)(1).

delinquency, including OJJDP.[47] The Attorney General is statutorily designated Chairman of the Council, with the Administrator of OJJDP serving as Vice Chairman.[48]

The Council is responsible for coordinating "all Federal juvenile delinquency programs and all Federal programs relating to missing and exploited children."[49] It is also to make annual recommendations to the President and Congress with regard to "the coordination of overall policy and development of objectives and priorities for all Federal juvenile delinquency programs and activities."[50] Most importantly for present purposes, the Council is directed to "review the programs and practices of Federal agencies and report on the degree to which Federal agency funds are used for purposes which are consistent" with the statutory mandates of the JJDP Act, that is deinstitutionalization of status offenders, separation, and jail removal.[51]

Unlike the administrative structures previously surveyed, the Council has played an insignificant role in the formula grant program, despite the statutory requirement that it engage itself affirmatively in facilitating accomplishment of the goals of the JJDP Act. State officials interviewed as part of this study repeatedly observed that sizeable federal funds were being distributed to other parts of state government (or even other parts of the same agency) which might be, but were currently not being, used to serve both the purposes of the authorizing statutes and the purposes of the JJDP Act, including the accomplishment of deinstitutionalization, separation and jail removal.

6. Conclusions

The administrative superstructure for the formula grant program administered by OJJDP is complex. Complexity begets at least the potential for confusion, conflict, and misunderstanding. As this study will suggest, in the case of the JJDP Act this potential has been realized, though the success of the program in improving the system of juvenile justice has been, by many accounts, rather remarkable.

The discussions to follow in this study will describe the nature of the problems that have arisen. At least some of the perceived deficiencies in the Office's performance have found partial solution in the creation of institutions outside the Office, specifically the Coalition and the technical assistance provider. Dissemination of information relevant to promising programs for

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[47] *Id.* §5616(a)(1).

[48] *Id.* §5616(b).

[49] *Id.* §5616(c).

[50] *Id.*

[51] *Id.*

juvenile treatment--some importantly related to compliance with the statutory mandates--is performed today at least as much, if not more, by both of those nongovernmental entities rather than OJJDP. The same is true with regard to technical assistance to states.

B. The Mandates

As noted at the outset of this report,[52] the purpose of this study is not to explore whether the three statutory mandates--deinstitutionalization of status offenders and nonoffenders (DSO), separation of juveniles and incarcerated adults, and jail removal--make sense as a matter of social policy. That issue has been and no doubt will be explored in great detail by others. It bears reiterating, however, as a matter of background that the mandates have been and remain a matter of controversy.[53]

For example, concern has been and still is expressed that deinstitutionalization of status offenders may merely swell the population of "runaways" and "throw-aways" to the detriment of both the public and the alleged "offenders" themselves.[54] Others fear that the DSO mandate will encourage police to unnecessarily charge juveniles with delinquent offenses in order to permit incarceration as a "treatment" or "protection" mode.[55] Alternatively, some juveniles whose behavior creates social problems may be unnecessarily committed by their parents or the courts to private mental health facilities rather than treated within the juvenile justice system.

In some states still out of compliance with the jail removal mandate, arguments have been made that co-located jail and juvenile facilities, which

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[52]See text following note 20 *supra*.

[53]With regard to DSO, *see, e.g.*,, Cox, *Study Debates Locking Up 'Status Offenders'*, The Los Angeles Daily Journal, Feb. 3, 1986, at p. 81, col. 1; Kearon, *Deinstitutionalization, Street Children, and the Coming AIDS Epidemic in the Adolescent Population*, 41(1) Juvenile and Family Court Journal 9 (1990); Logan & Rausch, *Why Deinstitutionalizing Status Offenders is Pointless*, 31(4) Crime and Delinquency 501 (1985) (focusing on Connecticut's DSO program); Read, *Deinstitutionalization of Status Offenders: A Look at the Debate*, 7 CHILDREN'S LEGAL RIGHTS JOURNAL, No. 2 at 1-5 (1986).

For a critical examination of the attempts to achieve the DSO mandate (including state resistance to compliance), *see* Costello & Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41 (1981). For another view of the DSO effort, *see* Sweet, *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389 (1991) (written by the then incumbent OJJDP Administrator).

[54]See Kearon, *supra* note 53, at 9-10.

[55]See Read, *supra* note 53, at 3.

satisfy separation requirements but which may incorporate phased sharing of rooms and staff, make clear economic sense and fit conformably with the statutory jail removal mandate. After all, the argument goes, the real social concern should be conditions of confinement, not merely maximizing physical separation of adults and children.

This argument is countered by others. It is maintained, for example, that a facility for juveniles that adequately serves their needs and conveys to them the appropriate rehabilitative messages will not be designed if it also houses adults within its walls or grounds because construction design and security will generally be based on the worst prisoner to be encountered. Alternatively, it is argued that maintenance of total separation through time-phasing in use of various areas is simply not possible on a consistent basis; and that staff trained to serve both juveniles and adults in different fashions will, as a matter of human nature, treat all prisoners alike, and not in ways appropriate for the juvenile population. According to this view, jail removal means, both as a matter of construction of the JJDP Act and good social policy, totally different facilities and staffs to serve incarcerated adults and children.[56]

Putting these debates aside, at least for the moment, it is clear that Congress determined and has continued in its beliefs that, *at a minimum*, status offenders and nonoffenders should not be securely held; that adults and juveniles should be separated when incarcerated in a single facility; and that, beyond separation, juveniles should not be detained or confined in adult jails or lockups.

Unfortunately, this rather general description of the mandates is not really adequate for the discussion that follows. Therefore, we must more carefully define the parameters of these mandates, including the exceptions to their scope and dates of final compliance. It should be noted that the mandates themselves have not remained entirely unchanged since 1974. Accordingly, it is important to examine the statutory evolution, in particular because OJJDP policy has at times found itself later incorporated in the legislative amendments.

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[56]For generally critical evaluation of progress on jail removal, *see* Frazier & Bishop, *Jailing Juveniles in Florida: The Dynamics of Compliance with a Sluggish Reform Initiative*, 36(4) CRIME AND DELINQUENCY 427 (1990) (noting criticism of OJJDP for failing to push hard for compliance and difficulties for states resulting from lack of necessary resources and alternatives); Schwartz, Harris & Levi, *The Jailing of Juveniles in Minnesota: A Case Study*, 34(2) CRIME AND DELINQUENCY 133 (1988).

For a general (and critical) treatment of the progress to date to improve juvenile jailing and treatment practices, *see* I. Schwartz, (In)Justice for Juveniles: Rethinking the Best Interest of the Child (1989) (the author was both one of the architects of the jail removal mandate and a former Administrator of OJJDP), reviewed by B. Krisberg, *The Politics of Juvenile Justice: Then and Now*, in 15 LAW & SOC. INQUIRY 893 (1990).

1. Deinstitutionalization

Enacted in 1974, this mandate requires that juveniles who are charged with or convicted of offenses which would not be criminal if committed by an adult, and nonoffenders (such as dependent or neglected children) may not be placed in secure detention or correctional facilities.[57] Secure facilities are defined to include public and private residential facilities which include "construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody . . . ."[58] Nonoffenders were brought within the scope of the mandate in 1977.

The perspective which, in part, set the stage for the enactment of the DSO mandate is captured by the following testimony delivered in February of 1973 by Allen F. Breed, then president of the National Association of State Juvenile Delinquency Program Administrators, to the Senate Subcommittee to Investigate Juvenile Delinquency:

> The structural and procedural system has two built-in patterns that tend to be self-defeating. First, the youth in need of trouble is identified and labeled. As he is labeled, certain sanctions are imposed and certain critical stances assumed. The sanctions and the stance tend to convince the individual that he is deviant, that he is different, and to confirm any doubts he may have had about his capacity to function in the manner of the majority.
>
> Second, as the label is more securely affixed, society's agencies (police, schools, etc.), lower their level of tolerance of any further deviance: the curfew violator who is an identified parolee or probationer may go into detention; the nonlabeled offender will frequently go home; and the misbehaving probationer will be remanded to the vice-principal's office faster than his nonprobation fellow. As these discriminations are made, the youth is further convinced of the difference and of society's discrimination.
>
> If the unacceptable behavior continues and the youngster penetrates further into the justice and correctional apparatus, he is subjected to an increasing degree of segregation from others of his kind--from special schools to detention to state correctional school--each step invites a greater identification

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[57]42 U.S.C. §5633(a)(12)(A).

[58]*Id.* §5603(12)(A)(13)(A).

> with the subculture of the delinquent, and so, again, his anti-adult-antisocial-peer-oriented values are reinforced and confirmed, and the socializing conformity-producing influence of the majority society are removed further from him.
>
> Thus, as the state's "treatment" is intensified, so too is the rejection, both covert, and overt, and as we try harder to socialize the deviant, we remove him further from the normal socializing processes.
>
> Our objective must be, therefore, to minimize the youngster's penetration into all negative labeling, institutional processes. To this end, we must exploit all of the available alternatives at each decision point, i.e.,, suspension, expulsion, arrest, detention, court wardship, commitments, parole revocation. At each critical step, we should exhaust the less rejecting, the less stigmatizing recourses before taking the next expulsive step.[59]

Exempt from the mandate are juveniles who are charged with or convicted of violating "valid court orders,"[60] that is, "a court order given by a juvenile court judge to a juvenile who has been brought before the court and made subject to a court order" wherein the juvenile has, during the proceedings, been given all due process rights guaranteed by the Constitution.[61] This exemption was added in 1980, as a result of a floor amendment in the House introduced by John Ashbrook of Ohio. It was argued in its support that the JJDP Act

> has made it virtually impossible for juvenile courts to deal with chronic status offenders by denying the court its traditional discretionary power to enforce valid court orders involving these youth. Under current law, the court can remand a runaway person to a half-way house, or similar institution, and order the youth to stay put, but then be totally powerless to do anything when the youth runs out the back door. This allows young people to continually flout the will of the court, which not only breeds contempt and

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[59]S. Rep. No. 93-1011, 93d Cong., 2d Sess. at 221-22 (1974).

[60]42 U.S.C. §5633(a)(12)(A).

[61]*Id.* §5603(16).

> disrespect for the courts, but only makes helping that young person much more difficult.[62]

The valid court order exception was controversial in its inception and remains so today. At the present time, the states differ in the degree to which they permit incarceration of juveniles based on their violation of court orders.[63] It was and is now seen by some as a significant erosion of the progress made under the deinstitutionalization mandate as enacted in 1974. For example, Congressman Kildee argued unsuccessfully in opposition that "[j]udges should use their expertise and knowledge to provide placements and treatments that will help a child overcome his or her problems and prevent that child from advancing from noncriminal to criminal activities. Incarceration is difficult to justify as either a treatment or a punishment."[64]

Not mentioned in the text of the statute is another "exception" to the seemingly absolute commands of the DSO mandate. That exception is found in congressional reports accompanying the 1977 amendments. Specifically, *accused* status offenders and nonoffenders may be held in secure detention for up to 24 hours after apprehension and 24 hours after initial court intake "for investigation purposes, for identification purposes, to allow return of proper custody to the juvenile's parents or guardian, or detention for a brief period of time under juvenile court authority in order to arrange for appropriate shelter care placement. . . ."[65] This was deemed to represent a "rule of reason"[66] which permitted states and the Office to adjust the statute to what were considered to be appropriate police and court practices. It was noted that such an "exception" would be particularly valuable in sparsely populated states like Alaska where shelter facilities might not be readily available.[67] As we will see, concern for the peculiar difficulties of rural areas in meeting the mandates finds its expression elsewhere in the statute. These concerns still remain strong.

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[62]126 Congressional Record 30227 (Nov. 19, 1980) (statement of Rep. John Ashbrook).

[63]*See* General Accounting Office, Noncriminal Juvenile Detention: Detentions have been Reduced but Better Monitoring is Needed [hereinafter "GAO Valid Court Order Report"] (Draft) (April, 1991) at 23-24.

[64]126 Congressional Record 30228 (Nov. 19, 1980) (statement of Rep. Dale Kildee).

[65]S. Rep. No. 95-165, 95th Cong., 1st Sess. at 60 (1977). *See also* H.R. Rep. No. 95-313, 95th Cong., 1st Sess. at 43 (1977). The "exception" does not apply to status offenders and nonoffenders following adjudication. *See* OJJDP Policy No. 89-1201 (April 1989), contained in Vol. 1 OJJDP Formula Grants Program Manual at 1.1.

[66]Senate Report, *supra* note 65, at 60.

[67]*Id.* at 61.

This 24 hour exception is less controversial than the valid court order. Yet today, as in 1977, the potential impact of even brief periods of incarceration for status offenders is worrisome for some.[68]

In 1977 the original 2-year deadline for full compliance with the DSO mandate was extended. Convinced that flexibility had to be provided to those states demonstrating good faith efforts to meet the mandate and also concerned that the prior level of funding of the Act had been lower than expected, Congress extended the deadline by 1 year.[69] In addition, it adopted OJJDP's definition of "substantial compliance" (in terms of a percentage) which had been utilized for grant nonrenewal/termination purposes.[70] Accordingly, the Administrator was authorized to allow a state up to two additional years beyond the initial three to achieve full compliance where the state had accomplished deinstitutionalization of not less than 75 percent of status offenders and nonoffenders and made an unequivocal commitment to achieving full compliance within a reasonable time not exceeding two additional years.[71]

This was the first, but not the last, time Congress would confront the dilemma posed by grant termination as a sanction for noncompliance with federal mandates. On the assumption that grant funds are being expended in ways that serve the mandates and substantive purposes of the JJDP Act, termination is suggestive of "cutting off one's nose to spite one's face." Inevitably, this dilemma creates strong incentives for accommodations of various types.[72] In the case of the JJDP Act, this has resulted in legislative extensions of the timeframes for full compliance, coupled with specific conditions imposed on extensions which attempt to guarantee further progress. Since the same dilemma confronts an agency administering such a program, it comes as no surprise that OJJDP has attempted, within what it believes are the statutory limits on its discretion, to use a combination of negotiation, ultimatum and administrative invention to move states along the road to full compliance.[73]

Not surprisingly, Congress ultimately provided further leeway for compliance with DSO. In 1980, it added an alternative to the 75 percent removal test for "substantial compliance." Specifically, removal of 100 percent of status and nonoffenders from secure *correctional* facilities (as opposed to

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[68]*Id.*

[69]42 U.S.C. §5633(c)(1).

[70]S. Rep. No. 95-165, 95 Cong., 1st Sess. at 60 (1977).

[71]*Id.*

[72]See Mason, *A Guide to Federal Grant Statute Drafting* at 108, in Administrative Conference of the United States, "Studies In Administrative Law and Procedure" 90-1.

[73]*Id. See generally* Gormley, *Food Fights: Regulatory Enforcement in a Federal System*, 52 PUB. ADMIN. REV. 271 (1992).

both detention and correctional facilities) would justify up to a 2-year extension of the 3-year deadline for full compliance.[74] Secure *detention*, generally for shorter periods of time, was deemed less harmful to children than their being held for perhaps longer periods in correctional institutions.[75] Again, this was an attempted accommodation to good faith compliance efforts by states.[76]

The 1980 amendments to the substantive DSO mandate were to be the last. The 1989 monitoring reports indicated that 42 participating states and other jurisdictions were either in full compliance with the DSO mandate, or in full compliance with de minimis exceptions, one was out of compliance, and data were not yet available for two others.[77]

2. Separation

The original JJDP Act established as a mandate that juveniles alleged or found to be *delinquent*[78] could not be detained or confined in any institution in which they had regular contact with adult incarcerated persons.[79] The only amendment to this came in 1977 when the separation provision was extended to cover status offenders and nonoffenders.[80]

By some accounts the DSO, rather than the separation, mandate was really the focus of Congress' concern in 1974 when the JJDP Act was enacted. No exemptions to the provisions of this mandate are found in the text of the statute. Its language is as absolute as that of the DSO and jail removal mandates and its phrasing is similar. Moreover, it is noteworthy among the mandates for its lack of any specific final compliance deadline. The absence of that deadline gives rise to two arguments: (1) that immediate compliance was expected; or (2) that the Office had discretion to allow states a "reasonable" period of time for full compliance taking into account the peculiar difficulties each state might have in meeting the mandate. As will be noted below,[81] the Office opted for the latter view. Congress has not expressly challenged (or approved) this by statutory amendment or otherwise.

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[74]H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 26-27 (1980).

[75]*Id.* at 27.

[76]*Id.*

[77]See Appendix C1, which is available upon request from the Conference.

[78]A delinquent, or criminal-type offender, is a juvenile offender 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. *See* 28 CFR §31.304(g) (1991).

[79]42 U.S.C. §5633(a)(13).

[80]*Id.*

[81]See text at notes 124-27 *infra*.

Based on the state monitoring reports for 1989 submitted to OJJDP, 29 participating states and other jurisdictions were in full compliance with the separation mandate, 12 were in full compliance with permitted exceptions, 11 were not in compliance but showing progress, 1 was out of compliance, and data were unavailable from 3 others.[82] To a degree, the addition of the jail removal mandate in 1980 mooted the significance of the separation mandate. Compliance with jail removal means compliance with separation in many, though not all, instances.[83]

3. Jail Removal

Of all the legislation amending the mandate portion of the 1974 JJDP Act, perhaps none was more important than the requirement for jail removal.[84] That was added late in 1980, within 1 month of the end of the Carter Administration.

Congress established a 5-year deadline (that is, extending to December 1985), subject to some extensions, after which "no juvenile" was to be "detained or confined in any jail or lockup for adults." According to statistics and testimony presented at hearings, mere separation was not adequately protecting juveniles. Witnesses pointed to potential physical and sexual abuse encountered by youths incarcerated in adult jails and to youths kept in isolation. Moreover, the suicide rate for juveniles so incarcerated was approximately seven times the rate of children held in secure juvenile facilities. Developments in the area of constitutional law and the perception that jail removal was economically feasible added to the argument in favor of this new mandate.[85]

The House Committee on Education and Labor, where the jail removal provision originated, noted that the mandate did not apply (though the statute was not amended to say so expressly) to: (1) juveniles waived or transferred to criminal court by a juvenile court after criminal charges had been filed; or (2) juveniles over whom a criminal court had formally asserted its jurisdiction by the filing of criminal charges.[86] This was required because "[a]ppropriate alternative secure placements for serious and violent juvenile criminal

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[82]See Appendix C2, which is available upon request from the Conference.

[83]*See, e.g.*,, text at notes 90-91 *infra*. But see text at note 400 *infra*.

[84]*See generally* Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 Ind. L.J. 999 (1991) (discussing, among other things, the problems facing juveniles in adult jails and the legal protections that apply, including the JJDP Act).

[85]H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 24 (1980).

[86]*Id.* at 25.

offenders waived or bound over to adult court are often not available."[87] Congress hoped, however, that this approach would not encourage increased waivers of juveniles to criminal court or state redefinition of the scope of jurisdiction of their criminal courts,[88] developments which, however, were not entirely forestalled.[89]

The Committee (and ultimately OJJDP)[90] defined in its report (but not in the statute) "jail or lockup for adults" as follows:

> For the purposes of this provision, a jail for adults is defined as a locked facility, administered by State, county, or local law enforcement and correctional agencies, the purpose of which is to detain adults charged with violating criminal law, pending trial. Also considered as adult jails are those facilities used to hold convicted adult criminal offenders sentenced for less than one year. . . . A lockup for adults is similar to a jail for adults except that it is generally a municipal or police facility of a temporary nature which does not hold persons after they have been formally charged.
>
> . . . [I]nstitutions and facilities that are used exclusively for the post-conviction or post-adjudication detention or confinement of offenders who have been convicted of crimes or adjudicated delinquent are not adult jails or lockups. Juveniles adjudicated delinquent, if confined in an institution that incarcerates adult criminal offenders, would continue to have to be separated from regular contact with adults in order for the State to be in compliance with the . . . separation requirement.[91]

In other words, technically the jail removal mandate applies only to facilities holding adults pending adjudication and to facilities holding convicted adults for less than a year, which are the kind of facilities where problems had been identified. Excluded are long-term confinement facilities where both juveniles and adults may be held. They are few in number and are covered by the separation mandate.

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[87] *Id.*

[88] *Id.*

[89] See text at note 389 *infra*.

[90] 28 CFR §31.304(m), (n) (1991).

[91] House Report, *supra* note 85, at 25-26.

As in the case of DSO, the Committee noted in its Report (but not in the text of the legislation) that it expected OJJDP to follow a "rule of reason" in administering this mandate. Specifically, the Office could:

> permit the temporary holding in an adult jail or lockup by police of juveniles arrested for committing an act which would be a crime if committed by an adult for purposes of identification, processing, and transfer to juvenile court officials or juvenile shelter or detention facilities. Any such holding of juveniles should be limited to the absolute minimum time necessary to complete this action, not to exceed six hours, but in no case overnight. Section 223(a)(13) [the separation mandate] would prohibit such juveniles who are delinquent offenders from having regular contact with adult offenders during this brief holding period.[92]

In other words, *accused* delinquent offenders (but not status offenders or nonoffenders) could be held in adult jails and lockups for up to 6 hours as long as there was adequate separation.[93]

From the beginning Congress realized that the states might have difficulties in complying with the 5-year deadline for full compliance. Analogously to the DSO mandate, it defined in 1980 "substantial compliance" with the mandate--which would permit continued funding--as the achievement of at least 75% removal of juveniles from jails and lockups for adults. It permitted an up to 2-year delay beyond 1985 for final compliance where a state made the 75% showing along with an unequivocal commitment to achieving full compliance within that additional 2-year period.[94]

Despite the committee provision for a 6-hour "hold" and the provision for some extension of the deadlines, concerns remained in 1980 regarding the ability of rural areas to meet the jail removal requirement in view of the economic costs of compliance and the existing lack of alternative placements in such areas. Representative Tom Coleman of Missouri proposed an amendment, which was adopted, providing that, with regard to sparsely populated areas, the OJJDP could permit the temporary holding of juveniles

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[92]*Id.* at 26.

[93]Adjudicated delinquents may not be held for any length of time in adult jails or lockups. *See* OJJDP Policy 89-1401 (April 1989), Vol. 1 OJJDP Formula Grants Program Manual at 1.6-1.7.

[94]House Report, *supra* note 85, at 24.

accused of serious offenses where no suitable alternative placement was available and separation was provided for.[95]

In 1984 this rather open-ended "rural" exception was tightened up by limiting the Administrator's authority to grant relief to rural areas to the period "through 1989." The amendment also specified that only accused nonstatus offenders could be held in adult jails and lockups under this exception and only when they were "awaiting an initial court appearance pursuant to an enforceable state law requiring such appearances within 24 hours after being taken into custody (excluding weekends and holidays) provided that such exceptions are limited to areas which--(i) are outside a Standard Metropolitan Statistical Area (MSA), (ii) have no existing acceptable alternative placement available, and (iii) are in compliance with the provisions of paragraph (13) [separation]."[96]

In 1988 the use of this so-called nonMSA exception was extended "through 1993."[97] This extension of time was, moreover, part of a broader revision of the deadlines for full compliance with the jail removal mandate. Those changes were again deemed necessary to permit state flexibility and take account of good faith efforts by states to comply.

First, in 1984, the original provision for "substantial compliance" was amended to permit a 3-, rather than a 2-year period for coming into full compliance.[98] Then in 1988 Congress added an alternative definition of "substantial compliance" along with a waiver provision.

The new "substantial compliance" standard was designed to take into account the fact that a state might not be able to show a 75% reduction in holding juveniles in adult facilities from the 1980 baseline because, for example, it had prior to 1980 removed many juveniles from jails and lockups and the type left required secure holding facilities that were not yet available. This perceived unfairness, it was argued, demanded an alternative standard. The one enacted required that all juvenile status offenders and nonoffenders have been removed from jails and lockups for adults; meaningful progress has been demonstrated by the state in removing other juveniles from jails and lockups; and that the state has "diligently" carried out its plan to comply with the jail removal mandate, and has "historically expended, and continues to expend, to comply with [the jail removal mandate] an appropriate and significant share of the funds received by the State under this [Act]."[99]

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[95]126 Congressional Record 30224-5 (November 19, 1980) (statement by Rep. Thomas Coleman).

[96]*See* 42 U.S.C. §5633(a)(14).

[97]*Id.*

[98]S. Rep. No. 98-499, 98th Cong., 2d Sess. at 26 (1984).

[99]42 U.S.C. §5633(c)(2)(A)(i)(II), (4).

Both substantial compliance standards were statutorily tied to the 3-year limit on the extension of the 1985 deadline for full compliance. For all intents and purposes, therefore, the new alternative standard for substantial compliance had a very limited lifetime. Absent reliance on a waiver or nonMSA exception, states had to be in final, full compliance after December 1988 at the latest.

Eligibility for waiver was not so restricted. The 1988 amendment permitted waivers when substantial compliance was not achieved (that is, during the period prior to December 1988)[100] as well as after the date for compliance with the jail removal mandate.[101] No express limit on the number of waivers was specified in the statute nor was there any explicit statutory requirement that the state demonstrate that it had achieved substantial progress or that it promise to achieve such progress in the future. However, the legislative history indicated Congress' expectation that a waiver would be granted only when the noncompliant state had made significant progress and additional funding would likely produce further progress toward full compliance.[102] The only explicit textual condition on the waiver was that the recipient state agree to expend all of the funds to be received, with minor exceptions,[103] to achieve compliance with the jail removal mandate.

In sum, generally speaking, states were required to come into full compliance with the jail removal mandate by December 1988, with the exception of "rural areas" which have additional flexibility through 1993. Aside from demonstrated full compliance, continued eligibility for funding depended on a state's being found in "substantial" compliance or having received a waiver in the interim after 1985. If compliance data indicated the failure to achieve full compliance after December 1988, only a waiver could permit further eligibility for funding.

Based on the 1989 monitoring reports submitted by the states to OJJDP, 7 participating states and other jurisdictions were in full compliance, 32 were in full compliance with de minimis exceptions, 6 were not in compliance but with a waiver granted, 5 were not in compliance but waiver eligible, 3 were out of compliance with waiver denied, and data were not available from 3 others.[104]

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[100]42 U.S.C. §5633(c)(2).

[101]*Id.* §5633(c)(3).

[102]H.R. Rep. No. 100-605, 100th Cong., 2d Sess. at 11-12 (1988).

[103]42 U.S.C. §5633(c)(2)(B), (3) (other than those to be used for administrative purposes, to support the SAG, and for Indian tribe compliance with the mandates).

[104]See Appendix C3. *See also* Appendix B, which indicates the number of waivers granted to various states. Both Appendices are available upon request from the Conference.

4. Monitoring

In 1974 Congress required that participating states have adequate systems to monitor for compliance with what were then the two statutory mandates--deinstitutionalization of status offenders and separation of adults and juveniles--and to report annually the results of such monitoring to the Administrator. With the addition of the jail removal mandate in 1980, the requirements for state monitoring and reporting were extended to it. However, Congress provided that the annual compliance reports to OJJDP need not be provided in certain limited circumstances. As explained in 1980 by the House Committee on Education and Labor, its bill also provides that

> annual monitoring report requirements shall not apply to States which are fully in compliance with the deinstitutionalization, separation, *and removal-from-adult-jail* requirements and which have enacted State legislation which conforms to those requirements and which, in the opinion of the Administrator, contain [sic] sufficient enforcement mechanisms to insure that the legislation will be administered effectively. The intent of the committee is to reduce paperwork, to provide an additional incentive for full compliance, and to encourage States to pass State legislation which conforms to the requirements of the act.[105]

In contrast to the House Committee Report, however, the text of the 1980 amendment[106] unaccountably omits compliance with the jail removal mandate as a condition for waiver of the annual monitoring reports which are supposed to cover all three substantive mandates. As we will see,[107] OJJDP has in only one instance permitted a State not to submit annual monitoring reports. That experience proved so disastrous that it is unlikely that such permission will (or should) be granted in the future.

A study by the General Accounting Office prompted an amendment to the statute in 1984 that requires that OJJDP provide for the auditing of state monitoring systems for the purpose of determining their adequacy in ascertaining the status of compliance with the mandates. The House Committee on Education and Labor noted that it had "assumed it to be obvious that the Congress, by requiring these systems as part of a State plan, intended for the Administrator to review them for adequacy."[108] However the GAO's

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[105]H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 26 (1980) (emphasis added).

[106]*See* 42 U.S.C. §5633(a)(15).

[107]See text following note 340 *infra*.

[108]H.R. Rep. No. 98-741, 98th Cong., 2d Sess. at 19 (1984).

study indicated that the Office did not in fact evaluate the reliability and validity of the data supplied by the states and that state reports were often based on inaccurate and incomplete local records.[109]

5. A Note on Statutory Structure as it Relates to the Mandates and Grant Termination and Ineligibility

The mandates themselves are contained in the provisions of Section 223 of the JJDP Act, which sets forth the requirements for an acceptable state plan. That plan is required "in order [for a state] to receive formula grant funds under this part."[110] Such plans must "provide" that, within the timeframes established by Congress, status offenders "shall not be" placed in secure institutions; that juveniles "shall not be detained or confined" in institutions incarcerating adults without adequate separation; that "no juvenile shall be detained or confined in any jail or lockup for adults" (except for rural areas); and "for an adequate system of monitoring jails, detention facilities, correctional facilities, and nonsecure facilities to ensure" that the foregoing three mandates are met.[111]

Other than the nonMSA exception, provisions for extension of the final compliance dates (i.e., the alternative "substantial" compliance standards for DSO and jail removal along with the waiver provisions for jail removal) are included in a different part of Section 223, which provides not for a termination of an outstanding grant but noneligibility for future receipt of grants.[112]

The JJDP Act contemplates the possibility that, during the term of a particular year's formula grant, a state might so fail to carry out its plan that some sanction might be warranted. Accordingly, the Administrator is authorized, after notice and hearing at which he finds that a state has failed to comply "substantially with any provision of this title," to withhold grant funds.[113]

Also, in determining eligibility for new formula grant awards, the Administrator must provide the opportunity for an on-the-record hearing with respect to alleged failures of a state to submit a plan that meets statutory requirements, including alleged noncompliance with one or more of the mandates.[114] The standard for a determination of ineligibility is "substantial"

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[109] *Id.*

[110] 42 U.S.C. §5633(a).

[111] *Id.* §5633(a)(12)(A), (13), (14), (15).

[112] *Id.* §5633(c)(1)-(4).

[113] 42 U.S.C. §5673.

[114] *Id.* §3783, §5633(d).

failure to comply.[115] In a case where such a finding has been made, OJJDP must "endeavor to make [the noncomplying] State's allotment . . . available to local public and private nonprofit agencies within such State for use in carrying out" the mandates.[116]

To date, mid-grant terminations, along with formal and final determinations of ineligibility under these provisions--while threatened in some instances--have not taken place.

C. Regulatory Elaboration of Statutory Requirements

1. Overview

Many of the rules governing the formula grant program are found in Part 31 of Title 28 of the Code of Federal Regulations.[117] These are legislative regulations, that is to say, rules promulgated by OJJDP pursuant to the legislative grants of rulemaking authority contained or referred to in Sections 201(b), 223(a), and 292(d) of the JJDP Act.[118] Those rules have the force and effect of law.[119]

Part 31 covers a multitude of areas, including the submission date for formula grant applications, the designation and composition of the SAGs, the content of the 3-year plans describing the barriers to compliance with the statutory mandates and the program for achieving full compliance and for monitoring for compliance, the content of annual monitoring reports, definitions of "full" and "substantial" compliance, conditions for a jail removal compliance waiver, requirements for annual performance reports, and applicable definitions.

Many of these rules repeat largely verbatim the requirements found in the statute. In important respects, however, some go beyond the statutory text, sometimes picking up language found in congressional reports accompanying amendments to the JJDP Act.

The Office has not, however, restricted its interpretation of the JJDP Act and its policymaking thereunder to legislative rules. At various times, it has

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[115]28 CFR §§18.1, 18.2, 18.5 (1991).

[116]42 U.S.C. §5633(d).

[117]28 CFR Part 31 (1991).

[118]42 U.S.C. §§5611(b), 5633(a) and 5672(d).

[119]*See* Memorandum from Charles A. Lauer, Office of General Counsel to Alfred S. Regnery, Acting Administrator, OJJDP (February 8, 1983).

issued nonlegislative[120] policy statements and interpretations. While some of these have later ended up as or been referred to in OJJDP's legislative rules, others have not.

In selected instances the Office has published proposed nonlegislative statements for comment in the Federal Register. More often, as issues of policy and interpretation have arisen during the day-to-day administration of the formula grant program, they have been resolved without invoking a formal consultation process with interested parties and the public at large. What have been deemed to be the most important and currently relevant nonlegislative statements appear now in two staff manuals,[121] which were issued in 1989 and 1990 and distributed to OJJDP state representatives and state juvenile justice specialists. Those manuals were intended both as a training and reference tool and to be updated on a regular basis (the latter of which seems not to have occurred with great regularity).

What follows is a relatively brief overview of the Office's regulatory elaboration of the statutory mandates, including the provisions defining levels of "compliance," conditions for waiver, and monitoring requirements. Tables 2 and 3 summarize the various statutory and administrative "exceptions" to the mandates and the provisions for extension of final compliance dates.[122]

2. The Separation Mandate

The statutory prohibition of "regular" contact between juveniles and incarcerated adults is defined "as sight and sound contact with incarcerated adults . . . . This prohibition seeks as complete a separation as possible and permits no more than haphazard or accidental contact . . . ."[123]

As noted above,[124] despite the similarity in textual phrasing of this mandate to the others and the presence of explicit congressional timeframes for DSO and jail removal, the Office has not interpreted the separation provision to require immediate compliance in all cases, apparently on the basis that that would be "unreasonable." Accordingly, states have been afforded a great deal of flexibility here. The relevant regulation notes as follows:

> The requirement of this provision is to be planned and implemented immediately by each State in light of identified

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[120]Nonlegislative rules lack the legal effect of a statute. *See, e.g.,*, A. Bonfield & M. Asimow, State and Federal Administrative Law 405-418 (1989).

[121]OJJDP Formula Grants Program Manual, Vols. 1 & 2 (1989, 1990).

[122]*See* Mason, *supra* note 72, at 86, 126 (noting that "exception" mechanisms are desirable in grant statutes).

[123]28 CFR §31.303(d)(1)(i) (1991).

[124]See text at note 81 *supra*.

> constraints on immediate implementation. Immediate compliance is required where no constraints exist. Where constraints exist, the designated date of compliance in the latest approved plan is the compliance deadline. Those States not in compliance must show annual progress toward achieving compliance until compliance is reached.[125]

This potentially leaves some room for the Office to second-guess the compliance deadline established by the States, as, for example, where the Office deems that no constraints on compliance exist.[126] However, in practice the Office appears to defer largely to state judgment. State plans must "justify any deviation from a previously approved timetable."[127]

Full compliance with the mandate is deemed to occur when monitoring reports indicate no instance where a juvenile has been held in violation of the statutory separation requirement. Alternatively, the Office has established a regulatory standard which permits some holding in violation of the separation mandate and yet a finding of compliance. Specifically, OJJDP will deem compliance to have been achieved as long as state law or policy prohibits holding juveniles in cases where the requisite separation is not present; all instances of noncompliance reported in the last submitted monitoring report were in violation of that state law or policy; such instances do not indicate a pattern or practice; and existing mechanisms for the enforcement of state law or policy are such that the instances are unlikely to reoccur.[128]

This standard is purely a regulatory creation with no express basis in the statute. As we will see, it is similar in certain respects to so-called "de minimis" standards developed by the Office for the DSO and jail removal mandates.[129] Given the general notions underlying the concept of de minimis, it could be considered itself a de minimis standard.

Finally, it should be noted that juveniles who are waived or transferred to criminal court or who are otherwise charged with a criminal act are not deemed to be within the protection of the separation mandate since they are not status offenders or delinquents.[130]

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[125]28 CFR §31.303(d)(2) (1991).

[126]Legal Opinion No. 76.7--State Plan Requirements of 223(a)(12)-(14) of the Juvenile Justice Act--October 7, 1975, contained in Vol. 2 OJJDP Formula Grants Program Manual at C-21.1-21.4.

[127]28 CFR §31.303(d)(1)(i) (1991).

[128]*Id.* §31.303(f)(6) (1991).

[129]See text at notes 173, 182 *infra*.

[130]Policy No. 89-1301 (April 1989), contained in Vol. I OJJDP Formula Grants Program Manual at 1.5.

Table 2

EXCEPTIONS RELIED UPON IN DETERMINING COMPLIANCE WITH MANDATES

	SOURCE		
	JJDP Act	Legislative History	Administrative
DSO	valid court order	24 hour holding period	de minimis full compliance standards
Separation	n/a	n/a	violations of state law
Jail/Lockout Removal	non-MSA 24 hour exception (available through 1993)	6 hour holding period	de minimis full compliance standards; non-secure custody policy

Table 3

COMPLIANCE DEADLINES AND MECHANISMS FOR EXTENSION

	Initial Deadlines for full Compliance	Extensions Available	Basis for Extensions
DSO	Three years from start of participation	up to 2 years	numerical substantial compliance standards[1]
Separation	"reasonable" time	n/a	n/a
Jail/Lockout Removal	1985	up to 3 years (to December 1988) unless a waiver	numerical[2] and non-numerical[3] substantial compliance standards; or waiver[4]

[1]75% removal of status offenders and nonoffenders from secure facilities or 100% removal from correctional facilities.

[2]75% removal.

[3]100% removal of status offenders; meaningful progress; diligence in carrying out removal plan; significant share of grant funds used for jail removal.

[4]No statutory limit on number but regulations limit to three.

3. Valid Court Order Exception to DSO

The statutory language which permits secure holding of juveniles for violations of "valid court orders,"[131] along with the definition of "valid court orders,"[132] leave many questions unanswered regarding the scope of this exception to the DSO mandate. After an extended public comment process during 1981-82 which followed the legislative adoption of the exception in 1980, the Office arrived at a definition which purportedly reflects both the statutory text, legislative background, and policy concerns.[133]

Briefly stated, in order for secure incarceration of a status offender to occur consistent with the DSO mandate, the following must take place: the juvenile must have originally been brought before a court of competent jurisdiction and made subject to a legally issued order regulating his or her future conduct; the order must have been entered in accord with established law, the facts and proper procedures; the juvenile and his or her attorney must have been warned of the consequences of violation at the time the order was issued; after apprehension for violation of the order, a probable cause hearing must occur within 24 hours and a final hearing should occur within 72 hours if the alleged offender is held securely in the meantime; the violation hearing must accord the juvenile all his or her due process rights; and the judges presiding at the probable cause and violation hearings must ascertain that the foregoing requirements have been met.[134] A juvenile found, after the requisite hearing, to have violated a valid court order may be placed in a secure detention or correctional facility after the judge determines that there is no less restrictive alternative appropriate.[135] Nonoffenders such as neglected children cannot be placed in secure detention for violation of valid court orders.[136]

4. Separate Facility Within a Jail or Lockup

Inevitably the question arose regarding how the jail removal mandate applied when juveniles were held in the same building or on the same grounds as adults.

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[131] 42 U.S.C. §5633(a)(12)(A).

[132] *Id.* §5603(16).

[133] *See* 47 Fed. Reg. 35686-7 (Aug. 16, 1982).

[134] 28 CFR §303(f)(3)(i)-(vi) (1991).

[135] *Id.* §31.303(f)(3)(vi) (1991).

[136] *Id.* §31.303(f)(3)(vii) (1991).

a. "Separateness"

In January 1984 the Office published what it called a "position statement" in the Federal Register, apparently in final form without first utilizing a formal notice-and-comment process.[137] The announcement set forth four "mandatory requirements," along with a nonexclusive list of factors to be utilized to determine whether those requirements were met, all to be applied "to determine acceptability in the event both juveniles and adults are detained in one physical structure."[138]

Briefly stated, according to the "mandatory" part of the test, part of a building housing an adult jail or lockup could be utilized, consistent with the jail removal mandate, to house juveniles if there was "[t]otal separation between juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents;" "[t]otal separation in all juvenile and adult program activities;" "[s]eparate juvenile and adult staff, including management, security staff, and direct care staff;" and "[i]n states that have established state standards or licensing requirements for secure juvenile detention facilities, the juvenile facility meets the standards and is licensed as appropriate."[139]

The listed "factors" included that "[j]uvenile staff are employee [sic] full-time by a juvenile service agency or the juvenile court with responsibility only for the conduct of the youth-serving operations" and "[j]uveniles do not share direct service or access space with adult offenders."

What is curious about the "factors" is the degree to which they seem, in large degree, to restate the requirements for "total separation" contained in the "mandatory" aspect of this "position statement" without adding much new. While perhaps not intended, the message that might be conveyed is that the "mandatory requirements" are not as clearcut as they appear to be on the surface since the nonexclusive list of factors bespeaks administrative discretion to deal with cases in somewhat of an ad hoc basis. This is not the only possible meaning, however, for the factors could be taken as emphasizing that spatial areas may not be shared at any time and for any purpose and that the staff members must be dedicated exclusively to different incarcerated populations.

The four mandatory criteria, but not the factors, were incorporated in the Office's formula grant regulations in June 1985.[140] One of the objectors to their inclusion argued that, to qualify as a separate facility, a place of juvenile

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[137]49 Fed. Reg. 2054 (Jan. 17, 1984).

[138]*Id.*

[139]*Id.*

[140]See 50 Fed. Reg. 25553 (June 20, 1985).

detention should not share any common wall or roof with an adult jail or lockup.[141] The Office rejected that position.

Finally, during 1988 to 1991 the Office revisited this issue in the context of Wisconsin's continued participation in the formula grant program. That episode will be more elaborately discussed below.[142] It suffices for present purposes to note that in July 1991, without engaging in a public comment process, the Office issued what it called a "clarification" of the four separation requirements. More specifically, the Office approved time-phasing of the use of spatial areas for both juveniles and adults where there were adequate protections against "haphazard or accidental contact." Also approved was the use of the same security staff to serve both populations. The staff must be trained to serve the special needs of juveniles and the same staff persons cannot serve both populations at the same time or during the same shift.[143]

This "clarification," which was issued as an "OJJDP policy" not published in the Federal Register but distributed for inclusion in the agency's staff manual, was an attempt to afford more flexibility to states having special problems.[144] However, questions have been raised by various state and other officials regarding the effectiveness of operational plans to ensure separation as well as the ability of guards to wear "two hats" and not treat juveniles in the same way they treat adults.[145]

b. "Nonsecure Custody"

Following the issuance of the "separateness" definition in 1984, the Office issued another policy statement dealing with what it called "nonsecure" custody. This appeared in final form, following opportunity for comment, in the Federal Register of November 2, 1988.[146] The Office noted that state and local officials "are often called upon to identify alternatives to holding juveniles in jail cells or lockups while law enforcement officers carry out their responsibilities of identification, investigation, processing, release to parent(s) or guardian, hold for transfer to an appropriate juvenile detention or shelter facility, or transfer to court." During this "interim" period, a balance must purportedly be struck between the "statutory objective" of jail removal and the

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[141] *Id.*

[142] See text at notes 315-28 *infra*.

[143] OJJDP Policy 91-1401 (July 1991), to be contained in Vol. 1 OJJDP Formula Grants Program Manual.

[144] Letter from Robert W. Sweet, Jr., Administrator OJJDP, to A.C. Carlisle, Associate Commissioner, Maine Department of Corrections (March 27, 1991).

[145] See text following note 55 *supra*.

[146] 53 Fed. Reg. 44366 (Nov. 2, 1988).

need to avoid disruption of police operations.[147] Accordingly, the Office identified the circumstances in which it would deem a juvenile who was held in a facility housing an adult jail or lockup as being in a nonsecure custody status, and therefore, according to the Office, not to be considered as detained "in a jail or lockup" for monitoring purposes. Specifically, a juvenile could be held in "an unlocked, multi-purpose area . . . which is not designated, set aside or used as a secure detention area" or "if a secure area, is used only for processing purposes." That area must be "limited to providing nonsecure custody only long enough and for the purposes of identification, investigation, processing, release to parents, or arranging transfer to an appropriate juvenile facility or to court" and cannot be "designated or intended to be used for residential purposes." Moreover, the juvenile cannot be "physically secured to a cuffing rail or other stationary object" and "must be under continuous visual supervision by a law enforcement officer or facility staff during the period of time he or she is in nonsecure custody."[148] During the period the juvenile is in nonsecure custody, the statutory separation requirement is deemed inapplicable.[149]

One of the principal differences between the "separateness" definition and the "nonsecure" holding policy is that the latter is directed in large degree to *temporary*, nonresidential holding and processing of juveniles in facilities housing adult jails and lockups. It is a concession to the needs of operating various police facilities. The former is related more generally to institutional design for short-term secure *residential* arrangements. The "separateness" definition is now part of the Office's legislative regulations, while the "nonsecure" policy statement is not. As to both, however, the Office's approaches are not rooted in legislative history, unlike some other positions taken by the Office like the 6 and 24 hour holds.[150]

5. Substantial Compliance

It is a reasonably well-established principle of federal grant law, which is expressly adopted in the JJDP Act, that ineligibility for funding or withholding of funds follows not every violation of federal grant conditions, but only "substantial" violations.[151] As noted above, first the Office and then Congress

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[147]*Id.*

[148]*Id.* at 44367.

[149]*Id.*

[150]See text at notes 65-68 and 92-93 *supra*.

[151]R. Cappalli, Federal Grants and Cooperative Agreements §8.07 (1982). *See also* text at notes 113-15 *supra*.

purported to define "substantial" compliance with the DSO mandate.[152] The "75 percent" removal standard, first applied to DSO, was extended by Congress in 1980 to the jail removal mandate.

In 1988 Congress added the alternative standard of "substantial" compliance for jail removal purposes.[153] The Office elaborated on this in its legislative regulations. For example, no status offender or nonoffender could be incarcerated in a jail or lockup for any period of time (even the 24 hours generally permitted for secure facilities[154]) unless the incarceration was in violation of state law and did not constitute a pattern or practice.[155] The statutory standard of "meaningful progress" in removing other juveniles was defined as a "significant reduction" judged by several alternative measures of improvement (e.g., hours of confinement, number of offenders).[156] The legislative requirement of a "significant" expenditure of grant funds for jail removal purposes was defined to be no less than 40 percent except in certain circumstances.[157] These administrative interpretations of the statute, even if not required by the text, would appear to be supported by the fact that determining "substantial" compliance in particular cases is expressly vested in the Administrator's "discretion."[158]

Since Congress specifically defined "substantial" compliance with regard to all but the separation mandate, it might be argued for DSO and jail removal purposes that, following the periods during which the various substantial compliance standards apply, *any* nonexcepted instance of secure incarceration of a status offender or jailing of a juvenile constituted "substantial" noncompliance. (Exceptions include the valid court order, nonMSA, and limited holding period exceptions.)

The availability of a jail removal waiver, as it is provided by the JJDP Act, does not deal with problems of this type since such instances of noncompliance are likely to be recurring given mistakes, oversights, and unavoidable situations in which holding is deemed necessary to avoid disruptions of police operations or to protect the juvenile. Yet termination of a grant for what might be viewed as "trivial" violations, with the repercussions that would have for valuable treatment and other programs funded by federal dollars and for federal/state relations generally, suggests that there should be a method to accommodate these occurrences. Against this background, the Office

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[152]See text at notes 70-76 *supra*.

[153]See text at note 98-99 *supra*.

[154]See text at notes 65-68 *supra*.

[155]28 CFR §31.303(f)(6)(iii)(A)(2)(i) (1991).

[156]28 CFR §31.303(f)(6)(iii)(A)(ii) (1991).

[157]28 CFR §31.303(f)(6)(iii)(A)(iv) (1991).

[158]42 U.S.C. §5633(c)(2)(A).

developed the concept of "full compliance with de minimis exceptions," which will be discussed below.[159]

6. Waiver

Finally, with regard to jail removal waiver, the Office added to the statutory conditions for obtaining that type of relief from the sanction of grant ineligibility. These additions are found in the agency's published legislative regulations. All the statute expressly requires is a state's agreement to dedicate all formula grant funds to jail removal.[160] Granting a waiver is discretionary with the Administrator.[161] Therefore, it would appear perfectly consistent with the statute for the Office to impose additional conditions.[162] One of the most important of these is the three-waiver limit.[163] Beyond that, OJJDP created a somewhat different set of conditions for granting a waiver where substantial compliance was not achieved (that is, for the period before December 1988) and for periods thereafter.

Beyond the statutory requirement of use of all formula grant funds for jail removal, under the Office's regulations a waiver where substantial compliance had not been achieved required that the state have "diligently" carried out its jail removal plan; have submitted an acceptable plan to eliminate "noncompliant incidents;" have "achieved" compliance with the requirements of the statute for an adequate monitoring system; and have demonstrated a commitment to achieve full compliance with the jail removal mandate.[164] For a waiver from the full compliance deadline of 1988, the state must have done or pledged to do all those things required for a waiver where substantial compliance had not been achieved and, in addition, have removed all status and nonoffenders from adult jails and lockups and made "meaningful progress" in removing other juvenile offenders from adult jails and lockups.[165] One way to synopsize the conditions for a waiver is that the state have demonstrated a good faith effort at compliance in the past and that it also provide OJJDP with a promise--backed by the will and a plan--to achieve compliance in the near future. These also characterize eligibility under the JJDP Act for extension of compliance deadlines on the basis of "substantial" compliance.[166]

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[159]See text at notes 170-87 *infra*.

[160]42 U.S.C. §5633(c)(2)(B), (3).

[161]*See* H.R. Rep. No. 100-605, 100th Cong., 2d Sess. at 11-12 (1988).

[162]28 CFR §303(f)(6)(iii)(D) (1991).

[163]*Id.* §303(f)(6)(iii)(E) (1991).

[164]*Id.* §303(f)(6)(iii)(D)(1) (1991).

[165]*Id.* §303(f)(6)(iii)(D)(2) (1991).

[166]*See, e.g.,*, text at note 98-99 *supra*.

7. De Minimis Exceptions

The Scylla of grant termination (with the effect of extinguishing important state efforts in the juvenile justice area) and the Charybdis of countenancing disregard of the statutory mandates (which, at a minimum, would have provoked considerable congressional ire) created the necessary motivation in the Office for the creation of the "de minimis" concept for judging compliance efforts. First fleetingly referred to in a legal opinion to the LEAA Regional Administrator for Region III in October 1976,[167] the Office applied the concept to the DSO mandate in 1981[168] and then to the jail removal mandate in 1985[169] with a revision following in 1988.[170] Being its initial foray into the area of defining departures from full compliance which were deemed "of slight consequence or insignificant,"[171] the Office adopted a rather elaborate policy statement on DSO. It did so after notice-and-comment rulemaking. The statement is today referred to, but not apparently incorporated by reference in, the legislative rules of the Office.[172]

The Office announced that it would "consider each case on its merits" based on three general criteria: the extent to which noncompliance "is insignificant or of slight consequence in terms of the total juvenile population in the State" (Criterion A); "[t]he extent to which the instances of noncompliance were in apparent violation of State law or established executive or judicial policy" (Criterion B); and "[t]he extent to which an acceptable plan has been developed which is designed to eliminate the noncompliant incidents within a reasonable time." (Criterion C).[173]

Of particular significance, moreover, is the Office's position that de minimis levels of noncompliance are considered but a waystation toward 100% compliance, though it is also clear that they can be applied to protect a state's continued funding in the case of occasional backsliding due to circumstances beyond its control.[174] The Office noted that it "deems it to be of critical importance that all states seeking a finding of full compliance with de minimis exceptions demonstrate progress toward 100 percent compliance and continue

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[167]Legal Opinion No. 76-7--State Plan Requirements of Section 223(a)(12)-(14) of the Juvenile Justice Act--October 7, 1975, contained in Vol. II OJJDP Formula Grants Program Manual at C-21.1-21.4.

[168]46 Fed. Reg. 2566 (Jan. 9, 1981).

[169]50 Fed. Reg. 25551 (June 20, 1985).

[170]53 Fed. Reg. 44370 (Nov. 2, 1988).

[171]46 Fed. Reg. 2566.

[172]28 CFR §303(f)(6)(i) (1991).

[173]46 Fed. Reg. 2567-68.

[174]See text at note 291 *infra*.

to demonstrate progress annually in order to be eligible for a finding of full compliance with de minimis exceptions."[175]

What makes for some complication in the application of this policy statement is that the three criteria do not operate independently. Rather the first is broken down into statistical levels of DSO noncompliance (i.e., an institutionalization rate per year of less than 5.8 per 100,000 population under age 18, a rate between 5.8 and 17.6, a rate between 17.6 and 29.4, and finally a rate in excess of 29.4). The ranking of a state on this scale determines the degree to which a state must satisfy Criteria B and C (e.g., "adequately" rather than "fully"). The lower the state's own noncompliance rate the less the relevance of the other criteria. Moreover, a rate in excess of 29.4 does not entirely disqualify a state from being found in "de minimis" noncompliance if the state can point to "exceptional circumstances," including the presence in secure facilities of out-of-state runaways or federal wards or a recent change in state law which promises "substantial, significant, and positive impact on the State's compliance with the deinstitutionalization requirement within a reasonable period of time."[176]

The statistical measures were arrived at by determining the average annual rate for the eight states having both the smallest institutionalization rate per 100,000 population under age 18 and an adequate system of monitoring.[177] These figures have not been, and apparently were not designed to be, recalculated every year or at any regular interval to take into account changes in institutionalization rate in the "most compliant" states.

It is clear that the application of the three criteria for a DSO de minimis finding leaves room for administrative discretion and that the de minimis concept as thus elaborated permits a significant rate of institutionalization of status offenders and nonoffenders as long as the state makes a promise and commitment (through the enactment of state law) to achieve full compliance within a reasonable period of time. In fact it was contemplated that those states which had very low rates of institutionalization at the time they began participation in the formula grant program and, on that account, would not be able to satisfy the 75 percent reduction required for a finding of substantial compliance might use the de minimis concept to remain eligible for grant awards.[178] In short, the notion of a prior "good faith" effort and the evidence of "commitment" to achieve full compliance characterize the statutory and regulatory preconditions for extension of compliance deadlines on the basis of

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[175]46 Fed. Reg. at 2567.

[176]*Id.*

[177]*Id.*

[178]*Id.* at 2566.

"substantial compliance."[179] Good faith and commitment are mirrored also in the elaboration of the de minimis concept which was first formally adopted by the agency in 1981 after Congress had amended the Act in both 1977 and 1980 to incorporate definitions of substantial compliance.[180] However there is no legislative history which explicitly endorses--or rejects--a de minimis rule as applied to the mandates.

With regard to jail removal, the Office first added a de minimis concept in its 1985 formula grant regulations.[181] Essentially it focused on the type of noncompliance considered by Criterion B of the DSO de minimis, that is, violations of existing state law or policy. Specifically, in order for the Office to make a finding of compliance with de minimis exceptions for jail removal purposes, state law or policy had to prohibit confinement of juveniles in circumstances violating the jail removal mandate; all reported instances of noncompliance in the most recent monitoring report must constitute violations of that law or policy; such violations must not indicate a pattern or practice; existing legal mechanisms must be such that the violations are not likely to reoccur; and an acceptable plan must have been developed to eliminate noncompliant instances.[182]

Curiously this same set of formula grant regulations of June 1985 also included a provision for determining full compliance with the separation mandate which was largely identical except for the omission of a requirement for an "acceptable plan" to eliminate violations. For unstated reasons, the Office chose not to denominate this a "de minimis" exception.[183] This same "exception" from 100 percent compliance with the separation mandate is still contained in the Office's regulations.[184]

The jail removal de minimis standard was expanded in November, 1988 through an amendment to the grant regulations.[185] What was added was a statistical measure along with a provision making allowance for exceeding the designated rate in certain circumstances. In this regard the standard was similar to the DSO approach, though it did not duplicate its use of interrelated "criteria" and range of statistical rates of noncompliance. Specifically, the annual rate chosen for jail removal purposes was nine instances of violation per 100,000 of juvenile population (calculated on the basis of data from 12 states), not to be exceeded unless the State had "recently enacted changes in state law

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[179]See text at notes 69-76, 94, 98-99, 151-59 *supra*.

[180]See text at notes 69-76 *supra*.

[181]50 Fed. Reg. 25551 (June 20, 1985).

[182]*Id.* at 25560.

[183]*Id.*

[184]See text at note 128 *supra*.

[185]53 Fed. Reg. 44370.

which have gone into effect and which the State demonstrates can reasonably be expected to have a substantial, significant and positive impact on the state's achieving full (100%) compliance or full compliance with de minimis exceptions by the end of the monitoring period immediately following the monitoring period under consideration."[186] In addition the State must have an acceptable plan to eliminate the noncompliant instances. Finally, in order for a State to remain eligible for a finding of full compliance with de minimis exceptions, the state must annually demonstrate "continued and meaningful progress toward achieving full (100%) compliance."[187]

As Appendices C1, C2 and C3 to this study demonstrate, a considerable number of states rely on the de minimis concept, whether for DSO or jail removal, in order to remain eligible for OJJDP formula funding.

8. Limited "Permitted" Holding Periods

As indicated previously in the discussion of the legislative history of the DSO and jail removal mandates, Congress anticipated the need for some continuing flexibility for state and local officials in working within the DSO and jail removal mandates.[188] Accordingly, it was willing to countenance holding accused status offenders and nonoffenders in secure facilities for up to 24 hours (with separation from adults) in determining compliance with the DSO mandate and holding accused delinquent offenders (but not status offenders and nonoffenders) in adult jails and lockups for up to 6-hours for investigation, processing and other purposes in determining compliance with the jail removal mandate. These "exceptions" are contained in the part of the Office's grant regulations which describe the types of data to be submitted in the required annual monitoring reports to OJJDP.[189] The "nonsecure" custody policy supplements the permitted 6-hour holding period to increase somewhat police flexibility in dealing with alleged delinquent juveniles in police custody.[190] It also achieves the same result with regard to status offenders and nonoffenders as to whom the 6-hour holding period does not apply.[191]

It is important to note that, despite the fact that the Office does not "count" instances falling within the limited (6- and 24-hour) holding periods against a state's continued eligibility for funding--as it does not "count" the instances

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[186]*Id.* at 44371.

[187]*Id.* at 44371. The jail removal de minimis standard now appears at 28 CFR §303(f)(6)(iii)(C) (1991).

[188]See text at notes 65-68, 92-93 *supra*.

[189]28 CFR §303(f)(5)(i)(C) (DSO), (f)(5)(iv)(G), (H) (1991).

[190]See 53 Fed. Reg. 44366-67.

[191]See text at note 93 *supra*.

encompassed within a de minimis finding against the State--the Office still considers all these instances to be technical violations of the statutory mandates which states should attempt to reduce or eliminate.

In part this treatment of violations is reflected in the requirement that states seek to eliminate all noncompliant instances that fall within the de minimis range.[192] The Office does not approach the limited holding periods in exactly that same way, apparently in the belief that the need for police flexibility which the holding periods seek to accommodate may be a continuing one which may not disappear over time. In considering all of the instances of secure holding of status offenders and jailing of juveniles as violations of the JJDP Act, OJJDP attempts to avoid the connotation that they represent good social policy as opposed to concessions to administrative reality in overseeing a grant program and in running a police department. This in turn may preserve the "moral" force of the mandates and convey to states the need to hold departures therefrom to the absolute minimum.

9. Monitoring

The legislative regulations of the Office describe in some detail the monitoring required of states for determining compliance with the mandates and the information required in the annual monitoring reports sent to OJJDP.

The states are required to: (1) identify all public and private facilities encompassed within the scope of the mandates and determine which are secure detention or correctional facilities or adult jails or lockups; (2) inspect the facilities to confirm the appropriate classification and to determine whether adequate separation exists and the type of record-keeping system utilized to maintain the data necessary for compliance findings; and, finally, (3) collect and verify data from the facilities subject to the mandates.[193] If there are "barriers" in the way of a state's having an adequate monitoring system, the state plan must identify those and indicate how they will be overcome.[194]

Monitoring reports must be submitted annually to the Office no later than December 31. The reporting period should cover 12 months of data, but in no event less than 6.[195] The regulations specify in detail all of the information deemed necessary for the Office to determine compliance status.[196] These reports are used to determine eligibility for future grant awards which are to be made following the beginning of a new fiscal year. Therefore, in practice,

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[192]See text at notes 174-75 and 187 *supra*.

[193]28 CFR §303(f)(1)(i) (1991).

[194]*Id.* §303(f)(1)(ii) (1991).

[195]*Id.* §303(f)(5) (1991).

[196]*Id.*

determinations of full compliance, de minimis full compliance, substantial compliance, and noncompliance are generally based on data collected a year or more before the beginning of the new fiscal year to which the grant applies.

For example, a state's monitoring report covering the period January 1, 1988 to December 31, 1988 would be received and analyzed during fiscal year 1989 and used to determine eligibility for 1990 fiscal year grant funds. Moreover, since the compliance date for jail removal was "after" December 1988, practically speaking it would be the data covering 1989 which would indicate whether full compliance or full compliance with de minimis exceptions had been achieved on time. The monitoring report for 1989 did not have to be submitted earlier than December 1989 and thus would be used in relation to the 1991 fiscal year grant.

As noted earlier, the statute expressly exempts states from submitting the annual monitoring reports to OJJDP (but not from maintaining adequate monitoring systems) in certain circumstances.[197] The Office's regulations largely mirror the statutory requirements and do not address the anomaly that compliance with the DSO and separation mandates (but not jail removal) is the condition precedent to waiver of monitoring reports which are to cover compliance with all three mandates.[198] The statutory language does not indicate much in the way of administrative discretion if the conditions specified in the statute are met (and compliance with jail removal is not one of those).

III. Policymaking and Application by OJJDP

A. An Overview of the Intra-Agency Process for Policymaking

With regard to the formula grant program, the Office is not primarily a policymaking agency. Generally speaking, upon submittal of an acceptable plan, the Office must award a grant to the state.[199] The criteria for an acceptable plan and continued eligibility for a grant are elaborated in considerable detail in the statute. The prior description of the Office's grant

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[197]See text at notes 105-06 *supra*.

[198]28 CFR §303(f)(7) (1991). See text at notes 105-06.

[199]*Cf.* 42 U.S.C. §5633(c)(1) ("The Administrator shall approve a State plan and any modification thereof that meets the requirements of this section."). *See also id.* §5632 (mandatory allocation).

regulations indicates some administrative elaboration, at times very significant. However, compared to other federal agencies and programs--particularly those in the regulatory area such as the Environmental Protection Agency, the Occupational Health and Safety Administration, and the Securities Exchange Commission--the number of OJJDP's published rules and nonpublished policies and interpretations is modest indeed.

This comparison to regulatory programs is not inappropriate in the case of this grant-making agency. The nature of the statutory mandates for which it is responsible has gone a long way in causing SRAD to perform very much like a typical regulatory body. From the point of view of the states faced with the DSO and jail removal mandates and deadlines, the division is perceived as operating in an "enforcement" mode. Most telling is the fact that the monitoring reports required by the statute are not related to how the federal funds have been expended but rather to progress made in achieving the mandates which themselves call for very concrete, real world results. Such reports are analogous to emission and discharge reports required under various environmental statutes which are concededly "regulatory" in the true sense of the term.

Outside the lack of civil and criminal penalties as enforcement sanctions, SRAD differs most from the typical regulatory body in the small scope of its permitted policymaking function.[200] This is not to say, however, that SRAD could not, over the years, have lawfully exercised more policymaking initiative than it has.

It appears that over most, if not all, of its lifetime and particularly in recent years, SRAD has developed policy positions and interpretations largely in a reactive mode. One or more states may have raised an issue regarding a particular statutory provision or one of the grant regulations. That would trigger discussions within the division regarding the need for an official position, which might then be issued as part of the legislative rules of the agency, in a Federal Register pronouncement, or in a letter or memorandum which ultimately might find its way into the staff manuals used by the Office. As it turns out, most of the significant issues that have been resolved are now covered by the published regulations, at least in the area of the mandates and compliance with them. The former position of monitoring coordinator afforded the Office the perspective of an employee who was in close touch with developments and problems across the states. He could, therefore, identify issues of policy or interpretation that affected more than one state soon after they arose and bring those to the attention of the Division Director for possible resolution through a general statement of policy or interpretation. The abolition of that position could create future difficulties to the extent that

[200] *Id.* §5633(a).

the Division Director or someone else in the Office does not maintain close surveillance over state developments, a point acknowledged by SRAD. Without that, issues requiring resolution will simply be ignored or take long to surface (leaving the states without guidance), will perhaps be resolved differently by different state representatives, or will finally confront the Division Director in an atmosphere laced with state frustration and irritation.

Even when the Office retained the position of monitoring coordinator, however, his duties went beyond that function and thus other responsibilities competed for his attention. Issues calling for a general policy statement or interpretation could not always be resolved by the issuance of written general guidance in a timely fashion. This left the states without guidance and may have contributed to confusion regarding SRAD's expectations. These are among some of the ramifications of the heavy workload of the division which is not being matched by the commitment of adequate personnel resources.[201]

In addition, while there is one OJP Office of General Counsel attorney who is assigned to assist the Office, at times over the last decade or so SRAD personnel were explicitly told not to seek his assistance. While the precise impact of breakdowns in communication between the division and OGC is not entirely clear, their occurrence may have hampered reasoned and lawful evolution of Office policy.

Given the roles the state representatives play in dealing with states,[202] it would appear crucial that at least the substance of the advice given states on important issues should be known to others within SRAD, if only to promote consistency in treatment of the States. In fact the written description of the roles and responsibilities of state representatives expressly requires that "[a]ll correspondence leaving the Division shall be routed through the Division Director for final review, and logged out by the SRAD Control Desk. These procedures are designed to assure uniform quality in copy leaving the Division, and to assure that regulations and policy are accurately and consistently interpreted."[203] This directive is complemented by another which requires state representative preparation of "contact sheets" which apparently summarize oral advice or interpretations given states and which may be circulated within the office to at least the Division Director.[204]

However, one of the complaints regarding SRAD over the years has been inconsistency, including inconsistency in what is told to the states by different state representatives and in what is said by the same representative at different times. The survey of state representatives conducted as part of this study

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[201]See text at notes 32-34 *supra* and text at notes 372-74 *infra*.

[202]See text at note 36 *supra*.

[203]State Representative Roles, *supra* note 36, at XIV.1 (1989).

[204]*Id.* at V.1.

indicated that at least 38% of the respondents believed that SRAD was inconsistent among states.[205] Compliance with the office's own internal operating procedures might go a long way toward eliminating this source of frustration for the states.

SRAD is very small in terms of its allocated positions (less than 15). A formally issued directive regarding the "route" for policy evolution within the office might, therefore, be unnecessary or even counterproductive to the extent it introduces inflexibility. Still, consideration should be given to the formulation of a memorandum to the state representatives which provides them with some indication of when to seek the advice of the Office of General Counsel and when an issue might be the type of policy or interpretative problem requiring resolution by the Division Director or the Administrator. For new state representatives, such guidance might be very important indeed.

B. Consultation with Outsiders

Omitted from the discussion to this point has been any reference to the role of persons and groups outside the government in the policymaking process. It is clear that, over the years, the Office has engaged in consultation with outsiders both through the "formal" mechanisms of notice-and-comment rulemaking and in less formal ways. As with other agencies, questions regarding the degree and kind of necessary and appropriate consultation are answered by reference both to statute and good administrative practice.

In the case of OJJDP there is an express special statutory obligation to consult states and local governments prior to the adoption of at least some of its rules[206] and perhaps an implied statutory obligation to consult the National Coalition of State Juvenile Justice Advisory Groups in its rulemaking efforts.[207] OJJDP has often engaged in consultation with regard to its rulemaking where not required by law. At times, however, its willingness to involve interested outside parties early in its policymaking process has been more restrained than it should have been. In fact, on several recent occasions it may have violated its special statutory obligations to consult the states and the Coalition.

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[205]See Appendix D3 at 3-4, which is available upon request from the Conference.

[206]See text at note 223 *supra*.

[207]See text at note 227 *supra*.

1. Section 553 Notice-and-Comment Procedures

The most familiar mode of predecisional consultation between an agency and its public is the notice-and-comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA).[208] However, despite recommendations by the Administrative Conference in 1969 that Congress repeal the blanket exemption from Section 553 for matters "relating to . . . grants,"[209] there has been no such amendment enacted to date. Accordingly, neither procedural nor substantive rules which "directly" relate to grants need be adopted after a round of public comment.[210]

An agency can waive this exemption. Some in fact have.[211] When that has occurred, courts have enforced the notice-and-comment procedures despite the exemption.[212] Neither the Department of Justice, the Office of Justice Programs, nor OJJDP have, however, expressly waived the APA exemption as it applies to the formula grant program. The Office has consistently over the years adhered to notice-and-comment procedures with regard to the legislative regulations it has issued to implement that program. While it is not entirely clear whether that course of conduct would be deemed to be a constructive waiver, it is unlikely that such would be found.[213] If voluntarily going out for comment on a regular basis would bind an agency to that in the future, agencies would be more likely to avoid the comment process altogether.[214]

In short, OJJDP is likely not subject to notice-and-comment consultation procedures with regard to the formula grant program. Even if it were, some of the Office's issuances--such as the nonsecure custody statement and the DSO de minimis standard--might be considered "interpretative rules" or "general statements of policy" and thus statutorily exempt from those procedures.[215] The DSO de minimis policy was, however, subjected to the comment process. The jail removal de minimis policy and the definition of "separateness" for jail

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[208]5 U.S.C. §553(b), (c). For a general overview of the applicability of the APA to Federal grant programs, *see* Yamada, *Rulemaking Requirements Related to Federal Financial Assistance Programs*, 38 Fed. Bar J. 89 (1980).

[209]1 CFR §305.69-8 (1991).

[210]*See, e.g.,*, National Wildlife Federation v. Snow, 561 F.2d 227 (D.C. Cir. 1976).

[211]*See* Administrative Conference of the United States, A Guide to Federal Agency Rulemaking at 82 and n.181 (2d ed. 1991) (listing some of the agencies waiving or limiting the exemption).

[212]*See, e.g.,*, Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975).

[213]*See, e.g.,*, Malek-Maizbanv v. INS, 653 F.2d 113, 116 (4th Cir. 1981) (deals with the "foreign affairs" exemption and emphasizes the need for "swift action."); Lewis v. Richardson, 428 F. Supp. 1164 (D. Mass. 1977).

[214]*Cf.* 468 F. Supp. at 1168 n.6.

[215]See 5 U.S.C. §553(b)(A).

removal purposes[216] eventually became part of the Office's legislative rules and were thus adopted after notice-and-comment.

2. Other Statutory Requirements for Consultation

a. With States and Local Governments

The office did not utilize notice-and-comment procedures with regard to the "clarification" of the definition of facility "separateness" which was issued in July 1991 after the matter was raised by Wisconsin's 1990 request to remain a participating state in the formula grant program.[217] Given the "grant" exemption along with that for "interpretative rules,"[218] there is a strong argument that the APA itself did not require consultation via a comment process prior to adoption of this policy. After all, the office was apparently purporting to interpret its own regulations.[219]

Beyond the APA, however, the office is or may be subject to other statutory requirements for consultation. As noted above, it has been given at least two express general grants of rulemaking power that would appear to relate to the formula grant program.[220] In addition, there may be either a third grant of rulemaking power or a cross-reference to the other two.[221]

The first authorization of rulemaking is expressly made applicable to award, administration, monitoring and other functions relating to grants, formula and otherwise.[222] The second relates to rules "necessary for the exercise of the functions of the office and as are consistent with the purpose of

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[216]See text at notes 137-45, 181-87 *supra*.

[217]See text at notes 142-45 *supra*.

[218]See 5 U.S.C. §553(b)(A).

[219]See OJJDP Policy 91-1401 (July, 1991) ("For ease of reference, this clarification will reiterate each of the four criteria, expanding as necessary on what arrangements will be accepted by the Office . . . as constituting compliance with each criterion."). Some arguments were raised that SRAD was misinterpreting or changing its regulatory definition of "separateness." In view of the APA grant "exemption" and for other reasons that will appear, see text at notes 223-26 and 321-24 *infra*, it would not be worthwhile to evaluate here the merits of those arguments from the point of view of the APA, though it is appropriate to note that had a "change" in its regulations been attempted and had the grant exemption been waived in fact or constructively, a notice process would have been legally required.

[220]See text at notes 25-26 *supra*.

[221]*See* 42 U.S.C. §5633(a) ("In accordance with regulations which the Administrator shall prescribe, such plan shall . . .").

[222]*Id.* §5611(b).

this Act" and expressly requires "appropriate consultation with representatives of States and units of local government" prior to rule adoption.[223]

Whether or not the 1991 policy should be deemed a "clarification," change in the regulation, or something else, at a minimum it is a "rule" within the meaning of the 1946 APA[224] and arguably within the meaning of the later-enacted JJDP Act. Accordingly, the JJDP Act itself may have required "appropriate consultation" at least with the states and local governments prior to the adoption of this policy. By the same token, of course, even conceding the inapplicability of the APA, the Office's adoption of its legislative grant rules may require some type of prior consultation with at least the states and local governments because arguably the adoption of those is subject to this same section of the JJDP Act.

Unfortunately, there is no congressional history or other basis that convincingly explicates the scope or content of this "consultation" requirement. Contentions for and against its application to the 1991 policy and the office's legislative rules are equally plausible.

It could certainly be argued, based on the "canons" of statutory construction, that the rulemaking authority expressly applicable to grants is the only one relevant to the formula grant regulations and their interpretation.[225] It does not contain a consultation mandate. On the other hand, of all the rules promulgated by the Office that might be of interest to states and local governments, those establishing the eligibility for formula grant funds would likely be foremost on the list. If the consultation requirement is to have meaningful scope in its operation, it should, therefore, apply to such rules.

Even if the consultation requirement is applicable, one might contend that only "appropriate" consultation is mandated and that either no prior consultation may be appropriate in some cases or, in any event, required consultation can take forms other than notice-and-comment procedures. The latter point is well taken. However, it is unlikely that the separateness "clarification" in 1991 was an appropriate case for no prior consultation.[226]

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[223]*Id.* §5672(d).

[224]5 U.S.C. §551(4).

[225]*See generally* W. Eskridge & P. Frickey, Cases and Materials on Legislation/Statutes and the Creation of Public Policy 639-46 (1988) (general discussion of canons). Canons which might be invoked include some version of "expressio unius est exclusio alterius" (inclusion of one thing indicates exclusion of the other) and "specific" statutes control over "general" ones. *See* Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976).

[226]See text at notes 321-24 *infra*.

b. With the National Coalition

The statutory roles of the National Coalition of State Juvenile Justice Advisory Groups to review federal policies regarding juvenile justice and to advise the Administrator might be construed to require some form of prior consultation with at least the Coalition (whose members represent all the participating states' SAGs)[227] whenever the Office has decided to propose legislative regulations or other important policy or interpretative pronouncements. If the 1991 "clarification" is judged not only by the outcry from both the Coalition and some states that preceded and followed its issuance but also by its significance in defining the contours of the jail removal mandate, that policy would seem to fit comfortably within the type of regulatory action requiring the involvement of the Coalition under this view of its statutory role.

At the same time the controversy over the "clarification" of the separateness criteria was brewing, the office made what appears to have been an important new or changed policy on the coverage of the mandates with regard to persons who were under juvenile court jurisdiction when initially held for offenses but are later mixed with adults or placed in adult facilities after they have attained the age of 18.[228] The office held that the separation and jail removal mandates did not apply in those contexts. It did so in a letter to the state (New Jersey) which raised the issue, without apparently either the prior review of the Office of General Counsel or prior consultation with the Coalition, other states, or other interested outsiders.

3. Sensitivity to the Value of Consultation

Avoidance of prior consultation on important issues did not surface as a significant complaint either in the telephone interviews with state specialists[229] or during the on-site factfinding. The recent episodes with regard to the 1991 separateness clarification and the New Jersey case may be as atypical as they were unfortunate in the apparent lack of attention to the need for consultation. At the same time, they suggest that the Office should be particularly sensitive to the value of consultation, both from the point of view of assuring that it has all the information it needs for making a decision and that concerned outsiders feel that they have been fairly treated and their needs taken into account. Such an approach is further required by the apparent concern of the JJDP Act itself

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[227]See text at note 45 *supra*.

[228]Letter from Eugene L. Rhoden, Jr., Acting Director, SRAD to Thomas F. Lynch, Assistant Commissioner, New Jersey Department of Corrections (April 11, 1991).

[229]*See* Appendix D3 at 3, which is available upon request from the Conference.

for adequate prior consultation and by various outstanding Executive Orders.[230] For example, prior consultation may not have averted the furor that accompanied Wisconsin's reentry as a participating state. But it may have taken some of the edge off the tone of debate and facilitated the establishment (or reestablishment, depending on the point of view) of more amicable and productive relationships among the office, the Coalition, and concerned states.

The recently prepared staff manuals[231] contain a variety of interpretations and policy statements. It is not clear in most cases what type, if any, consultative process was engaged in prior to their issuance. That they were included in these manuals suggests that the issues are likely to be confronted in more than one state, that is, they have some general and continuing applicability.

4. Methods of Consultation

In the past, the office has engaged in informal (that is, other than notice-and-comment) methods of consultation on some occasions in formulating positions on issues. This has taken a variety of forms, including circulation of draft positions and discussion at national or regional meetings of state juvenile justice specialists.

The "public" concerned with issues presented by the formula grant program extends beyond the Coalition and state and local officials. It also includes those juveniles for whose benefit the mandates were designed. Consultation via the Federal Register may in some cases be the most effective method of reaching all those who wish to have input. In other instances, consultation with the Coalition and/or the states alone may be adequate. Given the likely inapplicability of Section 553, the office has maximum flexibility to employ those consultative methods which are appropriate to the issues presented and audience most directly affected, which sometimes may include Federal Register publication and at other times less elaborate and expensive means.

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[230] *See* Executive Order 12372–Intergovernmental Review of Federal Programs, 3 CFR, 1982 Comp. at p. 197 (Sec. 1) ("Federal agencies shall provide opportunities for consultation by elected officials of those state and local governments that would provide the nonFederal funds for, or that would be directly affected by proposed Federal financial assistance . . . ."); Executive Order 12612–Federalism, 3 CFR, 1987 Comp. at 252 (Sec. 3(d)(3)). ("When undertaking to formulate and implement policies that have federalism implications, executive departments and agencies shall . . . [w]here national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.")

[231] *See* note 121 *supra*.

C. Use of the Federal Register for Notification Purposes

Regardless of the requirements of Section 553 of the APA to engage in a public notice-and-comment process prior to final rulemaking, the APA requires that certain agency "rules" be published in the Federal Register for the purpose of notifying the public of what the "law" is. Specifically, the statute mandates that "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public--. . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."[232] However, an agency need only "make available for public inspection and copying . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; . . . and administrative staff manuals and instructions to staff that affect a member of the public."[233]

Over the years, compliance by federal agencies with these requirements has left something to be desired if only because of the less than clearcut statutory distinction between those classes of materials which must be published and those which must be merely made publicly available.[234]

For the most part the office seems to have complied with statutory publication requirements. Its finally adopted legislative regulations appear in the Register, as have most of its important policy statements, including the de minimis standards, the original policy on "separateness" of facilities for jail removal purposes, and the nonsecure custody policy.

However, the 1991 "clarification" of the "separateness" definition[235] issued in connection with Wisconsin's renewed participation in the formula grant program was not published. Rather it was issued as a component of the agency's staff manuals. It is clear that inclusion of an agency statement of policy or interpretation in a staff manual does not excuse publication if that publication is otherwise required.[236] Such publication is required if it is a "statement of general policy" or "interpretative rule of general applicability."[237] Regardless which classification is appropriate for the 1991 "clarification," the statement certainly was "general" in the explicit scope of its

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[232]5 U.S.C. §552(a)(1)(D).

[233]*Id.* §552(a)(2)(B), (C).

[234]*See generally* Springer, *Gatekeeping and the Federal Register: An Analysis of the Publication Requirement of Section 552(a)(1)(D) of the Administrative Procedure Act*, 41 ADMIN. L. REV. 533 (1989).

[235]See text at notes 142-45 *supra*.

[236]*See, e.g.*,, Morton v. Ruiz, 415 U.S. 199 (1974).

[237]5 U.S.C. §552(a)(1)(D).

application. That is the characteristic which the relevant provisions of the APA seem to emphasize with regard to required publication. Without resorting to the caselaw, there is a strong textual argument, therefore, that the nonpublication of the "separateness" policy violates the APA.

Unfortunately, matters are not this simple. There are some cases which suggest that mere "clarifications" (as opposed to changes) need only be "made available" and not published.[238] However, those cases suggest that if a "clarification" has a "significant impact" on the "public," it may have to be published.[239] This latter part of the judicially-evolved test would appear to be satisfied with regard to the Office's 1991 "clarification" of the definition of separateness for jail removal purposes, given the important impact the policy may have on states seeking to comply with the jail removal mandate along with the derivative impact on juveniles who will be housed in "co-located" facilities. A confident conclusion regarding the need for publication of this "clarification" is muddied further in view of Professor Kenneth Culp Davis' evaluation of the caselaw to the effect that "[t]he law is neither that interpretations must be published nor that they need not be; it is that the answer usually depends on the court's sense of justice in light of the whole case."[240]

By the same token, the recent letter to New Jersey regarding the treatment of persons adjudicated originally before a juvenile court[241] arguably represented an interpretation or policy of general applicability and significant impact and therefore had to be published. However, it not only went unpublished, but, as far as can be determined, it had not been added to the agency's staff manuals for the information of OJJDP personnel and state juvenile justice specialists.

At least some of the "policy" statements and legal interpretations found in the two-volume staff manual[242] might likewise be subject to the publication requirement of the APA. It must be conceded, however, that the availability of these, along with the Wisconsin "clarification," in publications (i.e., the staff manuals) that reach those persons most interested in many of these issues--OJJDP and state agency personnel--might seem to make their Federal Register appearance more a matter of form than substance in terms of performing a true informing function. Yet, the New Jersey case and others[243]

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[238]*See, e.g.*,, Lewis v. Weinberger, 415 F. Supp. 652 (D.N.M. 1976). *See also* Springer, *supra* note 234, at 538-40.

[239]*See* Springer, *supra* note 234, at 538-40.

[240]K.C. Davis, Administrative Law of the Eighties 122 (1989).

[241]See text at note 228 *supra*.

[242]See text at note 121 *supra*.

[243]See text at notes 353-54 *infra* (discussing de minimis policy regarding monitoring data).

indicate that these manuals have not been regularly updated since their issuance in 1989-90 despite the fact that that was apparently the original intent of the office.

In sum, the office should pay more attention to the publication obligations of the APA in adopting new policies and interpretations as well as in changing or clarifying old ones. Professor Davis has himself suggested that "agencies should probably resolve doubts in favor of following the exact words" of the statute and thus publish.[244] The office should also take whatever steps are necessary to ensure expeditious and regular updating of its staff manuals.

Regardless of the form of communication--whether Federal Register, addition to staff manuals, or other means--from the office to the states, roughly a quarter of the state juvenile justice specialists found the clarity of the office's communications less than adequate.[245] In fact, in 1989 a group of specialists wrote the then Acting Administrator indicating that

> [p]olicy direction and rationale contained in the Federal Register are often unclear. . . . It would be advantageous to have regulations contained in the Federal Register . . . supplemented by . . . explanatory correspondence from the Office. The explanation would capture the essence of the information in the Federal Register in layman's terms. It could be used by the states for guidance when commenting on announcements in the Register.[246]

Accordingly, the office should make special efforts to explain its policies to the states more clearly and extensively and in a timely fashion.

D. Administrative Flexibility

We now focus on the administrative flexibility exhibited by OJJDP in its interpretation and enforcement of the statutory mandates. Monitoring will be dealt with in the next section. It should be noted at the outset that the findings in this section regarding administrative flexibility are based on a review of the statute, agency regulations and guidelines, along with interviews. We did not review all or even a random selection of grant files.

Keeping that caveat in mind, it can be said that, generally speaking, the office has possessed the administrative discretion needed to advance the

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[244]See Davis, *supra* note 240, at 122.

[245]See Appendix D2 at 7, which is available upon request from the Conference.

[246]Letter of State Juvenile Justice Specialists to Terrence Donahue, Acting Administrator OJJDP (May 15, 1989).

formula grant program objectives envisioned by Congress. Moreover, in the context of both the specificity of the mandates and the nature of a formula grant program which vests little policymaking discretion in the administering federal entity, SRAD has generally exhibited necessary and appropriate administrative flexibility in elaborating the various elements of the formula grant program. Additional flexibility and legal discretion might very well have resulted in a much lesser degree of compliance with the mandates than exists today as states resisted attempts to change their juvenile incarceration practices.

1. Overview

From both legislative and administrative perspectives, the evolution of the formula grant program has generally conformed to the same pattern: good faith efforts to achieve compliance and promote the adoption of sound professional law enforcement practices have been acknowledged and encouraged by time extensions or other types of relief, while there has been an insistence on ultimate compliance by a set date.

Over time, some administrative inventions have been adopted by Congress, as in the case of the 75% removal standard for substantial compliance with the DSO mandate, a standard later applied statutorily to jail removal.[247] Conversely, over the years, congressional committee reports have suggested additional areas for flexibility, which have been picked up by OJJDP in its formula grant regulations. For example, the 6- and 24-hour "holding" periods countenanced as exceptions to the literal commands of the jail removal and DSO mandates respectively originated in that fashion.[248] So too did the jail removal exceptions for "juveniles formally waived or transferred to criminal court and against whom criminal felony charges have been filed" and for "juveniles over whom a criminal court has original or concurrent jurisdiction and such court's jurisdiction has been invoked through the filing of criminal felony charges."[249]

It is not clear why Congress did not write the holding period exceptions into the language of the statute in view of the fact that the seemingly absolute language of the mandates appears otherwise to be misleading. However, at least with regard to DSO, the legislative history suggests that additional

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[247]See text at note 94 *supra*.

[248]See text at notes 65-68 and 92-93 *supra*.

[249]28 CFR 303(e)(2) (1991). See text at notes 86-89 *supra*. The House Committee referred to "criminal charges," see text at notes 86-89 *supra*, though the Office restricted the exemption to "felony" charges.

"exceptions" might fall within the "rule of reason" which Congress expected the Office to follow.[250]

It is possible that the legislature believed that codifying all these "exceptional circumstances" was impossible or unwise given the need for administrative flexibility. Alternatively, Congress may have hoped that the development of alternatives to secure holding of juveniles would develop to the point that eventually the office would be able to restrict or even eliminate the need for exceptions of various types. Drafting express exemption authority into the legislation may have been viewed as either opening up the door for too much administrative discretion in the office or diluting the "moral" force of the mandates and thereby encouraging states to delay their compliance efforts.

2. Separation Mandate

OJJDP has permitted states to set their own dates for full compliance with the separation mandate. Interestingly, the literal language of the statute does not necessarily point in that direction.[251] However, in view of the institutional changes (whether in terms of construction or operational plans) required to separate adults and juveniles incarcerated together, it would have been arguably unreasonable for Congress to insist upon immediate compliance. That Congress did not require immediate compliance with regard to the other mandates but rather recognized the need for adjustment periods suggests that it must have similarly realized that need in the case of the separation mandate. There is no legislative history indicating Congress' approval or disapproval of the Office's long-standing interpretation of the JJDP Act.

3. De Minimis Rules

In the context of the JJDP Act, the Office's development of a de minimis concept to excuse full (i.e., 100%) compliance with the mandates might be considered one of the more debatable exercises of administrative invention. After all, in providing for continued eligibility for funding in 1977, 1980 and 1988 where a state had achieved only "substantial" compliance but strictly limiting the time periods during which such a basis for relief would be available, Congress may have meant to convey that, following the expiration of those time periods, a state must have literally achieved the level of perfectly full compliance. The 1980 amendments to the JJDP Act required that "*no*

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[250]See S. Rep. No. 95-165, 95th Cong., 1st Sess. at 60-61 (1977) ("While Section 223(a)(12) appears to be an absolute prohibition, the committee recognizes that there may be rare situations in some states where short-term secure custody of status offenders is justified. For example [24 hour hold].").

[251]See text at notes 81-82 *supra*.

juvenile shall be detained or confined in any jail or lockup for adults" (outside rural areas).[252] Furthermore, as noted above, the articulation of the de minimis concept by the Office bears some resemblance to the statutory and administrative conditions for time extensions based on "substantial" compliance.[253]

Congress has neither in legislation nor legislative history (including oversight hearings) approved or disapproved the Office's general approach to defining "full compliance." It is, however, likely aware of it. The de minimis concepts as they apply to DSO and jail removal are clearly articulated or referred to in the agency's own grant regulations.

The analysis that follows concludes that, while the Office's general assertion of de minimis authority is or should be considered within its lawful discretion, certain important aspects of its existing de minimis policies may not be.

a. Caselaw on De Minimis Authority

Congressional inaction in response to the office's de minimis approach cannot convey administrative power to depart from existing statutory mandates. The Office's claimed de minimis authority must ultimately rest on some firmer foundation.

Recent judicial decisions outside the grant area have focused on the authority of an agency to permit "de minimis" departures from what otherwise appear to be clear statutory requirements. *Alabama Power Co. v. Costle*,[254] in which one panel of the Court of Appeals for the District of Columbia Circuit reviewed the regulations of the Environmental Protection Agency for preserving clean air quality, appears to have established the prevailing approach to examining assertions of agency power of this nature. In his opinion for the court, Judge Leventhal noted:

> Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*. It is common-place, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures

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[252]See text following note 84 *supra*.

[253]See text at note 179-80 *supra*.

[254]636 F.2d 323 (D.C. Cir. 1979).

> of effort . . . . The ability, which we describe here, to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.
>
> Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing. But we think most regulatory statutes . . . permit such agency showings in appropriate cases.

While the difference is one of degree, the difference of degree is an important one. Unless Congress has been extraordinarily rigid, there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value. That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history.[255]

Given the number of complex issues presented, the court's opinion was divided among the three judges. Judge Wilkey's opinion also alludes to the de minimis concept. However, he appears to take a position somewhat distinct from Judge Leventhal's. Specifically, Judge Wilkey suggests that "administrative burdens" can to some extent form the basis for an agency's fashioning of de minimis exceptions,[256] while Judge Leventhal indicates that the absence of benefits is the touchstone for a finding of de minimis authority.[257]

At one point in his analysis, Judge Leventhal links his approach to de minimis authority with what he considered to be an accepted qualification to the "plain meaning rule" of statutory construction, that is to say, "a court must look beyond the words to the purpose of the act where its literal terms lead to 'absurd or futile results.'"[258] At least three members of the Supreme Court (Justices Kennedy, O'Connor, and Rehnquist) have recently suggested a very narrow view of "absurdity" for the purposes of this exception to "plain

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[255]*Id.* at 360-61 (opinion by Leventhal, J.).

[256]*Id.* at 405 (opinion by Wilkey, J.).

[257]*See* Oren, *Detail and Delegation: A Study in Statutory Specificity*, 15 COLUM. J. ENVIR. LAW 143, 203 (1990).

[258]636 F.2d at 360 n.89.

meaning."[259] With the departures of Justices Brennan and Marshall, the appointment of new members of the Court who are likely to share Justice Kennedy's view, and given Justice Scalia's textualism,[260] it is possible that agency de minimis authority will be viewed even more narrowly than Judge Leventhal if the Court ever reviews a case in which its legality is at issue.

To date, however, the lower courts which have considered agency assertion of de minimis authority have relied on Judge Leventhal's opinion in *Alabama Power* and, therefore, have suggested that a balancing of costs (including perhaps administrative costs) and benefits is not permitted.[261] In *Public Citizen v. F.T.C.*,[262] Judge Wald explicated the apparent basis[263] for the very narrow approach to de minimis authority which focuses not on net benefits but on gross benefits:

> While agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to second-guess Congress' calculations.[264]

In other words, a more generous approach to de minimis authority would basically vest in agencies the power to depart in perhaps substantial degree from congressional directives and goals in the name of cost minimization and thereby alter the agency/legislature balance. The difficulty of judicially imposing some limits on such authority would be increased by the inability or unwillingness of the courts to second-guess an agency's balance of what might be intangible or otherwise difficult-to-quantify factors.[265]

Several final comments with regard to the *Alabama Power* test are appropriate before applying it to OJJDP's de minimis standards. First of all,

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[259]Public Citizen v. United States Department of Justice, 491 U.S. 440, 470 (Powell, J., concurring and suggesting that "absurd" means "where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.").

[260]Justice Scalia took no part in the decision in *Public Citizen*. For one analysis of his views on statutory interpretation, *see* Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

[261]*See, e.g.*,, Public Citizen v. Federal Trade Commission, 869 F.2d 1541, 1556-57 (D.C. Cir. 1989); Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987); Sierra Club v. E.P.A., 719 F.2d 436 (D.C. Cir. 1983).

[262]869 F.2d 1541.

[263]*See* Oren, *supra* note 257, at 202.

[264]869 F.2d at 1557. *See also* Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992).

[265]*See* Oren, *supra* note 257, at 202.

Judge Leventhal speaks in terms of a presumption in favor of de minimis authority even in the constricted form which he envisions for that power. Congress can, obviously, overcome that presumption. In several recent cases, including *Public Citizen v. Young*,[266] the courts found such congressional intent to negate the authority in the text and legislative history of the Delaney Clause of the Food, Drug and Cosmetic Act.[267] Secondly, *Alabama Power* and its progeny have all involved regulatory statutes, not grant programs. These considerations make reliance on *Alabama Power* to support OJJDP's de minimis authority problematical for reasons which relate both to the grant area in general and to the program administered by OJJDP in particular.

b. Alabama Power's Application to the OJJDP Formula Grant Program

The notion of de minimis noncompliance appears not to have developed in the grant area. The need for it is simply not generally present since it is accepted that "substantial" compliance is all that is necessary to ward off grant termination.[268] "Substantial" compliance is certainly generous enough to include within it at least most levels of noncompliance which could be labeled "de minimis." Furthermore, as noted above, the congressional definition of "substantial" compliance in the JJDP Act might be taken as an implicit statement that any departures from a literal reading of the mandates constitute "substantial" noncompliance which must trigger grant ineligibility.[269] If such congressional intent exists, it would constitute the type of congressional negation of de minimis authority which would overcome the *Alabama Power* presumption (assuming that presumption is applicable). However, Congress has apparently known of and yet not expressly disapproved the office's power in this regard. This might be taken as some support for continued application of the presumption in the case of OJJDP, though cautions against reading meaning into congressional silence and inaction are legion.[270]

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[266]831 F.2d 1108 (D.C. Cir. 1987). *See also* Les v. Reilly, ___ F.2d ___ (9th Cir. 1992), 5 Ad. L. 3d 333 (invalidating EPA order permitting use as food additives of four pesticides which have been found to induce cancer).

[267]21 U.S.C. §376 (listing of color additive "found . . . to induce cancer in man or animal" prohibited). *See also* Les v. Reilly, ___ F.2d ___ (9th Cir. 1992), 5 Ad. L.3d (invalidating EPA order 333 permitting use of food pesticides or food additives although they have been found to induce cancer). *See generally* Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 Admin. L. Rev. 267 (1988).

[268]See text at note 151 *supra*.

[269]See text at notes 252-53 *supra*.

[270]*See* Eskridge & Frickey, *supra* note 225, at 760-774. Congress first added the "substantial" compliance test to the Act in 1977 with regard to DSO (the 75% test) and then in 1980 extended that concept with the jail removal mandate (the 75% test) and DSO (i.e., 100% of

While the office considers de minimis levels of noncompliance "violations" of the mandates, it does not terminate or refuse to renew funding on that basis. Despite the fact that *Alabama Power* (1979) had been decided prior to the issuance of OJJDP's first de minimis standard (DSO) in 1981 but after Congress had amended the JJDP Act to incorporate various "substantial" compliance standards (1977 and 1980),[271] the Office's public justifications for its de minimis practices have not attempted to answer the textual argument for negation of de minimis authority presented above.[272] Rather, it has relied on the general notion that "the law cares not for small things, without, however, examining the relevance of *Alabama Power.*"[273] The office basically justifies its assertion of de minimis authority on its need to be "reasonable" in administering a formula grant program whose termination might not only strain federal/state relations but also destroy many important and beneficial juvenile justice projects.

The "regulatory" aspects of the formula grant program as they apply to the mandates themselves[274] might be deemed sufficient to make *Alabama Power* applicable to the Office's operations, regardless of that case's relevance to other types of grant programs.

Assuming, however, that Judge Leventhal's test is the appropriate one to apply and that Congress has not negated entirely OJJDP's de minimis authority as relates to compliance with the mandates, how do its various de minimis approaches fare? Even at this level, the result of *Alabama Power*'s application is not clearcut.

The crucial question might be phrased as follows: will OJJDP's grant termination, nonrenewal *or the threat thereof* on the basis of a "small" number of violations "yield a gain of trivial or no value"?[275] In addressing this, on the one hand, it might be argued that imposition of such sanctions or making such threats will or, at least, might force a state to remove all its status offenders

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status offenders removed from correctional facilities). In November 1988 it enacted the alternative substantial compliance standard for jail removal. Meanwhile, the DSO de minimis was published in 1980-81; the first part of the jail removal de minimis (i.e., state law violations) in 1985; and the second part of the jail removal de minimis (i.e., 9% or exceptional circumstances) during 1988 prior to enactment of the 1988 amendments to the JJDP Act. In short, the substantial compliance notion developed *before* OJJDP's de minimis concept was publicly articulated but Congress continued to elaborate and extend the substantial compliance concept during the same period the Office was extending its de minimis authority.

[271]See note 270 *supra*.

[272]*See* 46 Fed. Reg. 2566-2569 (Jan. 9, 1981); 53 Fed. Reg. 44370 (Nov. 2, 1988).

[273]*See* 46 Fed. Reg. 2566.

[274]*See, e.g.*,, text at notes 160-98 *supra*.

[275]See text at note 255 *supra*.

from secure detention and correctional facilities and all juveniles from adult jails and thus produce a "gain of [more than] trivial or no value." On the other hand, termination of a grant may have no effect other than cutting off projects benefitting the juvenile population of a state, including those juveniles who are incarcerated and who may, given additional state efforts aided by the grant funds, later be deinstitutionalized. In other words, whether there will be benefits in the absence of the de minimis rule is simply not clear. Since, under the Leventhal test, the burden is on the agency to establish the case for this authority, doubts regarding the existence of "gross benefits" could result in a finding that no such authority exists as a matter of law.[276] *Alabama Power* appears, however, to have contemplated that the consequence of the exercise of de minimis authority would be the absence of "regulation." Yet, as noted above, the de minimis concepts as they are applied to DSO and jail removal do not accept the status quo but rather require further state efforts to attain 100% compliance as a condition for continued funding under the de minimis concept.[277]

This rather lengthy examination with regard to the applicability of *Alabama Power* to the office's use of the de minimis concept yields only uncertainty: it is simply not clear whether a court confronted by a challenge to the office's exercise of that authority and relying on the *Alabama Power* "test" would invalidate the Office's de minimis policies as ultra vires. Yet *Alabama Power* appears to be the modern and accepted test for de minimis authority in the administrative area. Clearly the concern that underlies its narrow formulation (i.e., where regulation will yield trivial or no benefits) is genuine: too generous a concession of de minimis authority would permit agencies to rewrite congressional legislation based on cost/benefit calculations. This fear is no less relevant in the grant area, particularly with regard to a formula grant program like that administered by the Office where the policymaking discretion of the agency is, by design, small to start with. This is a classic "slippery-slope" problem and line drawing must, of necessity, be rather arbitrary if any line-drawing is in fact to be permitted.

Nevertheless, it is easy to be sympathetic to the notion that incarceration of a small number of juveniles in violation of the mandates should not mean that many important and useful state and local programs for the improvement of the juvenile justice system and prevention and treatment of delinquency will lose necessary funding. The case for the Office's authority to overlook such violations in its grant award decisions clearly strengthened by its insistence

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[276]*See, e.g.*,, Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992). Sierra Club v. EPA, 719 F.2d at 463; Environmental Defense Fund v. EPA, 636 F.2d 1267, 1283-84 (D.C. Cir. 1980).

[277]See text at notes 174-75, 187 *supra*.

that continued eligibility for funding requires a showing of progress towards 100% compliance. Moreover, once compliance is achieved, there remains the problem of its maintenance. It would be unreasonable not to expect some "backsliding" due to circumstances over which the state may lack substantial control. Consistently over the years Congress has been receptive to arguments for recognizing good faith efforts by states to meet the mandates and has also recognized the need for a "rule of reason" with regard to at least some parts of the formula grant program. This too suggests that literalism in the Office's enforcement efforts may be inappropriate.

c. Analysis of Office's De Minimis Standards

At this point we will examine various aspects of the DSO and jail removal de minimis standards in light of the foregoing arguments for some administrative leeway in determining compliance with the mandates.

1. Numerical Standards.

Both DSO and jail removal standards include statistical measures for determining de minimis levels of noncompliance, calculated on an annual basis. The former ranges from 5.8 to 29.4 instances of institutionalization per 100,000 population under the age of 18.[278] The latter does not rely on a range. Rather, 9 instances of jailing per 100,000 of juvenile population constitutes the touchstone.[279]

In arriving at a statistical measure of "de minimis" violations, two general approaches might be taken. The first would be to determine whether a particular number of violations was "minimal" in quantity in some absolute sense. The problem with this is the lack of any standard whatsoever--other than pure intuition. ("I know it when I see it.") The second, and arguably preferable, method would be to rely on some point of reference, that is to say, to determine what is "minimal" in comparison to some known reliable statistic of relevance.

It is this latter approach that OJJDP adopted by relying on what it deemed adequate monitoring data indicating how many youths were securely held or jailed in those states which held the least number.[280] However, the conceptual difficulty with OJJDP's choice of a comparative baseline is its implicit acceptance of violations of the statute as permissible in some sense--which they are not. In other words, that state A has no more violations than state B and

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[278]See text following note 175 *supra*.

[279]See text following note 185 *supra*.

[280]See 46 Fed. Reg. 2567; 53 Fed. Reg. 44371.

that state B is better in terms of compliance than most other states does not necessarily suggest that the levels of noncompliance of states A and B are minimal in the ordinarily utilized sense of that word. Moreover, it is not clear why the point of comparison picked by OJJDP focuses on the states' population of all juveniles, including even those who have not been securely held, jailed, or even taken into custody.

Other comparative baselines could in fact be considered. For example, for DSO one such point of comparison might be the population of juveniles in the state that applies for a de minimis finding who were alleged or adjudicated status offenders and nonoffenders and who were taken into custody over the period of 1 year. In the case of jail removal the baseline might be juvenile offenders (whether status or otherwise) taken into custody over that same period of time.[281] At least these measures do not implicitly accept as a given a certain level of mandate violation. Whatever the baseline chosen, it should probably be updated on a yearly basis or some regular interval of time, something that is not currently done with regard to the OJJDP de minimis standards.[282] Unfortunately, whatever comparative baseline is chosen, determinations of what number is "minimal" are, in great degree, arbitrary by nature. The courts are likely to defer to agency judgment if that falls within a "zone of reasonableness."

In sum, while the Office's choice of a numerical approach to de minimis is appropriate, its selected basis for comparison and refusal to revise that basis regularly are open to some question. It is, however, next to impossible to determine in advance whether a court would view the OJJDP's existing statistical measures of de minimis as being within that "zone of reasonableness."

2. *Violations of State Law and Unforeseen Circumstances*

All de minimis standards used by the Office acknowledge that some holding of juveniles may occur in violation of state law or policy and that this requires special treatment.[283] With regard to jail removal (as well as separation[284]) the Office has not subjected this category of mandate violation to

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[281] During 1988, approximately 834,985 juveniles were taken into custody, 65,263 in adult jails alone, that is at a rate of 3,230 per 100,000 of juvenile population (or 255 per 100,000 for those in adult jails). See B. Krisberg, et al., Juveniles Taken into Custody: Fiscal Year 1990 Report (Sept. 1991) at Tables 1, 2 & 3. It is not clear what percentage of these were status offenders and nonoffenders and what percentage were accused or convicted delinquents.

[282] *See* text following note 177 *supra*.

[283] *See* text at notes 173, 182 *supra*.

[284] *See* text at note 128 *supra*.

a numerical standard, though it does require that there not be evidence of a "pattern or practice" of violation of state law or policy,[285] thus implicitly limiting the likely number of countenanced violations. With DSO, the statistical measures of de minimis do in fact count even these instances of random violation of state law as well as those constituting a "pattern or practice."[286] Elimination of this category of mandate violation may be all but impossible if only because many of the violations may be due simply to mistakes made by arresting officers or other officials (some of whom may be new to their jobs and unfamiliar with applicable requirements). Alternatively, such violations may be necessitated by unusual circumstances, such as the need to securely hold a status offender beyond the permitted 24-hour period for his or her own protection. In fact, even under *Alabama Power*, to the extent it is deemed impossible as a practical matter for a state to eliminate all noncompliant instances, there may be implied de minimis authority to encompass these situations since termination or threatened termination of a grant would seem to create no benefits whatsoever, only losses to the juvenile population in terms of available programs.

Moreover, the Office does not accept this type of violation as a "given" to be tolerated without the need for remedial action. Rather, it requires that existing mechanisms for the enforcement of state law be such that reoccurrence of violation be unlikely (separation and jail removal)[287] and that the state develop a plan to eliminate these instances (DSO and jail removal).[288]

3. *Progress and Backsliding*

Insistence that the "status quo" is not acceptable and that the state provide some assurance that it can do better in the future is mirrored also in the Office's requirement that a state develop a plan to eliminate even the nine or less violations of the jail removal requirement[289] and the general requirements which apply to both DSO and jail removal (when compliance status is determined by the numerical measure) that the state show progress toward 100% percent compliance in order to retain eligibility for continued funding.[290]

In point of fact, determining the existence of "progress" opens the way for the exercise of some discretion. For example, the monitoring reports for 1 year may indicate 10 instances of incarceration of status offenders spread

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[285] *See* text at notes 128 and 182 *supra*.

[286] 46 Fed. Reg. 2567-68.

[287] 28 CFR 303(f)(6)(ii)(B)(4); (f)(6)(iii)(C)(1)(iv) (1991).

[288] 28 CFR 303(f)(6)(iii)(C)(1)(v) (1991); 56 Fed. Reg. 2568.

[289] 28 CFR 303(f)(6)(iii)(C)(2)(ii) (1991).

[290] 28 CFR 303(f)(6)(iii)(C)(2)(iv) (1991); 46 Fed. Reg. 2566.

throughout the state. The next year's report might show 12 or 13 such instances but all concentrated in one or two judicial districts where a particular judge or judges resistent to the mandates may preside. In the Office's view this may constitute "progress," since the violations are concentrated in only one or two areas of the state. In other words, progress is unlikely to be viewed strictly in terms of a relentless reduction in individual violations each year, nor should it as a practical matter.

Moreover, the de minimis standards should be and are in fact applicable to protect funding in the case of a state's backsliding in maintaining compliance due to unusual circumstances or circumstances effectively out of its control. For DSO purposes, those might include the holding of federal wards or out-of-state runaways.[291] And with respect to all three mandates, mistakes at the local level or exceptional situations may occur and yet some leeway for forgiveness should be available.

4. "Recently Enacted Changes in State Law"

The most dubious aspect of the DSO and jail removal de minimis standards are those provisions that permit continued funding where the numerical minima have been exceeded, perhaps in very significant degree. In those instances the Office requires that the state have recently enacted changes in state law which will "have a substantial, significant, and positive impact on the State's achieving full compliance" with the DSO mandate "within a reasonable time"[292] and on the "state's achieving full (100%) compliance or full compliance with de minimis exceptions" with the jail removal mandate "by the end of the monitoring period immediately following the monitoring period under consideration."[293]

These standards may in fact accommodate numbers of violations which could be regarded as far from "minimal." For DSO, the date of final compliance is placed somewhere within a "reasonable" period of time. Moreover, while the jail removal de minimis looks toward full compliance by the end of the next monitoring period, its language appears to allow for continued funding even when possibly substantial doubts remain regarding the ability of a state to achieve compliance within that timeframe. It appears that in some cases, such as Montana, the Office has accepted the mere enactment of jail removal legislation as sufficient in itself to justify a finding of de minimis full compliance despite the unlikelihood that alternatives to adult jails would be created in the near term. All the regulations require is that the recently

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[291] 46 Fed. Reg. 2567.

[292] 46 Fed. Reg. 2567.

[293] 28 CFR §303(f)(6)(iii)(C)(2)(iii) (1991).

enacted changes in state law have a "substantial, significant, and positive" impact on achieving compliance within a year, not that they by themselves assure compliance within that year.[294] When that next year's monitoring data are submitted and full compliance is not shown, however, at that point apparently the Office will not make a de minimis finding on the basis of "recent" changes in state law.

Permitting continued funding on the "recently enacted state law" basis suggests more in the nature of a finding of "substantial" compliance.[295] It also bears a close resemblance to the administratively-imposed conditions for a waiver of full compliance with the jail removal mandate.[296] However, one of the *statutory* conditions for a waiver is the state's commitment of all formula grant funds to jail removal compliance,[297] something which is not an element of continued funding on a de minimis basis.

5. Summary of Evaluation

In sum, to the extent the Office applies "de minimis" standards keyed to the existence of "recently enacted law" which are not numerically limited, it will not only be permitting continued funding of programs which cannot qualify for a finding of substantial compliance (which is unavailable with regard to grant awards for fiscal years beyond 1989). It will also allow funding which would otherwise be permitted only under the conditions of a jail removal waiver. The DSO de minimis standard permits continued funding beyond the statutory final compliance dates.[298] In protecting state eligibility in this way while countenancing a seemingly significant number of mandate violations, the Office may be violating the JJDP Act.

On the other hand, some type of numerical standard for de minimis, the provisions discounting (within numerical or other strict limits) both violations of state law or policy and those caused by unavoidable or unforeseen circumstances, and the "progress" requirements are appropriate and should be

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[294]*But see* 53 Fed. Reg. at 44371 ("This exceptional circumstance will only be applied where the legislation is expected to produce full (100%) compliance or full compliance with de minimis exceptions by the end of the monitoring period immediately following the monitoring period under consideration."). In a sense, this aspect of de minimis gives a state a "last chance" remedy to avoid termination or use of one of its limited number of waivers.

[295]*See, e.g.,*, text at notes 179-80 *supra*.

[296]*See* 28 CFR §303(f)(6)(D)(iii), (v) (1991) and text at notes 164-65 *supra*.

[297]*See* text at note 103 *supra*.

[298]In the case of the jail removal de minimis standards, the "recently enacted law" provision may not permit escape from the numerical measures of de minimis for two or more consecutive years. These provisions might, however, be invoked for a state, if not in successive years, then on several occasions over the years as backsliding develops.

deemed to be lawful exercises of the Office's discretion even if they do not fit within the Leventhal test for de minimis authority in *Alabama Power*.[299] However, the specific numerical measures chosen by OJJDP and the comparative baselines utilized might be subject to challenge.

Finally, it should be noted that the articulation and application of the Office's de minimis standards have apparently not provoked controversy in the states.

4. Substantial Compliance

Until recently, the Office's definitions of "substantial" compliance in the DSO and jail removal contexts were largely a matter of historical interest. Prior to the enactment of the recent amendments to the JJDP Act, for grant awards made for the 1991 fiscal year and beyond, relief on the basis of "substantial" compliance with the mandates was no longer available.[300] However, for those fiscal years prior to 1991 as to which findings of substantial compliance were relevant, the Office's legislative regulations either merely repeated the statutory conditions or elaborated on them in ways that seemed to fit comfortably within the statutory terms.[301] There was one exception to this: while the statute required (for jail removal purposes) removal of all status and nonoffenders from adult jails and lockups, the regulations created what amounted to a de minimis noncompliance standard for status offenders and nonoffenders securely held in violation of state law where there was no pattern or practice to violate that law.[302] However, based on the reasoning set forth previously,[303] there appears to have been a good argument in favor of this type of exception.

Otherwise, in administering the provisions for "substantial" compliance, the agency has exhibited some flexibility. Pennsylvania is a recent example. In determining whether the state had expended and would expend "an

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[299]For articles dealing with issues of exceptions and waivers in other administrative settings, *see* Aman, *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277; Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through An Exceptions Process*, 1984 DUKE L.J. 163; Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938 (1984). *See generally* Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991).

[300]See text following note 103 *supra*. But see text at note 403 *infra* discussing the 1992 JJDP Act amendments which reestablish "substantial compliance" as an extension mechanism.

[301]*See* text at notes 151-58 *supra*. The regulations for substantial compliance and waiver were further elaborated in OJJDP, Instructions/Alternative Substantive Compliance and Waiver of Termination (June 1985).

[302]28 CFR §303(f)(6)(iii)(A)(2)(i) (1991).

[303]See text at notes 283-88 *supra*.

appropriate and significant" share of its formula grant funds to achieve jail removal,[304] the Office permitted the state to average its expenditures made in various years in such a way that it could achieve the requisite 40% of program funds.[305]

5. Waiver

The only express statutory limitation on the availability of waiver is that the waiver state agree to apply all of its formula grant funds (with certain limited exceptions) to achieve compliance with the jail removal mandate.[306] In recognition of the legislative history of this provision,[307] however, the Office announced its intention to limit waivers to "those situations where, although [full compliance has not been achieved], the state has made significant progress in removing juveniles from adult jails and lockups, and there is substantive evidence that additional funding is likely to produce further progress toward full compliance."[308] Most of the conditions added by the Office in its grant regulations to the eligibility for a waiver[309] are designed to reflect these congressional concerns.[310]

Prominent among the administrative conditions on the availability of a jail removal waiver is the three-waiver limit,[311] the basis for which the agency did not explain in the preambles to either the proposed or final grant regulations issued in 1989 (the last occasion to date for amendment of these regulations).[312] The legislative history of the waiver provision does not refer to such a limit. Obviously the Office believed that, without a limit, states might be encouraged to slow their efforts at compliance and that the initiatives at OJJDP to hurry compliance along would be undercut to some, perhaps a substantial, degree.

As it turns out, while a number of states will have the waiver mechanism available until Congress can complete reauthorization of the JJDP Act

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[304]See text at note 99 *supra*.

[305]28 CFR 303(f)(6)(iii)(A)(2)(iv) (1991).

[306]See text at note 103 *supra*.

[307]See 54 Fed. Reg. at 32619-20.

[308]*Id.*

[309]*See* text at notes 160-61 *supra*.

[310]See 54 Fed. Reg. at 32619. In 1989, there were contentions made that the Office should require an "unequivocal" commitment to achieving full compliance with the jail removal mandate as a waiver condition, rather than a "mere" commitment. *See* 54 Fed. Reg. 32619. It was argued, inter alia, that "requiring a lesser commitment for a state in the context of an application for a waiver than is required for that state to achieve substantial compliance weakens the Act's compliance scheme . . . ." *Id.* The Office rejected this position.

[311]See text at note 163 *supra*.

[312]See 54 Fed. Reg. 14768-69 (April 12, 1989); 54 Fed. Reg. 32618-621 (Aug. 8, 1989).

(expected in 1992), several states will not be so fortunate, having reached the three-waiver limit prior to their application for the 1992 fiscal year grant awards.[313] This situation has created pressure on the Office to consider some type of modification to its three waiver limit.

It is difficult to summon an argument that the administratively imposed limits on the availability of waiver violate the JJDP Act. They appear to be entirely consistent with the pattern followed by both Congress and the Office in permitting extensions of deadlines for full compliance in the case of those states which have shown progress in the past and show a planned commitment in one way or another to achieve full compliance within a reasonably short period of time.[314]

6. A Recent Controversial Example of Administrative Discretion

While the same issue might have been presented outside the waiver context, one of the most controversial recent decisions by the Office arose from Wisconsin's application to remain a participating state. Its participation depended on its eligibility for a waiver. That eligibility turned on whether its plan for achieving the jail removal mandate was acceptable to the Office and that acceptability depended on the definition of "jail" employed by the Office.

As viewed by Wisconsin, the problem can be described as follows. It is a largely rural state with few counties having sufficient populations of juvenile offenders to justify the costs of separate juvenile detention and correctional facilities. Thus solution to the jail removal problem might require, among other things, the creation of regional facilities to which accused or convicted delinquents can be transported. The creation of those regional facilities is likely to be expensive. Moreover, it will require the cooperation of several of Wisconsin's counties, which are the dominant governmental structures in the state for many purposes and would have to take it upon themselves to finance the cost of these regional facilities. In addition, the counties might find it difficult to cooperate on this matter.

Consequently, the state, faced with the possible loss of federal grant funds for noncompliance with the JJDP Act, arrived at a plan whereby existing facilities housing adult jails could be modified to house juveniles in an assertedly separate part. In fact, early in the 1980s Wisconsin had proposed and the Office accepted as "jail removal" the location of a juvenile facility in the same building that housed an adult jail on the condition of "total

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[313]See Appendix B, which is available upon request from the Conference.

[314]*See, e.g.*,, text at notes 153-58 *supra*.

separation" of those facilities, that is to say, different staff and different physical quarters for all activities.

As noted previously, in 1984 the Office formally adopted a definition of "separateness" which permitted so-called co-located juvenile and adult facilities.[315] Thereafter, whenever a state proposed a co-located facility, the Office emphasized the need for "total separateness" in terms of both staff and spatial areas utilized. On one occasion the State of Maine suffered a rejection of its jail removal plan for failure to satisfy these criteria.

In 1988 Wisconsin's jail removal plan proposed to the Office phased use of some spatial areas in the same building for both juveniles and adults and reliance on security staff available to serve both populations but on different days. Advised that this was unacceptable, the state notified OJJDP in June 1989 that it had decided not to participate further in the formula grant program. In the spring of 1990, however, following discussions with the newly appointed Administrator of the Office, the state requested that the Office again review its plan for compliance with the jail removal mandate. This time, following staff examination, a modified plan was found acceptable, apparently without consulting with OJP's Office of General Counsel in advance. In July 1990 Wisconsin notified the Office that it wished to resume participation in the formula grant program and later applied for its fiscal year 1989 allotment. On September 27, 1990 it also applied for a waiver. In October, OJJDP approved the state's waiver request and awarded the grant.

OJJDP's decision on the modified Wisconsin plan was premised on a view of the "jail removal" mandate which permitted staff and spatial area sharing under limited conditions.[316] This "interpretation" of the "separateness" definition found in the Office's formula grant regulations[317] was not formally issued as a "policy" statement until July 1991 in a memorandum from the SRAD Division Director addressed to SAG chairs, state juvenile justice specialists and others.

In making the decision on the Wisconsin waiver and in later issuing the policy statement, the Office did not engage in notice-and-comment procedures or otherwise formally consult with the National Coalition or the states generally. What "consultation" with outsiders did occur appears to have taken place in large part (if not entirely) after the decision was made on the Wisconsin waiver and in the form of telephone conversations initiated from the outside in reaction to the decision. The policy statement was not issued in the Federal Register but was to be made part of the agency's staff manuals.

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[315]See text at notes 137-41 *supra*.

[316]See text at notes 142-43 *supra*.

[317]See text at notes 140-41 *supra*.

For some states, such as Wisconsin, New Mexico and South Carolina, this policy statement is a welcome approach to the jail removal mandate because it recognizes the need for state flexibility and cost effectiveness. For others, like Maine, the recently articulated view is not only a change in the Office's position but perhaps an amendment to its regulations. More importantly, for them it effectively represents the abandonment of the jail removal mandate[318] and undercuts the efforts they have made over the years to convince their legislatures, sheriffs and police departments to remove juveniles from adult jails, establish entirely separate facilities, and/or seek solutions to treatment of juvenile crime that do not involve incarceration.

This is not the place to attempt to resolve whether the Office has in fact changed its regulations rather than "clarified" its views on the separateness criteria. Nor is it appropriate here to determine whether, regardless of the characterization of the recent policy statement, it is consistent with the statutory jail removal mandate or represents good social policy. These particular issues are not relevant to this study. Unfortunately, all of the heat generated by this case creates the danger that an overall judgment on the operation of the Office might be unduly affected by this one incident.

There are, however, problems implicating administrative flexibility and discretion illustrated by the Wisconsin case that are important for present purposes.[319] Many of those same issues arose in connection with another recent case: the Office's response to New Jersey's inquiry regarding the treatment of 18 year-olds initially sentenced by juvenile courts.[320] This should increase the Office's sense of urgency in dealing with these matters.

First, with regard to the need for predecisional consultation, it was apparent to the Office that an affirmative decision with regard to the Wisconsin waiver request would at least appear to be a fundamental change in its position. Moreover, that decision might undercut the efforts of many state juvenile justice officials and activists who had worked hard to remove juveniles from adult facilities and jail-like environments for many years and who had previously expressed objection to the Office's permitting any juvenile incarceration in the same facility housing an adult jail. The public controversy that ultimately arose was entirely predictable.

Whether the policy that was applied in the Wisconsin case is properly designated a "clarification" (as the Office characterizes it) or a change in its regulation or views is in large degree beside the point in addressing the need for prior consultation. Of course, as a legal matter, if it were a change in the

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[318]See text following note 55 *supra*.

[319]We have briefly touched upon some of these previously. See text at notes 206-40 *supra*.

[320]See text at note 228 *supra*.

regulations there might be some argument[321] that the Office was obliged to engage in notice-and-comment rulemaking prior to the final issuance of the "policy" statement, and arguably before the decision on Wisconsin's request since agencies are not at liberty to disregard their own legislative regulations.[322]

But more importantly, it is simply not good administrative practice to omit consultation in the circumstances that confronted the Office in the spring and summer of 1990 when a review of an important and controversial policy was clearly in the works. The agency was denied the benefit of outside viewpoints which, though the content may have been anticipated by at least some in the Office, might have received more thorough consideration if formally solicited and received before the Office moved too far along in negotiations and discussion with Wisconsin. By the same token, some states and the Coalition would not have felt that their concerns--to say nothing of the jail removal mandate itself--were irrelevant to the Office. Appropriate consultation may have involved "formal" notice-and-comment procedures or less formal methods.[323]

The co-located facility issue is certainly a volatile one with a lengthy history. It would seem that it is just such issues that require fuller prior airing than afforded by the Office. In fact it may very well be that, had the Office directly involved the Coalition and other interested parties early on in its decisional process, it could have convinced them at least of its good faith in dealing with a difficult matter of interpretation and policy and thereby nurtured confidence in its stewardship.

Almost a year elapsed before the Office formally issued a policy statement that articulated its views on the meaning of its "separateness" regulation. This delay occurred while confusion reigned over what was the Office's policy and how to react to it in planning for compliance with the mandates. Delays of this nature in communicating policy to the states simply must be avoided. Moreover, as noted previously, the method ultimately chosen for making the Office's views publicly known was a memorandum distributed to agency staff and state officials. Yet, in the circumstances, publication of the "clarification" in the Federal Register may very well have been required.[324]

It is commonplace for agencies to change their policies and interpretations. That is obviously an important and legitimate aspect of their ability to respond to changed circumstances or new information. The courts, however, generally

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[321]See note 219 *supra*.

[322]*See, e.g.*,, Montilla v. INS, 926 F.2d 162 (2d Cir. 162). *See generally* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

[323]See text following note 231 *supra*.

[324]See text at notes 235-40 *supra*.

expect adequate explanations for these changes.[325] In the circumstances confronting the Office with regard to Wisconsin, where the Office knew that at least some outsiders would view its decision as a change, the Office should have explained in the policy statement more fully why it deemed it appropriate, in the context of the jail removal mandate and good policy, to construe its regulations in the manner set forth in the memorandum. This is true even if, as the Office claims, the "clarification" did not represent a real change in its position. Yet the Office merely offered its view of the meaning of the "separateness" regulation. An explanation has the functional significance of assisting those seeking to apply a policy to disparate circumstances and, more to the point here, may dispel fears of administrative arbitrariness and increase the perceived legitimacy of the agency's decision among those affected.[326] Moreover, as noted previously, state juvenile justice specialists have requested such clarifications in reasoning from the Office in the past.[327]

Finally, the apparent post hoc involvement of the Office of General Counsel in the decisionmaking process in the Wisconsin case simply does not reflect sound administrative practice. This is true even though, ultimately, a series of legal opinions supported the Administrator's decision. First, post hoc requests for legal opinions inevitably place attorneys in a position where there are pressures of various kinds that may limit the ability of the attorney to fully explore all aspects of a problem with appropriate objectivity. Second, even if the attorney warns of the possible adverse impact of a proposed course of action or expresses his or her considered opinion, that opinion may not have the effect it might otherwise have on the decisionmaking process.

Unfortunately in the case of OJJDP, there have been occasions in the past when the Office of General Counsel of OJP has not been able to offer its services to OJJDP staff. Apparently this has at times, at least, been the result of decisions within OJJDP itself. Clearly the lack of an assured source of predecisional legal and other advice from an attorney or attorneys can be a source of significant problems. Apparently there is a staff attorney position in OJJDP[328] which remains unfilled because of decisions of OJP. This position should be promptly filled to assure the Administrator and the Office's staff ready access to general program legal advice when needed and to serve as a

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[325]*See, e.g.,*, Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983); International Union, United Automobile Workers of America v. NLRB, 802 F.2d 969 (7th Cir. 1986).

[326]*See generally, e.g.,*, Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

[327]See text at notes 245-46 *supra*.

[328]See 42 U.S.C. §5612(a) (Administrator specifically authorized to employ attorneys).

liaison in seeking appropriate legal opinions from the Office of General Counsel of OJP.

E. Monitoring

1. Overview

If the mandates were to be taken seriously by the states, there had to be detailed monitoring of public and private secure facilities, including jails and lockups. The JJDP Act imposed this obligation on the states along with the duty to annually report to OJJDP the results of the monitoring[329] and further mandated that OJJDP determine that the monitoring systems employed were adequate.[330] Since the number of facilities that would have to be included in the "monitoring universe" might in some states far exceed 100 and monitoring would have to cover 24 hours a day, the task facing states was indeed formidable.

Moreover, the mandates, as elaborated by the Office, required that data-gathering systems obtain very detailed information regarding the custodial status of juveniles and other related matters. For example, monitoring records must indicate whether accused status offenders are held for more than 24 hours in secure detention facilities or, if in excess of 24 hours, pursuant to a valid court order as defined by OJJDP regulations. Those records must also show whether accused delinquents are held securely for more than 6 hours in adult jails and lockups. Such records must in turn reflect the fact that "secure" custody is defined in part by distinguishing between cuffing to "stationary" and nonstationary objects and the presence or absence of continuous visual observation.[331]

Violations of the mandates so construed would, moreover, not make a state ineligible for future grant awards if the instances of noncompliance were statistically "de minimis" under the Office's published standards. Application of those "exacting" tests to data bases that did not accurately reflect what was occurring in secure facilities would obviously make no sense.

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[329]42 U.S.C. §5633(a)(15).

[330]See text preceding note 108 *supra*.

[331]*See, e.g.*,, text at notes 146-50 *supra*.

2. Deficiencies in Monitoring Systems

Given the magnitude of the monitoring task, it should come as no surprise that state monitoring systems are uneven in their capabilities and reliability. Over the years between 1978 and 1991, no less than four studies by the General Accounting Office found that local records, on which monitoring reports to OJJDP are based, were either inaccurate or incomplete.[332] It was on the basis of the 1984 GAO report that Congress amended the JJDP Act in 1984 to require the Office to audit state monitoring systems since prior to that time OJJDP had not apparently evaluated the reliability and validity of the data that were submitted as part of monitoring reports.[333]

Between 1985 and 1988, the Office conducted audits of almost all states' systems, an effort which was apparently so resource-intensive that performance of many of SRAD's other tasks were significantly delayed. The Office's policy has been to reaudit each system every 5 years on a phased-cycle requiring that a certain number of states be examined each year. The first round of audits identified problems, particularly with regard to data collection and verification in many of the systems.[334] The experience in the aftermath has varied among the 10 states visited during the course of this study. Some of the states have been slow in responding to the audit recommendations and the Office has not consistently followed up with the states. Some major identified problems in the monitoring systems remain unaddressed or unremedied.

What is sometimes referred to as the "fourth mandate," that states "provide for an adequate system of monitoring" for compliance, is obviously interpreted by both Congress and the Office in the same fashion as the separation mandate,[335] that is, there is no fixed deadline for the creation of a fully adequate system but rather a state should show a good faith and steady effort to improve its monitoring to the point that it is fully adequate.[336] It is interesting to note, however, that OJJDP on its own added to the conditions for a jail

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[332]*See GAO Valid Court Order Report*, note 63 *supra* (focusing on valid court order data); Better Monitoring and Recordkeeping Systems Needed to Accurately Account for Juvenile Justice Practices GAO/GGD-84-85 (July 9, 1984); Improved Federal Efforts Needed to Change Juvenile Detention Practices GAO/GGD-83-23 (March 22, 1983); Removing Status Offenders from Secure Facilities: Federal Leadership and Guidance are Needed GGD-78-37 (June 5, 1978).

[333]See text at notes 108-09 *supra*.

[334]*See GAO Valid Court Order Report*, note 63 *supra*, at 29. For example, OJJDP recommended that 22 states improve their data collection procedures; 30 states improve data verification procedures; 29 states revise their procedures for identifying detention facilities; and 20 states change their procedures concerning the length of secure detention. *Id.*

[335]See text at note 81 *supra*.

[336]*See, e.g.*,, 28 CFR §303(f)(1)(ii) (1991) (state to indicate barriers to compliance with monitoring mandate and a plan to overcome them).

removal waiver a requirement that the state have "achieved" compliance with the monitoring mandate.[337] However, this provision may not be applied literally by the Office since it apparently finds the requirement satisfied even when major identified deficiencies still exist. There must be a plan and evidence of a commitment to fix the deficiencies.[338]

Creation of adequate monitoring systems will be expensive. In fact, several states are now committing tens of thousands of dollars (sometimes over $100,000) of their limited formula grant funds to create and maintain such systems. The JJDP Act expressly limits the use of formula funds for "monitoring" to 7½% of the total annual allotment to a state.[339] However, this provision has been interpreted by the Office as applicable to monitoring financial controls, not monitoring for compliance with the mandates.

The history to date suggests that if Congress seriously desires that there be adequate state monitoring for compliance with the mandates (something that presumably must continue even after "full" compliance is achieved), it will have to ensure that states have adequate financial resources to do the job well and that OJJDP has sufficient staff, travel funds, and other assistance to audit state monitoring systems on a reasonably regular basis without neglecting its other assigned tasks.

Some argue that the effort necessary to establish adequate monitoring is not cost effective and that scarce money is being taken from substantive juvenile justice projects to fund processes and procedures that have value "only" to determine compliance status. However, others familiar with the monitoring process have justified it in terms that go beyond the oversight needs of OJJDP. Specifically, monitoring visits to local facilities can be useful in determining other juvenile justice needs and the general conditions of confinement. The data collected can also be used to establish strategies for compliance with the jail removal mandate and the state's own policy objectives in the juvenile justice area. For example, such information may shed light on whether the population of juveniles securely detained in a particular area justifies a separate local secure detention facility or, rather, a regional one. In addition, data on the extent and nature of the jailed juvenile population might suggest that detention screening criteria are inadequate.

A number of the states visited have used data derived from monitoring for these and other purposes which they believed are worth pursuing in their own right. Interestingly, the cost of monitoring systems to a number of agencies administering the formula grant program were reduced since other state

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[337]*Id.* §303(f)(6)(D)(1)(iv); (f)(6)(D)(2)(vi) (1991).

[338]*See* United States Department of Justice, OJJDP Guideline Manual: Audit of Compliance Monitoring Systems, OJP M7140.7 (Nov. 6, 1987), ch. 2 at pp. 17-18.

[339]42 U.S.C. §5632(c).

agencies, such as a Department of Corrections, had the statutory duty to collect much of that data anyway.

3. Monitoring Reports

There is no question that the collection of data and translation into a format acceptable to the Office is an endeavor that consumes the time available to the limited state staffs assigned to deal with the formula grant program. In apparent recognition of this, Congress in 1980 amended the JJDP Act to provide that the requirement for annual monitoring reports would not apply to those states: (1) found to be in compliance with the DSO, separation and monitoring mandates; (2) having legislation implementing those requirements; and (3) having adequate enforcement mechanisms to ensure that that legislation would be administered effectively.[340]

In only one case has the Office ever excused the submission of state monitoring reports under this provision. The state was Pennsylvania, which was considered to be in the forefront of states in terms of its progress toward enlightened treatment of alleged juvenile offenders. As it turns out, the decision was an unmitigated disaster from the points of view of both the state and OJJDP. Not having to submit annual monitoring reports apparently resulted in diminished vigilance by the state in its efforts to maintain compliance with the mandates. It also meant that no one outside the state agency was in a position to raise questions regarding the type and sources of data being supplied to the state by local officials. In connection with a site inspection by the Office, the Pennsylvania agency discovered that the police lockups in Philadelphia in fact held juvenile offenders in violation of the mandates and in great numbers. From a position of assumed full compliance, the state was plunged into a frantic effort to solve its jail removal problems and with less time to accomplish that objective than would have existed had the problem been discovered sooner.

Not only is a waiver of annual monitoring reports fraught with dangers of the type that materialized in Pennsylvania, but it is questionable how much state effort is saved by such a waiver. After all, the statute does not excuse the maintenance of an adequate monitoring system and its maintenance presumably requires the keeping and reporting to the state of detention and other data. If the state has that data, it is difficult to summon an adequate justification in cost/benefit terms that the information could or should not be furnished to OJJDP for its own oversight use, though there may be ways to simplify the reporting format. The Pennsylvania experience clearly suggests the value of such oversight in assuring the maintenance of the mandates.

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[340]See text at notes 105-07 *supra*.

If Congress is serious in its desire for adequate state monitoring systems and compliance with the mandates, the funds necessary to cover the cost of preparing annual monitoring reports should be deemed well spent. If those funds are not now adequately provided by existing appropriations, those appropriations should be correspondingly increased. Alternatively, since monitoring may serve state needs that are distinctive and perhaps beyond the scope of mandate compliance, Congress could impose some type of matching requirement on the states to assure that adequate monitoring and reporting systems are in place. In the process, Congress should repeal the provision of the Act which permits waiver of annual state monitoring reports.

4. Monitoring Coordination within OJJDP

The required submission to and analysis of state monitoring reports by OJJDP for compliance purposes and, thereby, for determinations of state eligibility for future grant awards raises questions regarding the mechanisms in place in the Office to assure a uniform evaluation of the reports and data collected.

The application of at least the strictly numerical de minimis standards[341] may not implicate substantial administrative discretion and, thereby, create the risk of inequality in treatment of states. In fact this study identified neither allegation nor proof of such inconsistent treatment, though it bears noting that the research on this point was largely anecdotal and based on interviews rather than a review of grant files.

The nonnumerical aspects of the de minimis standards (e.g., the exceptions for "recently enacted law" promising full compliance[342]) are another matter in terms of their potential for idiosyncratic application. However, at least for the past few years until the summer of 1991, this potential for inconsistency was minimized considerably by the existence of a position in the Office for a monitoring coordinator who, in conjunction with each state representative, would in effect make all determinations of de minimis compliance. Recently, the individual who filled that position left the agency. Moreover, the position was abolished, with the responsibility for at least initially making determinations of compliance status vested solely in the state representative teams for each region of the country.

There is, of course, the possibility for some limited substantive review by the Division Director. However, his or her duties are sufficiently extensive that such review power is unlikely to be exercised except in the most unusual of circumstances. Such review might be triggered by a state's complaints

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[341]See text preceding note 176 and text at notes 185-86 *supra*.

[342]See text preceding note 186 *supra*.

regarding its treatment. But, absent widespread availability of state-submitted compliance data outside the Office--something which does not now exist--few states will be in the position to judge their comparative treatment and complain on the basis of inconsistency.

Even the elimination of the nonnumerical aspects of the de minimis standards for DSO and jail removal whose legality is questioned by this study (i.e., the "recently enacted law" provision)[343] would leave undisturbed the other nonnumerical aspects and the multi-factor balancing of the current DSO standard.[344] Unacceptably high risks of inconsistency in its ad hoc application remain. Moreover, during the period for which findings of nonnumerical "substantial" compliance with the jail removal mandate[345] would permit continued funding, there clearly existed those same risks given the nature of the criteria applied (e.g., "meaningful progress" in jail removal, "diligence" in carrying out jail removal plan).[346] Until the recent amendments to the JJDP Act, "substantial" compliance had become more a matter of historical, rather than contemporary, significance,[347] though now it has been given new life.[348] In addition, the administrative conditions imposed on the availability of jail removal waivers[349] mirror many of the statutory conditions for nonnumerical "substantial" compliance,[350] thereby creating opportunities for the exercise of significant administrative discretion. In addition, a review of waiver of termination memoranda suggests that, in relation to the monitoring system condition for a waiver,[351] the Office has clearly accepted less than full compliance despite the literal language of its own regulations.[352]

It also appears that on occasion the Office has made exceptions to the type of database a state must submit in order to satisfy the monitoring report requirements. For example, in 1990 the state of Pennsylvania submitted only four months of data relating to police lockups in Philadelphia, rather than the six months required by the agency's grant regulations.[353] Apparently the

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[343]See text at notes 292-99 *supra*.

[344]See text at notes 173-76 *supra*.

[345]See text at note 99 *supra*.

[346]See *id.* and text at notes 151-58 *supra*.

[347]See text following note 99 *supra*.

[348]See text at note 403 *infra*.

[349]The waiver mechanism will become unavailable for fiscal years after 1993 as a result of the recent amendments to the JJDP Act. See text at note 402 *infra*.

[350]See text at notes 164-66 *supra*.

[351]See text at note 164 *supra*.

[352]*See also* text at notes 334-38 *supra*. Waiver of termination memoranda covering seven states' eligibility for a FY 1990 waiver were reviewed.

[353]See text at note 195 *supra*.

Office ultimately either "waived" the application of its regulation or created some new "de minimis" rule and, therefore, accepted the information as sufficient for a determination of "substantial" compliance with the jail removal mandate. Whether or not such action was legally permissible, clearly such "exceptions" to the legislative regulations or other policies of the Office must be clearly explained, documented and made known both within and outside of the agency in order to ensure equality of treatment.[354]

In sum, there should be a person in the Office who has as one of his or her important responsibilities the job to review in some depth findings relevant to substantial compliance, de minimis full compliance, and eligibility for a waiver and to assure an even-handed evaluation and treatment of monitoring reports. The existence of such a monitoring coordinator can ensure that Office policies (including provisions for exceptional circumstances) with regard to acceptance or rejection of submitted data are consistently applied. Also, as noted previously in this report, the prior monitoring coordinator was given duties sufficiently expansive that he could exercise an informed judgment with regard to the need for new Office policies where issues affected more than one state.[355]

In addition, the Office should make efforts to ensure that the state-submitted data and other information by which it determines compliance and waiver are more widely available both to states and the public generally. This can provide a supplementary check on inconsistency in treatment of states.[356]

F. Personnel Resources

The adequacy of the performance of state representatives in OJJDP is crucial to the successful administration of this formula grant program.[357] Accordingly, the failure to fill these positions, frequent staff turnover or

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[354]See text at notes 232-46 *supra*. In fact there was a General Counsel opinion on the Pennsylvania monitoring de minimis policy which carefully evaluated its legality. *See* Memorandum to Robert W. Sweet, Jr., Administrator OJJPP, from John J. Wilson, Associate General Counsel, Application of Six Month Monitoring Data Requirement to City of Philadelphia Lockups (April 30, 1990). This memorandum had not appeared in agency staff manuals as of September 1, 1991.

[355]See text preceding note 201 *supra*.

[356]This should be the case regardless of the applicability of any exemptions from the public disclosure requirements of the Freedom of Information Act. *See* 5 U.S.C. §552(b). The only one even arguably applicable is (b)(7) dealing with "investigatory records compiled for law enforcement purposes."

[357]See text at note 36 *supra*. *See also* Mason, *supra* note 72, at 104 (indicating the need for the monitoring Federal agency to offer help to the grantee to "set its house in order.").

modification of staff responsibilities, and lack of relevant prior experience and subsequent training for those performing as state representatives must be a cause for grave concern. Unfortunately, the Office has had to live with all of these problems over the years. It has recently made efforts to solve them, though some issues remain unaddressed today and the solutions proposed for others are only now being tested for their adequacy.

1. Staff Levels

In 1990 the Department of Justice's own Justice Management Division issued a report[358] which indicated efforts in the Office of Justice Programs to hold down staffing levels in OJJDP,[359] as well as other parts of OJP. While noting that "OJP leadership has held the view that existing human resources have been underutilized,"[360] the report further observed that "[l]ine workers, however, indicated that they are overburdened and need additional resources to do an adequate job."[361]

One of the positions in OJJDP which has not been filled in recent years has been that for a general attorney. We already have suggested that this position should be filled.[362] In addition, in the recent past, state representative positions have remained vacant for long periods of time.

2. Personnel Turnover and Reassignment

It also appears that the Office has gone through at least two "waves" of staff turnovers, which have brought into the state representative position people without prior juvenile justice or other relevant experience and training. One of these occurred during the phased elimination of the Law Enforcement Assistance Administration in the early 1980s with the accompanying reduction-in-force of some OJJDP personnel.[363] The other, more recent episode of staff turnover has occurred since 1989, as longtime state representatives and their supervisors have either left the Office or taken positions elsewhere in the agency. The Justice Management Division study of 1990 indicated, without referring specifically to OJJDP, that low morale might be a significant cause of

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[358]JMD Report, note 32 *supra*.

[359]*Id.* Figure 4.

[360]*Id.* at 24-5.

[361]*Id.* at 25.

[362]See text following note 327 *supra*.

[363]The RIF, as it effected OJJDP, was the basis for litigation described in Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984).

the large staff turnover suffered by OJP in general.[364] At OJJDP, the lack of Presidential support for continuation of the formula grant program, along with the approach to human resources which has characterized the Office's personnel policies described below, could be potent causes for what appears to be the low morale among state representatives.

Even when employees have remained as state representatives for several years, the states for which they have responsibility have been changed frequently. Based on state representative assignment information provided by SRAD, on average a state had about three different OJJDP representatives between January 1986 and August 1991. In fact, one-third of the states and territories had four or more representatives over that same 5-1/2-year period. In contrast, based on information obtained from the state specialist survey, current state specialists have been in their positions for an average of 5-3/4 years, with one-third exceeding 7 years on the job.[365]

Whether the changes in state representatives can be traced to people leaving or merely being shifted around, this process has been frustrating for both the representatives themselves and, as the survey of state juvenile justice specialists for this study indicates,[366] for the states as well. It has clearly been very difficult to develop and nurture productive and confident working relationships between state agency specialists and their designated federal liaison in the Office. Moreover, at least some state representatives could not acquire more than a passing knowledge of the problems facing their states, knowledge which is crucial to providing needed technical and other assistance, as well as to determining with some confidence the compliance status of the states, including eligibility for waiver and other types of relief. This problem has been compounded by budget difficulties which have led to restrictions on travel, permitting little or no opportunity for state representatives to visit states. Finally, personnel rotation has increased the chances that a state might get inconsistent advice regarding the requirements of the formula grant program from different persons serving as its state representative.

3. Staff Technical Background and In-Service Training

Foreclosure of the opportunity to develop a substantial base of experience through day-to-day work with particular states has compounded a related problem that afflicts the Office; that is, lack of juvenile justice experience

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[364]*See* JMD Report, *supra* note 32, at 22.

[365]See Appendix D3 at 1, which is available upon request from the Conference.

[366]See Appendix D3 at 1-2, 4, which is available upon request from the Conference.

among the ranks of the state representatives.[367] In examining the various types of determinations that must be made by the Office in administering the formula grant program, it seems readily apparent that some technical background in the area of juvenile justice is clearly to be preferred, if not required, for someone in the state representative position. First, position descriptions for a state representative clearly contemplate his or her provision of technical assistance to states in planning for compliance.[368] Moreover, it would be difficult for someone unfamiliar with the basic techniques and processes for dealing with juvenile offenders to offer sound professional judgment regarding the acceptability of state plans for coming into compliance with the statutory mandates and the adequacy of state monitoring systems, to name only a few areas of critical importance to the formula grant program. Merely reading the regulations and staff manuals prepared by the Office certainly will not convey anything more than a general and rather abstract checklist of required information.

Recent vacancy announcements for the position of state representative have listed "knowledge of juvenile justice issues and programs relating to the criminal justice field" as a "ranking factor," something which has not always been so identified.[369] Beyond that, however, the Office has not focused on building up the type of juvenile justice expertise within the state representative group that a formula grant program of this nature needs.[370] Its success depends at least as much on cooperative federal/state efforts to solve perceived juvenile justice problems as on federal "enforcement" of statutory and regulatory requirements. Yet lack of adequate background and training substantially interferes with the development of such a cooperative relationship.

There is, for example, no in-house formal training program dealing with issues of juvenile justice for state representatives. What formal training they receive occurs during their attendance at workshops conducted by the Office's technical assistance provider, Community Research Associates, for state juvenile justice specialists. Yet, what state officials need to know about the formula grant program is not always the same type of information required by those with oversight responsibilities. Moreover, those workshops are not designed to give state representatives the type of general exposure to juvenile

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[367]Our interviews with the current state representatives focused in part on their education and job experience.

[368]State Representative Roles, *supra* note 36, at Intro. 4.

[369]The authors examined several recent vacancy announcements for state representative, including one dated October 1, 1990, which did not contain the noted ranking factor found in the announcement of September 20, 1991.

[370]This was the upshot of the various interviews we conducted at OJJDP and with others knowledgeable about its operations over the years.

justice issues which many of them may lack. Several of the interviewed state representatives indicated that they still regarded themselves as novices after as much as 2 years on the job. Despite the crucial importance of well-trained state specialists to the success of the formula grant program, there is every reason to believe that OJJDP state representatives require at least the same quality of in-service training. This is particularly true given the fact that the technical background of state specialists appears to be more extensive[371] than that typically possessed by recent state representatives.

The Office's recent establishment of a regional/team approach to assignment of responsibility for states may improve matters in a variety of ways, assuming the composition of the teams is not changed frequently. The membership on a team is supposedly composed of one seasoned state representative and one with less experience. The former may act as the "mentor" of the latter. At least if difficult problems arise, the less experienced member will have the benefit of the other's knowledge of the program. The team's focus on a particular region of the country may also be helpful to the newcomer to the extent the states in the region share the same types of juvenile justice problems and/or institutional responses to those, thus economizing on the amount of information he or she must absorb. It should also be noted that this regional approach has been fashioned in such a way as to fit with the regional structure of the National Coalition of State Juvenile Justice Advisory Groups and the operation of the technical assistance provider, Community Research Associates. This may facilitate a more coordinated and knowledgeable federal/state relationship.

4. Workload

The team approach may also assist in dealing with one of the other problems which has affected the Office's operations, that is, the size of its workload. The official description of the state representative position is both impressive and, for those willing to take the job, formidable.[372] Their oversight and liaison roles require not only work in Washington but site visits for program evaluation and auditing purposes or when other special circumstances warrant. Moreover, the assignment of responsibilities beyond those identified as distinctive of a state representative, along with staff turnover and other changes in the Office, has only added to what many see as a serious problem of too much work and too little time to do it adequately.

Evidence that this problem exists is not difficult to uncover. As noted previously, the congressionally required audit of state monitoring systems in

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[371]See Appendix D3 at 1, which is available upon request from the Conference.

[372]See text at note 36 *supra*.

the late 1980s occupied much of the time of SRAD to the detriment of many of its other tasks.[373] Furthermore, the submission to OJJDP of required state reports has been uneven and there have been instances of no followup by SRAD or followup only after a substantial delay. The specialist telephone interviews indicate that Office procedures for written acknowledgement of receipt of state reports have not been met.[374] This may be proof of the workload problem, poor training, inadequate supervision or mismanagement.

To say nothing of the frustration of the state representatives who are not able to carry out their functions adequately, these failures to respond and delays anger state officials who spend much of their time preparing reports to OJJDP. It contributes in no small degree to cynicism among state juvenile justice specialists regarding the work of the Office and the ability to find a helpful presence in Washington. The Office's workload has also meant that, rather than taking a "proactive" position with regard to state problems of compliance and otherwise, state representatives have found themselves largely in a reactive mode, making visits to states (where travel budgets and other work permits) only in response to problems after they have arisen.

5. Summary

In short, many of the Office's administrative difficulties over the years have been rooted in its lack of a staff of adequate size, training, and continuity to do the work assigned. To the extent that the program has been as successful as some observers believe it has been, it is a tribute to those in OJJDP who have dedicated a substantial portion of their careers to the achievement of the mandates as well as to those state officials and private groups that have both followed the federal lead and taken the initiative in attempting to achieve the goals established by Congress in 1974 and 1980. The delays and problems that have, however, accompanied progress might have been avoided or at least mitigated had these issues of staff support been more adequately dealt with.

G. Problems of Coordination

These are generally of two types: first, provision of information; and, second, use of federal funds within the control of the Office in solving juvenile

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[373]See text preceding note 334 *supra*.

[374]*See, e.g.*,, Appendix D3 at 2-3 (indicating lack of acknowledgement of reports submitted) and State Representative Roles, *supra* note 36, at I.1-IV.4 (noting requirements for such acknowledgements). Appendix D3 is available upon request from the Conference.

justice problems. To many observers OJJDP has been deficient with regard to both.

Despite the fact that the JJDP Act is filled with references to the Office's authority to disseminate information relating to juvenile justice and promising programs for delinquency treatment and prevention,[375] one of the consistent complaints over the years and in the state interviews was the lack of such dissemination to states. More specifically, it is said that the Office does not readily communicate information relating to successful programs and projects instituted in one state that might have more general application in assisting efforts at compliance with the mandates. Ironically, the recent creation of a new "dissemination" unit within the Office was not even widely known among the states we visited. Moreover, there was little indication that the responsibility of a state representative to provide information about programs was taking place.[376] This is not to say that dissemination never occurs; rather that it may occur too infrequently.

In part the breakdown in communication may be traceable to the fact that state representatives are overworked and have in recent years been largely unfamiliar with state programs given their brief periods of assignment to a particular state. Their lack of background and training might, in addition, make it difficult for a state representative to discern which programs are successful for reasons that might make them transferable elsewhere.

There is also a persistent perception by outsiders that information generated by Office sponsored-research and "special emphasis" funding for delinquency prevention and treatment projects is not obtained by SRAD, or at least, is not communicated to the states when in fact it might be helpful to them in their compliance efforts. In point of fact, the JJDP Act requires that state planning agencies be afforded the opportunity to review and comment on applications for special emphasis funding under the Administrator's discretionary grant authority[377] and, further, that they be given copies of the regular reports sent to OJJDP on projects within their respective jurisdictions.[378] There have been allegations that these procedures have not been followed.[379] States feel that fulfillment of these duties is essential in order to assure that the discretionary funding authority is not used in ways which unintentionally duplicate or undercut state efforts funded by the formula grant program. The statute itself directs that, in making a special emphasis grant, the Administrator take into

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[375]*See, e.g.*,, 42 U.S.C. §5602(a)(4); §5652; §5653.

[376]*See* State Representative Roles, *supra* note 36, at Intro. 2, III.1.

[377]42 U.S.C. §5665a(b)(5).

[378]*Id.* §5665a(b)(7).

[379]Letter of State Juvenile Justice Specialists to Terrence Donahue, Acting Administrator OJJDP (May 15, 1989).

consideration "the extent to which such program meets the objectives and priorities of the State plan."[380]

The statute contemplates that discretionary monies may be used directly to aid compliance with the mandates.[381] There have been several instances over the years wherein such funds were devoted to jail removal efforts, as in the case of a regional facility study now on-going in South Carolina. Yet states continue to express their concern that, in view of the focus on meeting the jail removal goal, more of an attempt has not been made recently to use special emphasis funds in particular and discretionary funds in general for these purposes. It should be noted, however, that state officials appeared to be not well informed about the full range of the Office's discretionary projects and initiatives.

In sum, any efforts the Office is now engaged in to disseminate information to the states which might aid in their compliance efforts should be continued and, if possible, expanded. In addition, as the statute itself suggests, the Office should adopt procedures to ensure that its discretionary funding authority is not used in ways that undercut the purposes of the formula grant program. Whenever it is otherwise appropriate, those funds should be employed to further state plans for compliance with the mandates. Finally, as the statute requires, state specialists should be regularly consulted with and informed about projects in their jurisdictions supported by special emphasis funds. They should also be told about other discretionary projects funded by the Office that might be of value to them.

IV. Other Elements of the OJJDP Formula Grant Program

This study did not attempt to probe in depth the many issues that might be examined with regard to the role and operation of entities outside OJJDP which, by statute, have a special relationship to the formula grant program. Those entities include the state planning agencies, the state advisory groups, the technical assistance providers, the National Coalition of State Juvenile Justice Advisory Groups, and the Federal Coordinating Council. Nevertheless, some general comments can be offered.

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[380] 42 U.S.C. §5665a(c)(3).

[381] *See, e.g.,, id.* §5665(b)(6)(A).

A. State Agencies

With regard to the state juvenile justice specialists, both the telephone survey and the in-person interviews indicated that a very high level of substantive competence and dedication to the goals of the formula grant program existed among them. Many of the specialists have been frustrated over the years by a variety of developments and patterns of performance by OJJDP, many of which have been detailed earlier in this study. In some states that either have achieved compliance or are making substantial efforts in that direction, this frustration has led to a cynicism regarding the Office's relevance to what the state agency wishes to accomplish in the juvenile justice area.

Funding of the state programs at times has made it next to impossible for some state specialists to obtain travel authorization to one or more of the scheduled workshops and conferences sponsored by the Office.[382] Moreover, the scheduling for these programs has not been announced sufficiently far in advance to allow some state officials to budget necessary travel funds.

The relationship between state advisory group and state agency in those states visited appeared to be largely cordial and cooperative. Some SAGs were more deeply involved in the details of the formula grant program than others. Where a SAG has functions with regard to programs other than OJJDP's, there can, however, be a problem with ensuring that formula grant issues will receive the full attention they deserve. Relationships with other state instrumentalities which may be involved in some aspect of the formula grant program--for example the inspection of secure facilities and collection of data--can also become strained because of differences in policy priorities and changing federal interpretations.[383]

B. The Coalition

Unfortunately, the Coalition and the Office have never developed the type of relationship that Congress envisioned. While certainly the role of the Coalition as advisor on juvenile justice issues would not be served if it did not remain at some "respectful distance" from the Office, the apparent level of mutual distrust is distressingly high for a variety of reasons, some of recent origin and some not so recent. For example, the Coalition and many SAGs reflect a strong child advocacy orientation that has not welcomed Administration efforts to terminate the formula grant program.

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[382] *See* Appendix D3 at 2, which is available upon request from the Conference.

[383] *See* Appendix D3 at 4-5, which is available upon request from the Conference.

In addition to commenting on Office policies, the Coalition has served valuable functions in training state officials with regard to juvenile justice issues and serving as a clearinghouse for information through its newsletters, conferences and workshops. This may have made up to some degree for the apparent lack of effort by the Office in disseminating the results of programs that might have promise in terms of compliance with the mandates.

C. Technical Assistance Provider

According to most observers the current principal technical assistance provider, Community Research Associates, has performed well in transmitting the types of information states have needed in their compliance efforts. In fact, like the Coalition, CRA may be taking up some of the slack in the Office's dissemination function in terms of advising states with regard to successful programs elsewhere.

The quality of the assistance was generally rated highly, as was the timeliness with which it was delivered following a request to OJJDP.

Other than providing technical assistance with regard to specific identified state problems, CRA runs the workshops which are utilized by OJJDP to train and update state officials involved in the formula grant program. There are several of these each year: one or two for new state specialists which focus on basic information relevant to the administration of the formula grant program; one for all specialists which may, among other things, discuss recent developments in proposed and newly established OJJDP policies, guidelines and instructions and seek comments on those; and, finally, a workshop that focuses on monitoring for compliance with the mandates. CRA also conducts training programs to orient new members of state advisory groups to their responsibilities. The descriptions of the coverage of these programs is impressive and generally there appear to be relatively few complaints regarding their quality. However, some specialists did express concern with regard to the availability of the basic training since they had been on the job for 1 or more years before the training was made available to them.

Moreover, it is noteworthy that, in a recent training session attended by the research team, what appeared to be very basic issues regarding the formula grant program were raised by state officials. One would have expected that such matters would have been settled long ago. The ensuing confused discussion might, however, suggest that those attending the workshop and presenting the questions were new to the program or, alternatively, that even experienced juvenile justice specialists might forget the answers to the types of questions presented. This episode might suggest the need for more frequent

and comprehensive training for new and experienced specialists alike in the issues of the formula grant program.

D. The Federal Coordinating Council on Juvenile Justice and Delinquency Prevention

One of the consistent concerns expressed by interviewed state officials was the lack of coordination among federal grant programs in such a way as to facilitate compliance with the JJDP Act mandates. Despite what appears to be the statutorily designated role for the Coordinating Council to provide just such coordination,[384] the efforts of the Council appear to have been minimal.[385] In view of the consistent theme of the JJDP Act[386] and its legislative history[387] that federal grant efforts in the juvenile justice area should be coordinated, it would be advisable for Congress to examine closely the role and functioning of the Coordinating Council.

E. Conclusions

In reviewing the legislative history since 1974 of the formula grant program, one is struck by the persistence of many of the types of issues and complaints which the preceding discussion has detailed with regard to OJJDP's stewardship of the formula grant program. For example, objections from some quarters that the Office focused too much on compliance issues and in a way which eliminated state flexibility were first raised in conjunction with the DSO mandate, only to be repeated recently with regard to the jail removal efforts.

Yet these complaints and charges have persisted in the face of apparent progress toward achievement of the statutory mandates. In short, the Office appears to have enjoyed some success in fulfilling the statutory goals despite the lack of strong Presidential support over most of its existence, despite the rather modest amounts of appropriated funds available to it, and despite the administrative problems which have plagued it over the years. It bears repeating that such success has been due in no small measure to a relatively small group of committed federal and state career employees, private interest groups, and individuals who have utilized the leverage afforded by scarce

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[384] 42 U.S.C. §5616.

[385] *See also* H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 20 (1980).

[386] *See, e.g.,*, 42 U.S.C. §5602(b), §5614.

[387] *See, e.g.,*, S. Rep. No. 95-165, 95th Cong., 1st Sess. at 40, 45-46 (1977).

federal dollars and the perceived "rightness" of the mandates themselves in the effort to carry out the JJDP Act.

The emphasis on compliance with the mandates has not, however, gone without a variety of criticisms (aside from those which question the mandates themselves). For example, as the telephone survey[388] along with our interviews with state officials indicated, some states believe that delinquency prevention programs have been neglected as have problems of violence, sex and drug offenders and conditions of confinement. Aside from this, some of the side effects of the mandates have been a cause for concern, including an alleged increased prevalence of waiving minors to adult courts to escape the constraints of the jail removal mandate and of charging juveniles with more serious crimes to avoid the DSO mandate.[389]

At the same time, according to a number of state specialists, the beneficial side effects of the program have included increased awareness of the special needs of youth among a variety of different agencies in various states as well as greater cooperation among the agencies within the same state having some jurisdiction to deal with youth and crime-related issues.[390]

V. The Juvenile Justice and Delinquency Prevention Act Re-Authorization Act: A Postscript

On October 7, 1992, several months following completion of the foregoing study of the operation of the JJDP formula grant program, the Senate concurred with the House of Representatives in various amendments to the Juvenile Justice and Delinquency Prevention Act of 1974. Those amendments (The Juvenile Justice and Delinquency Prevention Act Re-Authorization Act, H.R. 5194)[391] were presented to President Bush, who signed them into law. In fact, they significantly transform the substantive features of the formula grant program. While the procedural recommendations flowing from our study are not affected by the those amendments, a brief description of them here is necessary for completeness of presentation. That description will indicate the persistence of some of the same mechanisms previously employed by Congress to help bring states into compliance with the statutory mandates. More importantly, it demonstrates continuing experimentation by Congress in adopting new strategies to achieve that same general purpose.

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[388]See Appendix D3 at 4-5, which is available upon request from the Conference.

[389]*Id.* at 5.

[390]Some, however, noted a greater degree of inter-agency conflict. *Id.* at 4-5.

[391]138 Cong. Rec. (daily ed.), October 7, 1992 at S 17260-78.

First, Congress has created new "challenge" and "incentive" grant programs tied to compliance with the JJDP statutory mandates. Under a new Part E of Title II ("State Challenge Activities"), the Administrator of OJJDP may make grants to a state receiving an allocation under the formula program in the amount of 10 percent of the allocation to support the development and implementation of various policies and services, including the provision of basic health and education services for youth in the juvenile justice system, access to legal counsel, increasing community-alternatives to incarceration, removal of status offenders from the jurisdiction of the juvenile court, and increasing aftercare services for juveniles.[392] There can be cumulative 10 percent enhancements to the extent a state participates in more than one of the ten listed "challenge activities."

Under new Title V ("Incentive Grants for Local Delinquency Prevention Programs"), the Administrator may make grants to a state, to be transmitted though the state advisory group to units of local government, for delinquency prevention programs and activities for youth who have had contact with the juvenile justice system or are likely to have such contact. Such services may include recreation, tutoring and remedial education, child and adolescent health and mental health services, and alcohol and substance abuse prevention.[393] As in the case of "incentive" grants, one of the conditions for receipt of federal money under this program is compliance by the recipient unit with the statutory mandates of the JJDP Act. A 50 percent state or local match of funds is required for the incentive grant program, but no match is required to participate in the challenge grant program. The promise of additional funds for juvenile justice and delinquency prevention activities above and beyond the formula allotments may in fact provide the needed impetus to state efforts to comply with those mandates.

Turning to the mandates themselves, Congress reformulated those in various important ways. First of all, it has amended the DSO mandate to encompass "alien juveniles in custody" within its protection.[394] It also limited the "valid court order" exception to DSO by requiring that a public agency (other than a court or law enforcement agency) have determined, prior to the entry of a placement order, that placement in a secure facility is the only appropriate alternative for violation of the court order.[395]

With regard to the separation mandate, henceforth apparently no contact at all is permissible between juveniles and adults detained or confined in the same

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[392]*Id.* at S 17267 (adding Part E to Title II, §235).

[393]*Id.* at S 17273 (adding Title V, §§501-506).

[394]*Id.* at S 17263.

[395]*Id.* at S 17261.

institution.[396] Previously some contact, as long as not "regular," was allowable. In addition, the mandate is enlarged to forbid contact between juveniles and part-time or full-time security staff or direct-care staff of a jail or lockup for adults.[397] The latter amendment was obviously inserted to overturn the Office's "clarification" of its "separateness" regulation implementing the jail removal mandate.

On jail removal itself, Congress has extended the nonMSA exception through 1997.[398] In addition, it has added two types of situations where detention of accused nonstatus offender juveniles in adult jails and lockups may be extended beyond the 6-hour holding period permitted under existing law. One encompasses areas where conditions of distance to be traveled or lack of highway, road, or other ground transportation (e.g., Alaska) do not allow for court appearances within 24 hours. The other includes areas where conditions of safety exist (such as severely adverse weather).[399] Finally, Congress seems to have rejected the Office's definition of a jail or lockup for adults as including only "short-term" facilities. It does so in its new definition of those terms as referring to "a locked facility that is used . . . to detain or confine adults--(i) pending the filing of a charge of violating a criminal law; (ii) awaiting trial on a criminal charge; or (iii) convicted of violating a criminal law."[400] It is not clear now what the separation mandate adds to the jail removal mandate.

Finally, Congress has seemingly added another substantive mandate by conditioning receipt of formula funds on a state's "address[ing] efforts to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population."[401] It remains to be seen what this "mandate" means in terms of its demands for concrete state action.

With regard to extension mechanisms applicable to mandate compliance, jail removal waiver will be a thing of the past for fiscal years after 1993.[402] However, the sanction for noncompliance with the DSO, separation, jail removal, and minority over-representation mandates may not in all cases be a

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[396] *Id.* at S 17263.

[397] *Id.*

[398] *Id.*

[399] *Id.*

[400] *Id.* at S 17261.

[401] *Id.* at S 17263. It should be noted that this requirement has been in the Act for several years. However, for the first time, the 1992 legislation has treated it as a compliance issue in the same way it has treated the other three mandates.

[402] *Id.* at S 17264.

total loss of formula money. Rather for each mandate unattained, a state allotment will be reduced by one quarter. However, the remainder of the allotment will also be lost unless (1) the state agrees to use all (with minor exceptions) of its formula funds to achieve compliance with the unattained mandate(s) or (2) the Administrator determines that the state has achieved substantial compliance with respect to the unattained mandate(s) and has made an unequivocal commitment to achieving full compliance within a reasonable time.[403] The amendments do not offer any definition of "substantial compliance" in this context, thus apparently remitting to OJJDP the job of fleshing out the contours of that concept and, in the process, determining the scope of flexibility afforded the states. It bears repeating, as noted above, that the threatened loss of all or part of the formula funds plus ineligibility for incentive and challenge grants may, cumulatively, bring at least some states closer to full compliance with the jail removal mandate.

The 1992 amendments effect a variety of other changes in the statutory implementation mechanisms for the formula grant program including the following:

> 1. specifying that the Administrator of OJJDP "shall have the same reporting relationship with the Attorney General as the directors of other offices and bureaus within the Office of Justice Programs have;"[404]
>
> 1. requiring the Administrator to prepare, revise on a continuing basis, and implement a long-term plan for all federal juvenile delinquency programs and activities, such plan to include specific goals and criteria for making grants and contracts and for conducting research and provision for coordinating the administration of all federal juvenile delinquency programs and activities;[405]
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> 3. changing the statutory membership of the Federal Coordinating Council to include, in addition to nine federal agency representatives, nine public members, three each appointed by the Speaker of the House of Representatives, the majority leader of the Senate, and the President;[406]

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[403] *Id.* at S 17263-64.

[404] *Id.* at S 17261.

[405] *Id.*

[406] *Id.*

> 4. assuring that formula money is available to pay the salary of at least one full-time staff member in each state (i.e., a juvenile justice specialist);[407] and
>
> 2. to some extent reconstituting the membership and redefining the role of state advisory groups with regard to the formula grant program.[408]

The focus on coordination of policy and activities and the provision of adequate resources at the state level reflect a variety of recommendations made as a result of this study of OJJDP's formula grant program.

VI. The OJJDP Formula Grant Program In The Context Of Other Federal Grant Programs

The original purpose of our comparative analysis was to identify how federal grant programs similar to OJJDP's state formula grant program treat administrative issues and to make recommendations that extend beyond the OJJDP program. Accordingly, the appropriate base for comparison with OJJDP are programs having as close a resemblance as possible to the features of that program.

However, the more we studied OJJDP and reviewed the federal grant universe, the more it became clear that OJJDP's formula program is unusual in terms of the administrative issues presented. This is true despite the existence of some superficial similarities to other existing programs. That distinctiveness is due largely to the nature of the three substantive mandates of the JJDP Act.

The principal conclusion that follows from this comparative effort is that congressional creation of the OJJDP formula grant program, which is designed to function in a regulatory capacity at both the federal and state levels,[409] requires a substantial commitment of money, time, and talent if success in administrative terms is to be realized.

In the sections that follow we first offer several general observations regarding federal grant programs and a typology of those programs employed to narrow the universe for the selection of possibly comparable programs. Then we explain specifically how we identified those grant programs which appeared to offer the most promise for comparative purposes. Finally, we

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[407] *Id.* at S 17262.

[408] *Id.*

[409] See text at notes 199-200 *supra*.

briefly describe the four candidate programs ultimately selected and indicate why even these are different from the OJJDP formula program in ways that limit the ability to generalize in formulating recommendations going beyond that program.

A. Selecting Other Federal Grant Programs for Comparison

A federal grant involves budget authority and outlays by the federal government (1) to support state or local programs or government operations or (2) to support the provision of services to the public including direct cash grants and payments in-kind. Depending on the activity supported, subnational governments, private institutions, nonprofit organizations or private citizens may be involved as grant agents or beneficiaries. Using this definition, a 1989 catalog of federal grant programs identifies 492 programs allocating funds to states, local governments and other nongovernmental entities.[410]

A grant involves a voluntary relationship that is conditional in nature, but which allows some flexibility and discretion on the part of the grant recipient regarding how activities are carried out.[411] Broadly speaking, there are three theories that explain the use of grants as a means of addressing specific federal policy objectives:[412]

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[410]Advisory Commission on Intergovernmental Relations, *A Catalog of Federal Grant-In-Aid Programs to State and Local Governments: Grants Funded in FY 1989*, M-167, Washington D.C., October 1989.

[411]Donald Haider, "Grants as a Tool of Public Policy," in Lester M. Salamon (ed) assisted by Michael S. Lund, *Beyond Privatization: The Tools of Government Action*, The Urban Institute Press, Washington D.C., 1989, pp. 93-124.

[412]*Ibid.* P. Peterson, B. Rabe & K. Wong, When Federalism Works [Brookings Institution (1986)] describe what they see as the three-phase maturation process of redistributive federal grant programs:

> 1. The federal government is "bold in its expectations, unclear in its objectives, imprecise in its stipulations . . ."
>
> 2. The federal government intensifies its oversight with detailed regulation and clarification of federal goals. Intergovernmental confusion and conflict increase.
>
> 3. Finally "[a] new tolerance of local diversity, a new recognition that no single programmatic thrust is clearly preferable, and an appreciation of the limits as to what can be directed from the center steadily emerge."

Id. 133-47.

To a degree federal financial assistance to states in the juvenile justice area has followed this pattern: from pre1974 block grant programs; the detailed mandates of 1974 and 1980; and the

- **Political theories** argue that the national government is more representative of, accessible and responsive to various factions, interests, and minorities than individual state or local governments so that the federal government is in a preferred position to deal with particular problems that the states, individually or collectively, are unable to address because of structural, legal, resource, or political constraints.

- **Administrative theories** suggest that grants promote administrative effectiveness and efficiency by providing a vehicle for upgrading the budgeting, personnel, auditing and management functions of state and local governments while promoting efficiency by avoiding the excessive bureaucracy and inflexibility that are often associated with direct national provision of domestic services.

- **Economic theories** argue that grants promote fiscal equalization among governments and correct for spillovers and externalities thereby enabling state and local governments to provide additional services, especially where there is a special national interest.

In addition to differences in the purposes or objectives of federal grant programs, there are a variety of grant mechanisms used to transfer funds from the federal government to others--each mechanism has its own characteristics, impacts and consequences. There are three basic types of federal grants-in-aid: categorical, block and general assistance grants.

Categorical grants are used for specific, narrowly defined categories of activities. These grants can be distributed to eligible governments by legislatively mandated formulas (formula grants) or through a competitive process (project grants). Over the last 25 years, approximately two-thirds of all categorical grant programs have been of the project type--the most narrowly focused of all federal grant mechanisms.[413] The OJJDP state formula grant

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recent attempts by the Office to give more flexibility to states (e.g., the 1991 clarification of the separateness definition).

[413]Advisory Commission on Intergovernmental Relations, *A Catalog of Federal Grant In Aid Programs*, note 410 *supra*.

program is classified by the Advisory Commission on Intergovernmental Relations as a categorical formula grant program.[414]

A categorical formula grant can be open-ended or closed-ended. An open-ended categorical grant provides funds to state and local governments without specific appropriations limits on expenditures. Specifically, the federal government may distribute funds to states to support eligible recipients at a specified rate, but the exact number of eligible beneficiaries receiving benefits may not be known in advance. In contrast, a closed-ended categorical grant program has a specific amount of funds appropriated by Congress for the purposes of the program and these funds may be allocated according to a legislatively determined formula.

Merely requiring that the grant be used for a particular purpose does not assure that total local spending for that activity will rise by the amount of the assistance.[415] Categorical grants may require that the recipient match, to some degree, federal moneys. Alternatively, categorical grants may require recipients to continue to spend the same amount on the aided activity as they did before the grant program was enacted, i.e.,, federal money cannot be used to supplant local money already allocated to the aided activity. The OJJDP state formula grant program has a limited matching requirement[416] and a prohibition of using federal grant funds to supplant state and local dollars.[417]

Block grants, while sharing some of the features of categorical grants, are characterized by relatively broad program purposes. Block grants give greater flexibility to recipients to determine spending priorities and impose fewer administrative and reporting burdens on recipients and federal executive departments. The emergence of block grants on the intergovernmental landscape reflects several concerns. Most importantly, critics of categorical grant programs suggested that many categorical program requirements were so complex that they enmeshed federal administrators in administrative details that often obscured program goals and frustrated local accomplishment.[418] Block grants were perceived as a means of improving grant administration by providing more flexibility for recipients to set priorities and fewer administrative requirements for recipients and federal agencies alike.

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[414]Advisory Commission on Intergovernmental Relations, *A Catalog of Federal Grants In Aid Programs*, note 410 *supra*.

[415]Robert D. Ebel (ed.), *A Fiscal Agenda for Nevada: Revenue Options for State and Local Governments in the 1990s*, University of Nevada Press, Reno, 1990, Chapter 11.

[416]*See* 42 U.S.C. §5632(c).

[417]*See id.* §5633(a)(21).

[418]Jeffrey L. Pressman & Aaron B. Wildavsky, *Implementation*, University of California Press, Berkeley California, 1973 as cited in George Peterson et. al., *The Reagan Block Grants*, The Urban Institute, 1986, p. 3.

Finally, **general purpose assistance** provides funds to recipients which can be used for any purpose whatever, i.e.,, there are no conditions attached to the use of the funds for particular activities or services. Funds are allocated to eligible governments according to a legislatively determined distribution formula. The only example of general assistance grants-in-aid at the federal level was the general revenue sharing program which was terminated in 1986.

Table 4 presents, in a summary fashion, selected characteristics of major types of federal grants. In terms of recipient discretion the range is from categorical project grants with very limited discretion to general assistance grants with total discretion. Similarly, the range in program scope is from very narrow program scope for categorical project grants to very broad scope for general assistance grants. Finally, the funding criteria is generally a legislatively determined allocation formula, except in the case of categorical project grants which are allocated through a competitive process based on administrative evaluation criteria.

Table 4
Selected Characteristics of Major Types of Federal Grants

Type of Grant	recipient Discretion	Program Scope	Funding Criteria
Categorical Project	Very low	Narrow Program	Federal adminis-trative review
Formula	Low	Narrow Program	Legislative formula
Block	Medium	Broad functional area	Legislative formula
General revenue sharing	High	Broad Government operations	Legislative formula

Source: Donald Haider, "Grants As A Tool of Public Policy" appearing in Lester M. Salamon, Ed. (assisted by Michael S. Lund), *Beyond Privatization: The Tools of Government Action*, Washington, D.C.: The Urban Institute Press, 1989.

The OJJDP state formula grant program emerged from an earlier block grant program created during the Nixon Administration. There was, in effect, a recategorization of the juvenile justice portion of that program into today's OJJDP grant program. This has lead some observers to characterize the OJJDP program as a hybrid between a categorical and block grant.[419] Despite this perception, however, selection of a comparison set of federal grant programs for this study focuses on categorical formula grant programs. The nature of the substantive mandates along with the detailed planning, administrative, and monitoring requirements that flow from that feature of the program make the category of closed-ended categorical grants the appropriate base for comparison. Those are the types of grant programs that likely present the types of administrative issues, including the need for an exceptions process and de minimis concepts, which were the focus of the study of the Office. In addition it appeared that particular emphasis should be placed on formula grant programs that allocate resources to state and local governments (as opposed to other recipients) and which support the delivery of social services.

Our examination of the 1989 catalog of federal grant-in-aid programs to state and local governments identified 14 block and 478 categorical grant programs. Of the 478 categorical grant programs, approximately one-third, or 155 programs, were classified as being formula rather than project grant programs. Of this subset, we identified for possible comparison with the OJJDP program 103 formula grant programs that transferred funds just to state or state and local governments. We omitted all formula grant programs that allocated funds directly to local governments or other governmental, quasi-governmental, or private entities.

Once we had narrowed our search to this general set of 103 formula grant programs, we obtained a brief description of each program from the *1990 Catalog of Federal Domestic Assistance* (CFDA).[420] Each description in the CFDA provides information on program purposes and activities for which funding may or may not be used; general policy objectives and goals; and the administrative and programmatic requirements necessary to participate in the programs listed.[421] Based on these rather brief descriptions, we excluded 29 programs because they did not provide assistance for social service-type

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[419]*See* Memorandum from Charles A. Lauer, General Counsel, OGC, to Alfred S. Regnery, Acting Administrator, OJJDP, February 8, 1983.

[420]Executive Office of the President, Office of Management and Budget, *Catalog of Federal Domestic Assistance, 1990*, Washington, D.C.: Superintendent of Documents, December 1990.

[421]The CFDA contains a standard format for describing each individual grant program. However, the actual information is supplied by individual agencies responsible for administering their programs. Therefore, there is not perfect consistency across program descriptions when outlining the basic features of each program.

activities. Thus, our set of possible comparison programs contained 74 categorical formula grant programs to state and local governments to support the provision of various social service-type activities.

These 74 programs include programs from virtually every federal agency and represent a wide range of program design options. For example, approximately half of the programs require that states prepare some sort of program plan; three-quarters require states to submit an application but the remaining 25 percent are distributed automatically to all states; 1 in 5 programs has explicit maintenance of effort requirements and half of the programs have some state matching requirement; and 9 in 10 of the programs provide grant funds directly to state governments. Based on the Catalog's limited description of grants in this set of 74 programs, we tried to identify four that seemed appropriate for comparison to the OJJDP program because they appeared to have similar administrative and programmatic elements. We first identified 9 such programs. At this point, more detailed information was required to narrow the final set to four. This information was obtained by an examination of the relevant statutory provisions and agency regulations and guidelines. Based on this, we selected the final set of programs for even more detailed comparison to the OJJDP formula grant program. Brief descriptions of these programs follow.

B. The Comparison Set of Formula Grant Programs

1. Developmental Disabilities Programs: Formula Grants for Basic Support and Advocacy Protection (Office of Human Development Services, Department of Health and Human Services)[422]

In 1963, the Mental Retardation Facilities and Construction Act was enacted to promote planning activities and construction of facilities to provide services to the mentally retarded. This legislation was subsequently amended by the Developmental Disabilities Services and Facilities Construction Amendments of 1970, which constituted the first congressional effort to address the needs of a group of persons with handicaps designated as developmentally disabled. This amendment also required the creation of state planning councils to advocate, plan, monitor and evaluate services for persons with developmental disabilities.

The purpose of the program is to assist states to assure that persons with developmental disabilities receive the care, treatment and other services necessary to enable them to achieve their maximum potential through increased independence, productivity, and integration into the community. To pursue this objective, basic formula grants are made to eligible states and territories to assist them in developing and implementing state-submitted comprehensive plans to ensure that persons with developmental disabilities have the range of services available to them which best promote self-sufficiency. For FY91, $64.4 million was appropriated for this program.

2. Child Abuse and Neglect State Grants: Basic State Grants (Office of Human Development Services, Department of Health and Human Services)[423]

In each community, reports of child abuse and neglect are investigated by child protective services or the police; prevention and treatment services for both children and families are provided by public and private community agencies; and volunteer organizations and self-help groups provide assistance and support for families. The National Center for Child Abuse and Neglect (NCCAN) was established in 1974 to support and further state and local efforts in this area. NCCAN has responsibility for administering four separate grant programs. The Basic State Grant program was selected for comparison with

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[422]*See* 42 U.S.C. §6000 *et seq.*

[423]*See* 42 U.S.C. §§5106a-5106b.

the OJJDP state formula grant program. Under Part I of this program, NCCAN awards basic grants to state and territorial governments for assistance in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs. For FY91, approximately $16.5 million was distributed to the 57 states and territories eligible to receive funds.

Under Part II, NCCAN awards grants to eligible jurisdictions for the purpose of assisting states in responding to reports of medical neglect and improving the provision of services to disabled infants with life-threatening conditions and their families. For FY91, approximately $3.0 million was allocated to eligible jurisdictions under this part of the program.

3. Drug Control and Systems Improvement Grant[424] (Bureau of Justice Assistance in the Office of Justice Assistance, Department of Justice)

The growth of illicit drug use in the early 1980s raised issues of enforcement and control that challenged the existing organizational structure of American law enforcement. It was argued that the traditional approach to combating crime--almost total dependence on local efforts with little or no federal involvement--would prove inadequate for the task of controlling the sale and use of illicit drugs. These circumstances, combined with the growing public demand for a national response to the problem, led Congress to pass the Anti-Drug Abuse Act of 1986. Among other things, this Act created the Drug Control and System Improvement Formula Grant Program to provide federal assistance to state and local governments in three main areas: criminal justice, treatment, and education. Congress passed a second Anti-Drug Abuse Act in 1988 that expanded the formula grant program.

The purpose of the formula grant program today is to assist states and units of local government in carrying out specific programs that offer a high probability of improving the functioning of the criminal justice system. Special emphasis is placed on nationwide and multi-jurisdictional projects and projects that advance national drug control priorities. Funds can be allocated to state agencies and local governments for the purpose of enforcing state and local laws that establish offenses similar to offenses established in the Controlled Substances Act and to improve the functioning of the criminal justice system, with an emphasis on violent crime and serious offenders. A

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[424] *See* 42 U.S.C. §§3750-59. The following description is taken in part from Terence Dunworth and Aaron J. Saiger, *State Strategic Planning Under the Drug Control and System Improvement Formula Grant Program*, The Rand Corporation, June 1991, pp. 1-6 and Bureau of Justice Assistance, *The Edward Byrne Memorial State and Local Law Enforcement Assistance Programs: FY 1991 Formula Grant Program Guidance and Application Kit*, Department of Justice, April 1991, pp. 1-4.

primary component of the formula grant program is the requirement that eligible recipients--the 50 states, the District of Columbia, and 5 territories--create a state strategy for combatting crime related to drug trafficking and abuse. Funding for this formula grant program was $423 million in FY91.

4. Assistance for Education of All Handicapped Children (Office of Special Education Programs, Department of Education)[425]

Access to free public education is generally regarded as a right of all United States citizens. However, children with disabilities have not always in fact had access to such education. The purpose of Part B of the Individuals with Disabilities Education Act is to provide funds to ensure that all handicapped children have available to them a free appropriate public education that includes special education and related services to meet their unique needs; to ensure that the rights of handicapped children and their parents are protected; to assist states and localities to provide for the education of all handicapped children; and to assess and ensure the effectiveness of efforts to educate those children.

This is accomplished through a formula grant program that allocates funds to 58 state and territorial educational agencies. State advisory committees are required as are plans to achieve the goals of full educational opportunity by dates specified in the Act and individual education programs designed for each handicapped child. For FY91 nearly $2.0 billion was appropriated.

C. A Comparison with other Federal Grant Programs

In examining the statutes and administrative regulations and guidelines relating to the four selected programs, what is most striking is the lack therein of statutory mandates of a substantive nature which require the accomplishment of specific, tangible social goals, the achievement of which can be monitored by the collection of empirical data. It is, of course, such mandates which are found in the OJJDP program and from which so much of the administrative structure and function of that formula grant program flows or is otherwise intimately related. To reiterate, those include the following:

- the existence of specific compliance deadlines;

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[425] 20 U.S.C. §§1411-20.

- the need to create standards for "substantial" and de minimis full compliance, as well as waiver, when compliance efforts have fallen short of "perfectly" full compliance with the very specific terms of the mandates by the legislatively specified dates;

- the need for elaborate monitoring systems at the state level and for federal agency oversight on a consistent basis;

- the need for specially trained state and federal employees who can interpret the monitoring data and provide necessary technical assistance; and

- the usefulness of outside technical assistance providers who can help the states achieve compliance where the Office is not able to help.

Our comparison with other programs, in large part, focuses on issues created by these features of the OJJDP formula grant program. Specifically, the comparison focuses on specific administrative features of the four programs including:

- the nature and complexity of legislative mandates;

- monitoring and reporting requirements;

- timetables for achieving specific programmatic goals;

- the role of federally mandated advocacy groups;

- federal and state staffing arrangements; and

- technical assistance.

1. Nature and Complexity of Legislative Mandates

Based on our review of the legislative and regulatory requirements of these four federal formula grant programs, the OJJDP state formula grant program is distinctive with regard to the specificity of mandates concerning the level and quality of service that must be provided by state and local governments in

order to qualify to receive grant funds under this program. This conclusion was confirmed by our interviews with officials in the offices responsible for administering the comparison programs.

For example, the developmental disabilities program includes general goals and requirements for a state plan, federal priority areas of concern,[426] institutional requirements for the state system to protect and advocate the rights of persons with developmental disabilities, and individual habilitation plans with goals and methods of achieving them. However, there are no specific programmatic requirements regarding program outcomes, e.g.,, the level and quality of services to be provided to individuals.

The objective of this grant program is to develop a generic service system that will open the doors of state service programs to the developmentally disabled. This program is not designed to provide direct services, but rather to create systemic changes in planning, development and coordination within the state system so that services can be provided to persons with developmental disabilities in a strategic manner. Thus, the legislative requirements focus on administrative/procedural issues, not on program outcomes which are determined by specific state service activities.

Similarly, the child abuse and neglect state grant program has numerous requirements that relate, for example, to procedures to preserve confidentiality, promote cooperation with the police, and encourage accurate reporting. However, there are no specific requirements regarding the level and quality of services to be provided. For example, there must be a state law including provisions for reporting instances of child abuse and neglect, but the federal program allows some state flexibility with regard to the specific definitions of abuse and neglect as well as state discretion regarding who is required to report abuse and neglect (doctors, teachers, etc.) and how they are to be protected.

The drug control and systems improvement grant program probably represents the extreme in terms of the lack of specificity of programmatic requirements. Essentially, a state meets its eligibility requirement by coming in with an application on time and by designating a state agency to receive the funds. States have full discretion in determining what their needs are and how they are going to use the money to meet those needs. While the application process requires a statewide strategy, the funds can be spent in nearly two dozen programmatic areas.

In summary, the OJJDP state formula grant program has legislative mandates requiring specific quantifiable program outcomes in order to be eligible to receive funds under this program. No other federal formula grant

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[426]Sixty-five percent of the funds must be spent in these areas, but there are no specific requirements pertaining to how the funds are spent—it is left to state discretion.

program we examined had similar requirements addressing specific program outcomes. Virtually all other mandates deal with administrative/procedural issues.

2. Monitoring and Reporting Requirements

The differences in the complexity and specificity of the legislative mandates discussed in the previous section has important implications for how monitoring and reporting requirements of the various programs are addressed. All the programs examined have some monitoring and reporting requirements. However, because of the nature of the legislative mandates, the OJJDP monitoring and reporting requirements are much different than the other programs examined.

To be eligible for the OJJDP state formula grant program, the state must demonstrate its compliance with the deinstitutionalization, separation and jail removal mandates. This requires extensive recordkeeping and reporting requirements. Monitoring of state data gathering and reporting systems and actual compliance with the legislative mandates is then required. Because of the need for detailed and accurate data, these data gathering, reporting and monitoring requirements are time consuming and costly for state governments to implement as well as for the federal government to monitor and evaluate. The reporting and monitoring required in the other grant programs focus on compliance with administrative and procedural mandates, rather than mandates dealing with program outcomes.

In the drug control program, for example, the major focus of the monitoring is on whether the state actually spends the money on the programs it says it is going to and whether the state complies with all the legislative requirements concerning accounting practices, matching requirements and passthroughs. These are essentially administrative and procedural issues.

In addition, the monitoring for this program may also involve visits to subgrantees who are actually providing services. The primary focus is on the reporting requirements for the subgrantees and whether they are spending the money as they are supposed to. When innovative programs are uncovered through these visits to subgrantees, they are used for cross-training and technical assistance. However, there is no effort to gather data on program participants to evaluate the level and quality of service actually being provided.

The Assistance for Education of All Handicapped Children grant program has extensive requirements, but these are fundamentally administrative and procedural in nature. The monitoring that takes place evaluates how well the state and individual school districts are complying with those requirements. The focus of such monitoring efforts is on whether each child has an Individual Education Program (IEP), whether it meets all the requirements for

what needs to be in such a document, whether due process is followed in developing or challenging such a program, and whether federal monies are being misused. There is no effort to determine whether the diagnosis of the child is correct, whether the program elements in the IEP are appropriate given a specific diagnosis, or any other factors that relate to determining what an appropriate education is and how to achieve it for each child.

Unlike the other comparison programs, however, this program does require some detailed data collection and reporting. The grant allocation to each state and school district is based on the number of disabled children in the jurisdiction. Thus, schools are required to report annually on the number of children with disabilities and their geographic location. In addition, the states have to report on how many children are in various types of programs, which range from regular programs with no outside services except for some consulting specialists to institutions. They also have to report on how many children are in what types of institutions, why they are there, what the certification levels are for the personnel serving these children, and how that compares to state standards. In summary, none of the federal formula grant programs examined require the same kind or degree of data collection, reporting and monitoring as the OJJDP program.

3. Timetables for Achieving Specific Programmatic Goals

The OJJDP state formula grant program has specific legislatively determined timetables for coming into full compliance with the deinstitutionalization and jail removal mandates.

No other grant program has similar legislatively determined timetables for achieving specific program outcomes. The child abuse program has provisions for time-limited waivers of certain eligibility requirements where certain state action (generally in the form of legislation) has not been taken. In addition, with regard to the Education of Handicapped Children grant program, the timetable is for increasing participation rate (of children) to 100 percent and all states have met the deadlines. Again, the differences between programs reflect differences in the nature and complexity of the mandates and requirements of the OJJDP and the comparison programs.

4. The Role of Federally Mandated Advocacy Groups

The Juvenile Justice and Delinquency Prevention Act mandates the formation of an independent, autonomous State Advisory Group (SAG). The Developmental Disabilities Program also has a legislatively mandated state advisory council called the State Developmental Disabilities Council. The membership must be 50 percent from state agencies that serve this population

and 50 percent consumers (e.g.,, disabled or families with disabled members). As with OJJDP SAGs, the primary responsibilities of the Councils are to help develop the state plan, advocate for systemic change in the state system of service delivery, and lobby as appropriate. The Councils cannot be placed in a service providing agency. They have their own budgets from the grant funds and can hire their own staff directors. The Councils get staff support from the state agencies responsible for administering this program.

There is also a National Association of Developmental Disabilities Councils (NADDC). The NADDC has an annual meeting which brings members of the Councils together to discuss common problems and receive technical training.

The Assistance for Education of All Handicapped Children grant program also mandates the creation of an independent State Advisory Committee to be appointed by the Governor. The members represent handicapped individuals, teachers, state and local education professionals and administrators of programs for handicapped people. The purpose of the State Advisory Committee is to advise the state education agency of unmet needs of the handicapped, comment publicly on the state plan, and assist the state education agency in data collection and evaluation. There is no formal national organization of State Advisory Committees.

The other formula grant programs examined here do not have formal legislative requirements to create and fund state advisory groups. With the possible exception of the Developmental Disabilities grant program, the OJJDP state formula grant program appears to have a rather unique arrangement for its legislatively mandated and grant-financed SAGs. In some cases, the SAG is responsible for making grants, monitoring performance and making state policy. In such cases, the grant funds essentially go directly to the SAG, albeit the grant is to the state agency responsible for monitoring the program.

5. Federal and State Staffing Arrangements

All of the grant programs examined here require the Governor to identify a specific state agency to be responsible for administering these programs. That state agency generally identifies one person that is primarily responsible for the administration of each program. For those programs where there is a state advisory group of some kind, this state employee usually provides staff support.

In addition, each program has a federal staff responsible for administering the program. The OJJDP program, as well as the drug control and the education for handicapped children programs, are administered by staffs in the Washington office. The developmental disabilities and child abuse programs

are administered by the Washington office along with staff people in each of the 10 federal regional offices.

The Washington office staff responsible for the Education for Handicapped Children program is large (40-50 people) and relatively senior (GS grades of 13 or 14). The office is divided into two branches, one which reviews the plans and one which provides general technical support.

The staff profile for the drug control program is very similar to OJJDP. There are 4 teams, each responsible for between 13 and 16 states. The team is composed of one senior and one junior analyst.

The developmental disabilities and child abuse programs have a small Washington staff that is supported by staff in the regional offices. The regional offices provide the first review of the state plans, initial contacts for technical assistance or interpretations and are the primary contact for the state specialist. In addition to regional staff, these two programs also have Washington office staff responsible for reviewing the state plan, providing monitoring (usually in cooperation with the regional staff person) and making final decisions regarding legal interpretations, technical assistance or other policy concerns. The developmental disabilities program has a central office staff of 6 professionals. The child abuse program has a Washington office staff for this grant program of two people.

6. Technical Assistance

All the grant programs we examined have extensive technical assistance programs. However, because of the significant differences in the legislative mandates among the programs we examined, the content of in-house technical assistance to states seemed to vary substantially. For example, for virtually all of the comparison programs, the technical assistance provided directly by agency employees administering the grant program focused on interpretation of the law and providing financial guidance. This involves working with state specialists on issues of how to meet the state matching requirement, how to determine if federal funds are supplanting state funds, and how to comply with other administrative or procedural mandates.

In addition to this type of in-house technical assistance, all the programs have other means of providing technical assistance about how to meet various program objectives, i.e.,, how to provide the required services in a different, improved manner. The drug control program has a $1 million budget for technical assistance, but the money is used to help states with specific needs obtain access to technical people to address those needs, i.e.,, the money is for a brokerage role rather than the actual provision of technical assistance. On the other hand, the developmental disabilities program has technical assistance provided by the University Affiliates program, which is funded from monies

other than the grant program. Similarly, the education for handicapped children program gets programmatic technical assistance from the Regional Resource Centers which, again, are funded from dollars outside the grant program. Finally, the child abuse program gets technical assistance from a variety of sources including the National Clearinghouse on Child Abuse and Neglect, the National Clearinghouse on Medical Neglect and three national resource centers. These technical assistance programs are funded from resources made available through the grant program.

In summary, technical training of federal employees and the provision of technical assistance by outside contractors may be important for the success of one or more of the four comparison programs. Relative to the OJJDP program, however, such expertise in the comparison programs does not require a focus on the day-to-day efforts of states to meet very specific federal goals. Such a focus is in fact more characteristic of a regulatory agency than a grant-making agency.

D. Conclusions

Based on our comparison with other federal grant programs, we conclude that, while the four identified programs operate under somewhat analogous procedural and substantive "mandates," these mandates do not require the same type of federal direction and oversight as that which occurs under the JJDP Act. Substantive social goals or purposes are legislatively established but they usually lack specific content. Moreover, even where they are reasonably specific (as in the case of education for handicapped children), federal oversight is directed primarily to assure compliance with applicable federal financial controls and requirements that certain laws, procedures, documentation, or policies exist. Something called "monitoring" may be required as well as reports to the federal government. But these do not require the collection and analysis of detailed empirical information indicating the state of compliance with legislatively defined substantive goals. Similarly, the technical assistance needs of the comparison programs do not have to be so narrowly focused around a set of strategies and approaches designed to achieve and maintain specific and quantifiable outcomes.

All four of these programs (like other grant mechanisms) require for their success adequate personnel and other resources. It is clear, however, that the distinctive nature of the OJJDP formula grant program creates a particularly high priority for adequate funding to cover federal and state administrative costs (including necessary training and technical assistance). This is underscored by the trends during the 1980s which saw the program mandates

and requirements increase while the real value of annual appropriations for the grant program declined by over 50 percent.[427]

VII. Conclusion and Recommendations

The formula grant program administered by OJJDP raises issues that are peculiar to its regulatory nature as well as some that might arise in most, if not all, administrative settings. Some recommendations relating to such issues are rooted in statutory law and legal doctrine or in sound administrative practice generally. Others find their origin ultimately in judgments regarding what is necessary to create and administer a program that can successfully carry out congressional purposes.

Specifically, our study of the Office and its oversight of the JJDP Act formula grant program in the context of other federal formula grant programs suggests the following recommendations:

1. **Funding.** When Congress creates a federal formula grant program wherein the conditions for eligibility are similar in nature to the three substantive mandates of the JJDP Act, it should ensure that there are adequate appropriated monies available to provide staff, training, and other support necessary to enable both state and federal agencies to fulfill their respective administrative responsibilities under the program.

2. **Policymaking.**

   a. The Department of Justice should ensure that overall policy, priorities and objectives for all federal juvenile delinquency programs and activities are coordinated in order that related activities and programs advance OJJDP and state efforts to achieve and maintain compliance with the substantive mandates of the JJDP Act.

   b. The Office should so assign formula grant staff responsibilities and/or create and ensure adherence to internal operating guidelines in order that issues of policy and interpretation of general significance are identified as such as soon as feasible for possible resolution. Once such issues have been formally resolved, the Office's policy or interpretation should be made available in a timely fashion by appropriate means--whether the Federal Register or otherwise--to all state juvenile justice

[427]Grant program appropriations were $63,750,000 and $45,750,000 in 1980 and 1989, respectively. Using the GNP implicit price deflation for government purchases of goods and services this translates into inflation adjusted (using 1982 as the base year) values of $74,561,404 and $35,603,113 in 1980 and 1989, respectively. This reflects a decline in purchasing power of 52 percent.

specialists, the National Coalition of State Juvenile Justice Advisory Groups, and other groups and entities which may have a substantial interest in the policy or interpretation.

c. In all those instances where policy or interpretation may substantially effect the interests of one or more states, the National Coalition of State Juvenile Justice Advisory Groups, or other persons and entities, the Office should engage in predecisional consultation. The mode of such predecisional consultation may appropriately take into account the scope of the impact of the policy or interpretation and other matters relevant to the efficient and effective communication of views.

d. The Office should ensure that the reasons underlying its policies and interpretations, including changes and clarifications thereof, are clearly elaborated in documents announcing such policies and interpretations.

e. The Office should have adequate internal procedures to ensure that consistent advice is afforded by state representatives to states regarding the requirements applicable to the formula grant program.

3. **OJJDP Staffing.**

a. The Office should have a general attorney on its staff whose primary role is to advise the OJJDP state representatives, the SRAD Director, and the Administrator with regard to broad legal matters arising in the administration of OJJDP's grant programs and to serve as a liaison with the OJP Office of General Counsel.

b. The Office should either reestablish the position of monitoring coordinator or take other equivalent steps to ensure that the evaluation of monitoring data and other information relevant to determining compliance and waiver of grant termination is even-handed and takes full account of Office policies and interpretations.

c. To the extent feasible, the Office should refrain from shifting the OJJDP state representative assignments to states on a frequent basis.

4. **Background and Training of OJJDP and State Formula Grant Personnel.**

a. The Office should accord due weight to prior general training or experience in the area of juvenile justice in hiring applicants for the position of state representative.

b. The Office should institute training programs specially designed for new and experienced state representatives in order that they are fully informed with regard to their roles and responsibilities; that they have adequate knowledge regarding the Office's procedures and practices for the conduct of their work; that they have a firm working knowledge of

the relevant federal statutes, regulations, and guidelines applicable to the formula grant program; and that they are kept up-to-date on recent developments in Office policy regarding the formula program and recent developments in the area of juvenile justice generally that may be relevant to their roles as state representatives.

c. The Office should ensure that adequate training is provided state juvenile justice specialists for their role in the implementation of the formula grant program. This should include regularly scheduled training programs for new and experienced state juvenile justice specialists. These should be timed to ensure a) that necessary training is provided *soon* after new specialists take their positions and b) expeditious updating with regard to new developments in Office policy and interpretation, juvenile justice generally, and state compliance efforts.

5. **Information Dissemination to States.**

a. The Office should ensure that information collected as part of its research and program development functions which may be helpful to the states in complying with the statutory mandates is disseminated to state juvenile justice specialists in a timely fashion and accessible format.

b. The Office should create procedures to ensure that states will be a) fully consulted in a timely manner regarding applications for special emphasis grants awarded to projects in their respective jurisdictions and b) regularly informed about the progress and findings of those projects.

c. The Office should ensure that all states are kept advised in a timely fashion of promising approaches to reaching and maintaining compliance with the substantive mandates of the JJDP Act.

6. **Compliance With the Statutory Mandates.**

a. The Office should re-examine and ensure that its exercise of de minimis authority is consistent with the JJDP Act and applicable judicial precedent. Particular attention should be directed to its nonnumerical standards and the comparative baselines for its numerical standards.

b. The Office should ensure that state-submitted monitoring data and other information by which it determines compliance and waiver are widely available both to the states and the public generally.

c. Congress should repeal the existing provision of the JJDP Act which authorizes or requires waiver of the requirement that states submit annual monitoring reports to OJJDP. It should retain and adequately fund the current requirement that the Office periodically audit state monitoring systems to ensure their reliability.